

The Need for Enactment of Counterterrorism Laws in the Republic of Korea and a Review of Counter-terrorism Laws Proposed to the National Assembly

Jea Hyen Soung*, Sung Je Cho**

Hankuk University of Foreign Studies*, Daegu Haany University**

This research will explore the need for a terrorism prevention legislation and conduct a comparative analysis of the terrorism prevention legislations that had been laid before the National Assembly, as a means of seeking the optimal measure to minimize human rights breaches, while protecting national security and citizen safety in response to New Terrorism. A system in which national agencies may be organically overseen and coordinated is called for, in the aspect that a quicker and more effective response to new forms of terrorism, such as New Terrorism. Therefore, an agency that organically oversees and coordinates national agencies in the areas of data collection and analysis, and terrorist group designation is needed, and a terrorism prevention law that may serve as the grounds for such an agency should be enacted. And through an analysis of terrorism prevention bills that have been brought before the National Assembly, the following proposals are made as a means of reducing the risk of violating people's basic rights with respect to establishing terrorism prevention laws. First, terrorist group

designation and withdrawals thereof shall be clearly set forth as a matter for the National Counterterrorism Council's inquiry and resolution. As designation of terrorism organization and withdrawals thereof will be carefully executed through the Council member's deliberation and resolution, this should be the legislative approach to reduce the risk of people's basic rights violations which could occur if a certain national agency were to arbitrarily make the decision. Second, functional dualism of the Counterterrorism Center is proposed, as a means of addressing concerns that terrorism prevention laws will inevitably empower the National Intelligence Service and as a result lead to the breach of people's basic rights. Third, 'military and other supports' may be unconstitutional, as it will allow for mobilizing of military force in civilian areas without grounds for Marshall Law based on the Constitution. As a circumstance in which the counterterrorism special forces and police force have difficulty protecting key national facilities and frequented public facilities from terrorist attacks would be a circumstance equal to that of a 'wartime, disaster or an equivalent national emergency', retaining 'military or other supports' in the provisions do not

* 제1저자, **교신저자

seem to be worth the trouble of being criticized as being unconstitutional.

Key Words: terrorism prevention legislation, counterterrorism center, human rights, terrorist group designation, terrorism prevention bills

I. Preface

Even after the 9.11 Terrorist Attacks in the United States, the world continues to experience severe confusion with fear and horror due to incessant terror attacks, such as the 7.7 Terrorist Attack in London, United Kingdom in 2005; the Mumbai Attacks on India's central railway system in 2006; simultaneous and multiple terrorist attacks in luxury hotels in Mumbai in 2008; terrorist attacks in Bali, Indonesia in 2002 and 2005, etc.

The types of terrorism occurring have been centered around to symbolic targets, such as key-figure assassinations, airplane hijacking, etc. Unlike in the past when the attackers came forward with their cause, terrorism is being executed in the form of "faceless terrorism" under which their demands or identities are kept under cover. Their victims include young children with relentless human bloodshed. In executing acts of terrorism in incidents such as the 1995 Subway Sarin Gas Attacks in Japan and the 2001 Anthrax Scare in the United States, biochemical weapons which had mainly deployed in wars and large-scale conflicts are being used and maximizing fears of terrorism. Power generation and electricity distribution systems, also key components of an economy, have been vulnerably exposed to terrorism. Moreover, the 2002 Jose Padilla incident in the United States unveiled that gangs were supplying terrorists group members. In response to such acts of terrorism, nations around the world are establishing and enacting anti-terrorism laws as the legal grounds for counter-terrorism measures to ensure national

security and citizen safety.

Currently, Korea's anti-terrorism activities are based on Executive Order 17, "National Anti-terrorism Activity Directive." However, governing anti-terrorism tasks based on an executive order is contrary to the fundamental principles of constitutionalism. Following the 9.11 terrorist attacks, terrorism prevention legislations were initiated in Korea so as to establish the legal basis for Korea's counter-terrorism measures. The "Terrorism Prevention Act" was proposed to the National Assembly on November 28, 2001, led by the National Intelligence Service. After a process of collecting feedback on this legislation, a bipartisan decision was reach to create an amendment. Thereafter, on November 10, 2003, an amendment jointly proposed by parliament members Hong Jun pyo, Ham Seung heui and Kim Deok gyu was passed by the National Assembly Intelligence Committee. However, due to the termination of the 16th National Assemblymen' stermsin office(as of May 29, 2004), the act was automatically annulled. In the 17th National Assembly, assemblyman Gong Seong jin and other members of the Grand National Party proposed the "Counter-terrorism Systems Establishment and Anti-terrorism Activities Act" legislation to the National Assembly on March 15, 2005. Assemblyman Cho Seong tae and other members of the Woori Party submitted the bill for the "Anti-terrorism and Preservation from Damage Act" to the National Assembly on August 26, 2005. Thereafter, Grand National Party Assemblyman Jung Hyung geun and others proposed the "Terror Prevention and Counter-measures Act" on February 14, 2006. That same year, the Legislation Evaluation Sub-committee did not bring the three legislations before their respective assembly sessions, but decided to propose an alternative bill by supplementing the contents of the three legislations. On November 22, 2007, during the

269th session of the National Assembly's 6th Intelligence Committee the alternative was passed, but was not submitted before the Main Assembly sessions. Just as with the 16th National Assembly, due to the termination of office terms of the assembly men, the legislation was automatically annulled. In the recent 18th National Assembly, Assembly man Gong Sung jin proposed the bill for "National Anti-terrorism Activities Basic Act" before the National Assembly on October 28, 2008 (Cho Sung Je, 2009: 174-175).

This research will explore the need for a terrorism prevention legislation and conduct a comparative analysis of the terrorism prevention legislations that had been laid before the National Assembly, as a means of seeking the optimