

Anti-terrorism Operations and Human Rights : Report on Legislative Trends in Korea*

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I. Bill for enacting the Anti-Terrorism Act of November 2001 and Subsequent Discussions

A bill for enacting the Anti-Terrorism Act was announced for the first time in 12 November 2001 by the National Intelligence Service (NIS). It seemed at the time as if the said legislative bill would be rushed through

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since it took advantage of the nameless fear people might have had concerning terror in the immediate aftermath of Sep. 11 while insisting on the justification of making preparations for the co-hosting of World Cup 2002. However, since the enactment of the Anti-Terrorism Act bill encountered much resistance, the National Assembly's deliberation on the legislative bill has been suspended since early May 2002, right before the opening of the World Cup. Criticism of the proposed bill for enacting the Anti-Terrorism Act emerged from the National Human Rights Commission of Korea, a new governmental organization which had begun its activities since November 2001, as well as from the civil society. Thereafter, the process whereby a bill for enacting the Anti-Terrorism Act is proposed when national attention has waned, only to be repealed, amended or suspended, has been repeated time and again.

The legislative bill was almost carried in the process of the second attempt at enactment of the bill unfolding since August 2003. This time, the attempt to enact the law took the form of legislation at the instance of the government instead of members of the National Assembly. Although legislative bills proposed by the government must always be referred to the State Council for deliberation (Constitution of the Republic of Korea Article 89(3)), the NIS and other ministries were not well-disposed to this bill. The NIS took a roundabout way, which took the form of legislation at the instance of members of the National Assembly which does not require deliberation by State Council. On 14 August 2003, National Assemblyman Duk-Kyu Kim and five others of the Millennium Democratic Party submitted the 'Amendment to the Bill for Enacting the Anti-Terrorism Act' in the form of legislation at the instance of members of the National Assembly. This legislative bill passed a public hearing at the National Assembly on 3 November 2003. It was modified again on 10 November of the same year, and was passed unanimously at

the Intelligence Committee of the National Assembly on 14 November 2003. However, this amended legislative bill was not carried through in the Legislation and Judiciary Committee of the National Assembly, and therefore was automatically repealed when the 16th session of the National Assembly closed in May 2004.

The third attempt to enact an Anti-Terrorism Act is continuing since the 17th session of the National Assembly was opened in the autumn of 2004. Since the recent '7.7 London underground and bus explosions,' the possibility of a terrorist attack on Korea, which has dispatched the third largest troops to Iraq, is currently being voiced. There is a growing chorus asserting the need to enact an Anti-Terrorism Act citing the fact that the 2005 APEC summit shall be held in Pusan in November 2005.

However, the attempt by the Korean government (and especially the NIS) to enact an Anti-Terrorism Act has not been successful yet. Furthermore, the likelihood of it succeeding seems far from certain. In that respect, the movement in opposition to the Anti-Terrorism Act in Korea seems to have had considerable result so far.

The reasons for that could be summarized as follows :

First, the struggle by civil human rights movement groups to hinder the Anti-Terrorism Act has had considerable result, so that public information on the dangers of Anti-Terrorism Act have been disseminated to a degree to citizens. That there is very great concern that the NIS, which has been synonymous with human rights infringements even among the citizens, should direct anti-terrorism operations and investigate terrorists under the justification of preventing terror has had a positive effect. Especially, the first legislative bill contained contents consolidating the powers of the NIS, so much so that it earned the evaluation that it was the 'second National Security Act.'

The first bill of Anti-Terrorism Act proposed by the NIS had the following problems :

1. The concept of terror was indefinite. The concept of terror was stipulated so that sit-downs and occupations in protest by civil organizations and environmental organizations could come under terrorism according to interpretations.
2. The witness could be placed under arrest and held in custody against his will.
3. It was made possible for the period of arrest for persons under suspicion of terrorism to be extended.
4. The crime of failure of notification was to be punished.
5. It was made possible to keep a close watch on the movements of foreigners under the comprehensive proviso of 'when necessary in order to prevent terror.'
6. It was made possible for military forces to be mobilized to the scene of terrorist outbreak or scene of potential terrorist outbreak to exercise police authority.
7. The Anti-Terrorism Center established in the NIS was to exercise authority of investigating terrorist crimes.
8. The authority to use weapons against airplanes used in terror was granted.
9. It also contained provisions that the intelligence materials provided by foreign intelligence organizations could be accepted as evidence in trial when the sources and circumstances of acquisition have been revealed and the authenticity of materialization has been certified.

In early August 2005, citizens' distrust of the NIS was intensified as the illegal state wiretapping undertaken by the NIS in the past became a scandal.

Second, the National Human Rights Commission of Korea's opposition

in principle to the Anti-Terrorism Act is being firmly maintained to this day, and there exists skeptical viewpoints on the enactment of Anti-Terrorism Act even within government organizations (e.g., the police or the prosecution, the military).

Third, the legislature which should enact the law is devoid of an adamant will on the enactment of the Anti-Terrorism Act. The URI party, the party in power does not have an established party platform on this matter at present. NGOs such as civil human rights movement groups unduly represent public opinion in Korea in certain respects, but nonetheless there are few members of the National Assembly who would embark on enacting the Anti-Terrorism Act in disregard of such NGO' opposition.

Nonetheless, the possibility remains that this legislative bill might at any time be carried through the National Assembly in almost no time. While members of the National Assembly cannot ignore the critical attitude of human rights groups, they also worry about being subjected to such criticism as "Until when will you comment on violation of the constitution and harp on human rights and the legal system when direct terrorist threat against Korea is increasing?" "Will you be responsible when there is a terrorist attack?"

Should the state which overstates the danger of terrorist outbreak and the media which aspires to defense commercialism collaborate to describe the present situation in an extremely pessimistic way, citizens' voice that "we will obtain security by sacrificing freedom" may get louder. In that situation, citizens may easily prefer countermeasures to patch over each problem as it arises.

After 1997, the neoliberal economic policy which was applied in earnest after the IMF relief finance crisis is rapidly expanding the distinction in wealth between the wealthy and the poor. In the meantime, the poverty of a section

of the population which is already conspicuous, the kind of fear of falling to a lower social class, and the fear of terror and criminal acts which is very problematic right now have become factors obstructing citizens' active democratic participation. Accordingly, when problems arise even now, the majority of people are indifferent to it or merely seek to resolve the problem in an individualistic way.

In the midst of it all, citizens get swept away by reactionary political ideas, xenophobia and racism. "Social stress takes the attitude of tolerance away from citizens. It also creates citizens who react in an authoritarian manner to other people's actions. Citizens under heavy stress cannot perform their roles as citizens of democracy.¹⁾ Citizens who have lost the spirit of tolerance may easily be swept away by the slogans of politicians who propagate prescriptions to patch over each problem when it arises instead of seeing the origin of the problems.

II. Characteristics of the Korean bill for enacting the Anti-Terrorism Act

1. The Anti-Terrorism Act is a law consolidating the powers of intelligence agencies

The laws and ordinances related to preventing terrorism enacted or amended after Sep 11 can be divided into substantive law related to sections on what acts should be punished as crimes of terrorism and law on organizations

1) Peter Fritzsche, Wenn Freiheit in Streß umschlägt, FR-Dokumentation v. 29. 8. 1998.

related to organizational reshuffle and granting of powers to existing organizations in order to prevent terror. The law on organizations is the field of law dealing with the organizations and powers of governmental organs and the relationship of authority among the organs, and this is the core part in the present improvement of terrorism-related legislation in Korea. This is also the characteristic distinguishing Korea's bill for enacting the Anti-Terrorism Act from that of other countries.

As is universally acknowledged, Korea's police force, especially the intelligence police force, has moved up to a considerable level. Furthermore, Koreans have the 'combat police force unit' which is tantamount to the military. Such organization is unparalleled anywhere in the world. Since the intelligence organization is abnormally large within the police organization, there are comments that the police force to be committed to 'peace and order of public welfare' is always in short relatively. Even under the existing legal system, routine questioning, state tapping of telephone wires and other communications media²⁾ and widespread intelligence gathering is already taking place. The present questioning under the Act on Performance of Police Officer's Duties assumes all citizens to be potential criminals and is taking place on a routine

2) The research paper recently published by the Korean Institute of Criminology, 'The Limitations and Use as Evidence of Wiretapping, State Wiretapping and Secret Recording'tells eloquently how serious the level of wiretapping and state wiretapping is in Korean society. According to this paper, there are 150 crimes subject to state wiretapping provided for in the present Act on Protection of Secrecy for Communications, so that state wiretapping is possible in most criminal investigations, and that the period allowed for state wiretapping is too long, ranging from three months (for ordinary crimes) to six months (for matters of state security), so that there is much groundwork for human rights infringement. Especially, not only is the period allowed for state wiretapping too long compared to the ten days in Japan and thirty days in the U.S., but it may also be extended, so that in reality, there is the possibility for indefinite state wiretapping. Refer to *Columnist*, Vol. 336, 19 October 2001.

basis. Furthermore, through exchange of intelligence with foreign intelligence and criminal investigation agencies, a de facto preventive system to preclude terror in advance has been elaborately constructed. It is necessary to recollect that the bill for enacting the Anti-Terrorism Act recently being promoted in various western countries are attempting to introduce the above counter-measures which are already being enforced in Korea.

In addition to this, an adequate defense system such as the anti-terrorism special forces within the police has been constructed.³⁾ Such facts are acknowledged by the police themselves. On the other hand, even under the existing law, the NIS is already carrying out extensive operations gathering anti-terrorism intelligence.

Although legislative bills have been proposed and amended several times in the meantime, the section which has maintained its framework from beginning to end is the Anti-Terrorism Center. As can be so confirmed, the Anti-Terrorism Act is in reality law proposed under the intention to establish an Anti-Terrorism Center within the NIS from the beginning. The NIS is pursuing a 'legal acknowledgement' of the establishment of an anti-terrorism organization which the NIS had set as its goal from the outset by insisting on the establishment and formation of an Anti-Terrorism Center under any circumstance. The NIS is performing anti-terrorism operations based on the current National Intelligence Service Act at present (Article 3(1)(1), National Intelligence Service Act). The intention behind attempting to establish an Anti-Terrorism Center in spite of it all through the enactment of an Anti-Terrorism Act

3) Needless to say, should an organization such as the "special attack unit" of the police force be facing difficulty in performance of its duties due to lack of equipment and facilities, support of the budget and equipment should be undertaken within the boundaries of the law.

is manifest. Under a legal system like that of the present in which a ‘reshuffle’ of the NIS is mentioned whenever there is a change of regime, a reduction and regulation of organizations within the NIS is limitlessly possible even without amendment of the National Intelligence Service Act. On the other hand, should the Anti-Terrorism Center be established by law, the NIS could achieve the outcome of securing an organization which is independent to a degree from discussions on reshuffle. One could say that the intention is to actively deal with citizens’ demands for reshuffle of intelligence agencies through establishment of an organization like the Anti-Terrorism Center instead of responding defensively to demands for organizational reshuffle (or reform) of the NIS. A sort of advance strategic move, so to speak. This is the reason why the NIS never laid hands on the section on Anti-Terrorism Center in spite of having ‘made concessions’ in the form of amending a few provisions in response to the opposition from various fields against the bill for enacting the Anti-Terrorism Act.

The following problems of the Anti-Terrorism Center have been mentioned :

First, the NIS exercises the authority to directly plan and mediate [Article 4(1)(3), National Intelligence Service Act]⁴⁾ the functions of other governmental agencies under the justification of ‘anti-terrorism operations’ through the Anti-Terrorism Center in excess of gathering, drawing up and distribution of terrorism-related intelligence [Article 3(1)(1)]. Exercise of such authority exceeds the limits set upon intelligence agencies. An intelligence agency (Korean law expresses the NIS as an ‘intelligence investigation agency’)

4) Although this section was also to be “planning, supervision and mediation of anti-terrorism operations” in Proposal One of the second legislative bill, with the Ministry of Justice and others posing problems to it, the “supervision” section came to be deleted during the process of deliberation by the Intelligence Committee of the National Assembly.

“planning and mediating” the operations of each ministry of the administration is unparalleled anywhere in the world. As the intelligence agency’s authority expands, the boundary between intelligence agencies and administrative agencies may crumble and the danger of the intelligence agencies reigning over the administrative agencies in reality increases.

Second, the ‘anti-terrorism operations’ planned and mediated by the Anti-Terrorism Center are “all operations preventing and responding to terrorism such as the regulation of persons under suspicion of terrorism, safety supervision of dangerous substances which may be used in terrorism, protection of facilities and equipment, guarantee of safety for international conferences, response to threats of terrorism and armed suppression” [Article 2(4)], so that the de facto intelligence agency, the NIS, gets to exercise its authority directly over the citizens.

Third, secretive operation of the Anti-Terrorism Center is already anticipated since it shall not only be established within the NIS, the organization and quota of which are not revealed, but the organization and quota themselves of the Anti-Terrorism Center may be kept from the public [Article 4(4)].

However, since the NIS is claiming the need to establish an Anti-Terrorism Center citing the example of the US and other countries, there is the need to examine the anti-terror centers of the U.S., albeit briefly. As is commonly acknowledged, U.S. intelligence agencies expanded their organizations and manpower after the terrorist attack of Sep 11. It is ironic that the intelligence agencies which should have been subjected to reform to bear the responsibility of not having been able to prevent Sep 11 in advance succeeded in expanding their organizations and budgets instead. That they could succeed in such expansion of the organization is greatly indebted to the irrational atmosphere after Sep 11, an atmosphere in which none could put the brake on the admin-

istration's powerful anti-terrorism policy.

In Europe, which did not directly experience the Sep 11 terrorist attack and does not operate intelligence agencies with the whole world as the stage like the U.S., it is difficult to find an example where the budget of intelligence agencies was sharply increased or organizations suddenly expanded. Needless to say, the attempts to consolidate the authority of intelligence agencies are continuing ceaselessly, and civil society appears to be in opposition to such development.

Claims are being raised that an Anti-Terrorism Center should be established within the NIS as soon as possible since an organization like Korea's Anti-Terrorism Center is established within the Central Intelligence Agency (CIA) in the U.S., without critical evaluation of such problems. As a matter of fact, the Terrorist Threat Integration Center and the Terrorist Screening Center, which are centers generalizing anti-terrorism operations in the CIA and the Federal Bureau of Investigation (FDI) respectively, have been created after Sep 11. However, there are skeptical viewpoints even within the U.S. as to whether these agencies may contribute to discovering and eliminating in advance the threat posed by terrorists by organizing the flow of intelligence in a more efficient manner. That is, although creating such an organization as an extra may enable intelligence agencies to convey the fantasy that "we are doing something," whether it may prove effective in preventing terror in reality is unknown.

It cannot be ascertained whether such organizations in the U.S. served as the model for the Anti-Terrorism Center stipulated in the Anti-Terrorism Act of Korea. However, what must be made certain is that there is a fundamental difference between the Terrorist Threat Integration Center and the Terrorist Screening Center of the U.S. and the Anti-Terrorism Center of Korea. One

must accurately face the facts that such organizations do not request the mobilization of the military, nor plan and mediate organs performing anti-terrorism operations among each ministry of the administration on its own. Even at present, there exist more than twelve registers of names of terrorists drawn up by each federal ministry. Since decentralization of intelligence is a characteristic of a federal state, these organizations were created based on a Presidential directive instead of law by the CIA, a vast federal intelligence organization, in order to smooth the flow of intelligence acquisition and for the efficiency of execution of anti-terrorism operations by federal intelligence agencies. Regarding the establishment and operation of these organs, I would like to add that there is currently fierce criticism from civil human rights movement groups within the U.S. including intelligence monitoring groups advocating individuals' right of decision over one's own information.

2. Issues concerning mobilization of military force

(1) When the first legislative bill was introduced in the National Assembly, the part which provoked much controversy along with the ambiguity concerning the definition of terror was the "support of military force." Meetings on anti-terrorism countermeasures or a permanent committee could "recommend to the President the support of military force or the homeland reserve forces within the minimum extent required for the protection of facilities and defense when it is difficult for the police alone to protect important facilities of the state and facilities utilized by a large number of people." The fact that the military force which had been mobilized as a support force could undertake "questioning, protective measures, measures to prevent the occurrence of a dangerous event or to prevent and restrain crimes" within the ambit required for the protection

of facilities and defense was especially problematic. The military is not an organization trained or set up in order to exercise police authority over civilians. Yet, many people pointed out that granting police authority to the military under the pretext of prevention of terror even under situations in which martial law has not been proclaimed was a violation of the constitution.⁵⁾ Conscious of such criticism, the section on the military exercising police authority has been deleted since the second legislative bill.

(2) The problem that remains is whether the military should be disallowed from undertaking the protection of facilities and defense operations in times of terrorist threat. There has not been an adequate discussion on this point. However, the general tenor of the argument seems to judge that such activities are possible without legal grounds.⁶⁾ However, I believe that there is still material for criticism on this point as well. One cannot regard operations of the ‘protection and defense’ of major facilities undertaken by the military in peacetime as pure support operations and operations unrelated to the exercise of power and therefore decide that there could be no problem.

The domestic mobilization of the military requires constitutional mandate as a general rule. The Constitution of Korea specifies the circumstances in which the military may be mobilized domestically [Article 5(2), Article 77, Constitution of the ROK]. Naturally, I believe that what does not possess the characteristics of a mobilization may be possible without particular constitutional mandate. Therefore, although opinions are unified on that providing

5) Kye-Soo Yi, “Opinion on the Government’s bill for enacting the Anti-Terrorism Act”, *Min-joo-bup-hak*. Vol. 21. pp.394-395.

6) I conjecture that it is so. However, I have been unable to find a document specifically expressing such an opinion.

technical help through military equipment does not fall under mobilization, there is dispute on how to determine the extent of technical help.⁷⁾ Whether the protection of facilities and defense mentioned here comes under technical help to be differentiated from mobilization should be examined cautiously.

3. Reinforcement of supervision and discrimination against foreigners

In the first legislative bill, the authority to collect intelligence on foreigners was also widely sanctioned. The main body collecting intelligence on foreigners was to be the public servants of the Anti-Terrorism Center and police officers in charge of anti-terrorism operations, and their activities were routine ‘inspection operations’ as well. However, since the second legislative bill, the main body of intelligence-gathering operations has been limited to the head of the Anti-Terrorism Center and the fields of operation have been limited somewhat. Nonetheless, questions remained as to what confirmation of the facts mean in “regarding foreigners against whom there are considerable reasons to suspect membership of a terrorist organization, confirmation of facts such as his whereabouts, movements while remaining in Korea and whether he has supported funds for terrorism in order to gather intelligence on such foreigners” mentioned here. Concerns were raised that powers of investigation may be included in the authority to take measures to ascertain confirmation of facts. Conscious of such apprehensions, the bill presented to the Legislation and Judiciary Committee among the second legislative bills amended the wording to the effect that “regarding foreigners against whom

7) For details, refer to Kye-Soo Yi, “Military Law and Security Law : Entanglement of the Military and Security and the Inversion of Civilian-Military Relationship”, *Gong-bup-yun-goo*, Vol. 31 No. 4, 2003, p. 294.

there are considerable reasons to suspect membership of a terrorist organization, the head of the Anti-Terrorism Center may collect intelligence on his whereabouts, movements while remaining in Korea and whether he has supported funds for terrorism in order to collect information on such foreigner.” This part should also be considered as having been improved.

Nonetheless, since there is still the possibility of arbitrary exercise of authority and infringement of human rights against foreigners in the process of immigration control measures, and the reasons for amendment of the second legislative bill specifies ‘Islam’ as a terrorist threat, it has been pointed out since foreigners from particular countries are being regarded as a criminal group, there is much scope for substantial discrimination.

4. Duplication with existing legal system and organizations to respond to terror and wasteful spending of the budget

The current law and systems bestows special functions upon various governmental organizations in order to not only collect, analyze and distribute intelligence concerning terrorist acts but go on to prevent and suppress, investigate and punish terrorist acts as well. There are no particular problems in establishing and executing anti-terrorism measures even with the present law and system, structure of government organizations. Although enacting the Anti-Terrorism Act to create a wide-ranging system of planning, mediating and generalizing ‘anti-terrorism operations’ may seem plausible at first glance, in reality it would only duplicate operations and cause wasteful spending of budgets. The Anti-Terrorism Act is nothing more than law enabling the NIS to sharply expand its authority beyond the limits imposed on intelligence agencies under the justification of ‘prevention of terrorism’ based upon an

ambiguous concept of ‘terrorism.’

III. The Anti-Terrorism Act and so-called international co-operation

However, the NIS and members of the National Assembly who have initiated the legislation at the instance of members of the National Assembly have argued that enactment of the Anti-Terrorism Act is an obligation of the government of Korea to the United Nations, and that the Anti-Terrorism Act is necessary for intelligence co-operation among countries. The problems of these arguments shall be examined below.

1. On the claim that enactment of the Anti-Terrorism Act is an international obligation

Many people might pose the question that whatever the context, we cannot do nothing when the international society is ‘almost’ proclaiming prevention of terrorism in one voice, what are we to do if a terrorist attack takes place for real. A terrorist attack must not take place and international cooperation to prevent terror is clearly necessary. However, we must also be aware of the fact that there was something wrong from the very beginning in the ‘discussions on countermeasures on preventing terrorism’ which are taking place in various countries of the world and in Korea at present. Mahathir Mohammad, former prime minister of Malaysia, has recently criticized that “the whole world has been seized with paranoia on anti-terrorism security measures so that damage greater than a terrorist attack is being caused instead.”⁸⁾ Although he mentioned “the tourism industry’s loss and bankruptcy of airline

companies” in relation to the damage, it is not limited to such economic damage. Due to the attempt by some people to buy safety by selling freedom, the whole world is witnessing serious challenges to freedoms and human rights at present.

The concern expressed by the United Nations High Commission for Refugees that Korea’s bill for enacting the Anti-Terrorism Act will threaten the status of refugees and foreigners also expresses concern about that very situation. This organization’s apprehension reminds one of the 2002 resolution of the United Nations General Assembly (A/RES/57/219) which emphasized that “no anti-terrorism measure should compromise human rights and the status of refugees, humanitarian international law.” Although resolutions of the United Nations General Assembly only have recommendatory effect, it has significance as a grave warning to countries which are consolidating powers of public safety and intelligence using United Nations Security Council Resolution No. 1373. It is also a criticism of the actual situation in which anti-terrorism measures against human rights are running rampant in spite of the fact that the international society is still not agreed on what to define as terrorism.

The United Nations Security Council Resolution No. 1373 which the Korean government refers to often in relation to the need to enact Anti-Terrorism Act, is by no means a *carte blanche* on ‘anti-terrorism measures against human rights and in violation of freedom’ promoted in the past or present by governments of various countries including Korea. Although the said resolution was announced in the immediate aftermath of Sep 11, it is an extension of the continuous effort by the international society in its opposition to terrorism, and is concentrated on cutting off funds for terrorism which is being presented

as the most important element in relation to anti-terrorism measures. Furthermore, the said resolution makes clear that signing the ‘International Convention for the Suppression of the Financing of Terrorism’ and other such treaties is not an optional matter for member states of the United Nations but their duty.

Sections emphasizing the need to enact the Anti-Terrorism Act focus on this to claim that since the Republic of Korea is ‘bound’ by Security Council Resolution No. 1373 as a member state of the United Nations, it should create the Anti-Terrorism Act according to the present legislative bill. However, such claims fail to mention the fact that the Resolution No. 1373 pointed out in various sections that anti-terrorism measures must be undertaken in ‘all legally possible ways,’ ‘ways conforming to international law and national law.’ The legally possible ways mentioned here means ways conforming to international law and national law (including constitutional law). Considering citizens’ rights to privacy and communication, and the present situation in which the status of refugees is increasingly being encroached upon, legally possible measures for preventing terrorism should ultimately be understood as measures recognized by constitutional law and international human rights law.⁹⁾

2. So-called intelligence co-operation among countries and the Anti-Terrorism Act

On the other hand, the NIS claims that the NIS should have the Anti-Terrorism Center in order to generalize transborder data flow with other

9) Kye-Soo Yi, “Anti-Terrorism Act is terrorism against human rights”, *The Hankyoreh*, 1 November 2003.

countries. That is, the point of their argument is that “unless the NIS generalizes the intelligence dispersed throughout the country, co-operation on transborder data flow with other countries is difficult. Exchange of intelligence with other countries should be a task undertaken by the NIS, an intelligence organization, not something which can be undertaken by other intelligence organizations such as the police or the prosecution.” However, such claims lack persuasive force. Even the gathering of secret intelligence (wiretapping and state wiretapping through wiretapping equipments, utilization of secret intelligence agents) which could almost only be undertaken by secret intelligence agencies in the past is being carried out by all investigative organs at present. The popular diffusion of intelligence technology equipments is turning the police and the prosecution into secret intelligence agencies.¹⁰⁾ In such a situation, I would like to ask where the logic that only the CIS is competent for intelligence operations is coming from.

Since ‘generalization of intelligence for overseas transborder data flow’ has been mentioned, I would like to point out one more related issue. Even in the present situation in which Anti-Terrorism Act has not been enacted, I would judge that the NIS has been generalizing national intelligence and undertaking overseas transborder data flow in reality. The problem is that citizens cannot help but be curious about whether the NIS is properly observing the relevant laws and regulations in this process, and whether there is an ‘intelligence protection guideline’ which must be observed by agencies performing transborder data flow including the NIS.

In relation to protection of personal information, the ‘Act on the Protection of Personal Information by Public Organizations’ (hereafter, the Act on the

10) Of course, we must continue to supervise and criticize the intelligence gathering operations within the police and the prosecution.

Protection of Personal Information) has been enacted, although it is unsatisfactory. According to this law, after stipulating that “the head of the agency in possession must not use or provide to other agencies the intelligence managed other than for the purpose of retaining the personal information file in question excepting for use within the agency in possession or supply to a person outside the agency in possession according to another law,”[Article 10(1)] it goes on to stipulate that “notwithstanding the provisions of paragraph 1, the head of the agency in possession may use or provide to other agencies the intelligence managed other than for the purpose of retaining the personal information question file in possession in the circumstance coming under the following subparagraph. However, this is not so even in circumstances coming under the following subparagraph, when concern that the rights and interests of the subject of the information or a third person may be unduly infringed may be recognized,”[Article 10(2)] thus acknowledging exceptions to provision of intelligence. One of those exceptions is “when provided to foreign government or international organization in order to implement treaty obligations or other international conventions.”[Article 10(2)(3)] According to the information on treaties provided by the Ministry of Foreign Affairs and Trade, one can see that at present the conventions of “General Agreement governing Protection”(Concluded 1962. Undisclosed), “Security Agreement between the Government of the Republic of Korea and the Government of the United States of America governing the Protection of Classified Military Information”(Signed 24 September 1987, Effective. Disclosed), “Exchange of Notes for the Amendment to the Agreement between the Government of the Republic of Korea and the Government of the United States of America concerning the Exchange and Protection of Classified Information”(Signed 24 September 1987, effective. Undisclosed) have been concluded with the

U.S. Although it seems as if conventions for exchange of secret intelligence have been concluded, one cannot know what they are providing for. Therefore, the problem is whether these conventions which have been concluded before the Act on the Protection of Personal Information by Public Organizations' was enacted are comply with the provisions of the 'Act on the Protection of Personal Information', and the "Guideline Governing the Protection of Privacy and Trans-border Flows of Personal Data" established by the Secretariat of the OECD.

In relation to this, there could be a viewpoint that personal information which was collected or the provision of which is being requested for the purpose of intelligence analysis related to state security is excluded from the objects of protection of the 'Act on the Protection of Personal Information' from the beginning.¹¹⁾ However, we oppose understanding Article 3(2) of the said law as purporting to exclude all personal information collected or provided by the NIS from the objects of application of the said law. I believe that the concept of state security should be interpreted narrowly so that mechanisms for protecting personal information should operate in regard to data collected by the NIS as well. Furthermore, I would like to add that amendment of the law concretizing mechanisms for protecting personal information collected by the NIS is necessary as well.

The U.S. tends to conclude conventions on transborder data flow with other countries in general (within Europe, Germany and Denmark are classified as countries which have not concluded conventions on transborder data flow with the U.S.), and it has recently concluded a convention on transborder data flow with the EU as well. However, in relation to the conclusion of

11) Refer to Article 3(2), Act on the Protection of Personal Information.

these data flow conventions the concern is growing in each country on the point of whether intelligence adhering to the guidelines on protection of information shall be passed to and fro the countries which have concluded the conventions. There is the need to recollect the fact that the strengthening of transborder data flow which the U.S. is keen on especially after Sep 11 is transborder data flow only in name, and that there are viewpoints which understand the situation as that of information on the citizens of the member states of the U.S. being passed over to the U.S. unilaterally.

3. System of international co-operation among intelligence agencies and the pursuant problem of democratic control

The 9 · 11 terror and its aftermath revealed that the stake in external safety and internal safety are closely related to each other. However, 9 · 11 was not the only reason for that. Such transformation had begun a few years ago already. Internal safety is no longer confined to internal safety within one country only. As each country becomes intertwined with one another in the process of globalization and internationalization, the possibility of the effects of crises and conflicts being confined to one country lessens. On the other hand, the possibility of one country's safety policy being influenced by the decisions and events of other countries and regions increases. Amid such change, security agencies (intelligence organizations, the police, the prosecution, the military, etc.) develop the framework for international cooperation. And in the process of creating such a framework for international cooperation, there is the tendency to pursue only the efficiency and effectiveness of co-operation. The problem, then, is that the mechanisms for controlling intelligence agencies created to be suitable for individual countries (control

by the National Assembly, legislature and public opinion) are unable to follow the present development of international cooperation, so that international cooperation (intelligence cooperation, etc.) itself is being performed in a pattern contrary to democratic criteria. Although this problem is not only confined to the domain of security, it is especially serious in this field. How to respond to such reality? Enacting the Anti-Terrorism Act in a situation where the answer to this has not been given would cause intensification of concentration of information and monopoly of intelligence power. There needs to be deep reflection on this aspect.

Therefore, the National Assembly should embark on grasping the present state of overseas transborder data flow (including examination of the provisions in conventions and treaties) currently being undertaken and coming up with principles related to overseas transborder data flow instead of intensifying the phenomenon of intelligence monopoly by the NIS by enacting the Anti-Terrorism Act. For example, exchange of general intelligence should be made possible in principle, while intelligence related to individuals should be exchanged as an exception and on a limited basis, and especially if the latter two intelligence have been exchanged, procedures for notifying the interested persons should be prepared. The process whereby an independent external organization such as the National Assembly makes an *ex post facto* inspection of overseas transborder data flow by intelligence organizations should be introduced.

IV. For anti-terrorism countermeasures conforming with democratic constitutional order

1. Witnessing the 'case of assault on worker in Iraq' in November 2003,

many people have come to question the ability of the Korean government to respond to such cases. As many people are well aware, the Korean government is close to incompetent when it comes to Middle East diplomacy. Not only are experts on Middle East affairs virtually nonexistent within the Ministry of Foreign Affairs and Trade, the budget of the Middle East and African Affairs Bureau for 2003 was 905 million Korean won in total, merely 0.17% of the total business expenses of the Ministry of Foreign Affairs and Trade. 534.89572 billion Korean won. For a bureau in charge of 66 countries among the 189 member countries (excluding North and South Korea) of the United Nations and dealing with the region which takes up two-thirds of Korea's overseas construction market, this is indeed a mere trifle.¹²⁾ The government of Korea is too indifferent to these regions which have given us the special Middle East boom.¹³⁾ Although the Ministry of Defense and the National Assembly's survey team have each been to Iraq in order to decide on whether to send troops to Iraq, we do not have the ability to come to an independent decision on this region. That is because all intelligence comes from the U.S. or the west.

With the situation thus, government officials should agonize over how to solve the "absence of intelligence, preponderance of intelligence source" from now on. Instead of countless meetings for countermeasures and 'forceful' countermeasures to show to the citizens, a viewpoint and intelligence which would enable the problem to be seen in a rational manner must be procured. That should be the first starting point in prevention and preclusion of terrorism.

12) *The Hankyoreh*, 25 November 2003.

13) Such problems did not emerge recently. Many people have raised concerns and criticisms on this point, and the National Assembly has also reproved the disproportionate budgetary programming of the Ministry of Foreign Affairs and Trade whenever it held budgetary deliberations.

2. The ‘terrorist threat’ must not become a trump card rendering powerless the fundamental human rights of citizens (including foreigners staying in the Republic of Korea) guaranteed by international human rights law and constitutional law. There is a study report that even in Germany which maintains a system of ex post facto notification on measures restricting communications as in Korea [for Korea, refer to Article 9(2), Act on Protection of Communication Secrecy], the rate of ex post facto notification taking place is merely 27%. 73% of people are not being notified of measures restricting communications in spite of provisions of the law.¹⁴⁾ This is the reality of investigative organizations undertaking state wiretapping, the ‘intelligence investigation organizations.’ The National Assembly and the government must be aware that citizens are fearful of enactment of Anti-Terrorism Act which expands the authority of the NIS to state wiretapping, and that there certainly are rational grounds as to why they are in opposition to it.

3. ‘An eye for an eye, a tooth for a tooth?’ But one must not forget that the power to win over terrorists lies in fighting in a different manner from them. That different manner is already set out in the constitution of Korea which points to liberal constitutional state. It is not countermeasures which are ‘in perfect order’ (since they are commanded by the Anti-Terrorism Center) and ‘powerful’ (since the military may be mobilized as well) that

14) The statistics in the text were quoted from the following study. Hans-Jörg Albrecht, Claudia Dorsch, Christiane Krüpe, *Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation nach den §§100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen*, <http://www.iuscrim.mpg.de/forsch/krim/albrecht.html>; The full text of the above study is being provided on pdf file on the internet. The address is as follows. http://www.iuscrim.mpg.de/verlag/online/Band_115.pdf

prevent terror. Now is not the time to exert our efforts on creating the Anti-Terrorism Act but to give impetus to reform of the NIS.

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[국문요약]

테러방지활동과 인권 :

한국에서의 테러방지법 제정 논의에 대한 비판적 검토를 중심으로

이 계 수*

한국에서는 9·11 테러 직후인 2001년 11월 12일 국가정보원에 의해 처음 테러방지법이 발의되었다. 그러나 동 법안은 국가인권위원회와 인권시민단체의 반대에 부딪혀 법률로까지 제정되지는 못했다. 이후에도 정부와 의회는 두 번에 걸쳐 테러방지법 제정을 시도하였으나 아직 이 법안은 법률로 성립하지 못하고 있다. 제4회 아시아·태평양 지역 법률가회의에서 처음 발표된 이 글에서는 한국에서의 테러방지법 제정 시도와 그에 대한 반대운동들에 대해 보고하면서, 한국의 테러방지법안이 갖고 있는 위험, 특히 인권침해 가능성에 대해 조목조목 소개하였다. 여느 반테러법과 마찬가지로 한국의 테러방지법안은 정보기관의 권한을 강화하는 한편 국민의 정보기본권에 대한 심각한 침해를 예정하고 있다. 외국인에 대한 감시와 차별의 강화도 우려되는 대목이다. 민주주의적 통제 없이 이루어지는 정보기관 간 국제협력도 테러방지법 제정으로 인해 강화될 우려가 있다고 보았다. 결론부분에서는 국민에 대한 통제를 강화하는 것은 민주주의적 헌법질서에 부합하는 테러방지대책이 될 수 없음을 지적하였다.

주제어 : 테러방지법, 정보기관, 테러방지과 인권, 대테러센터

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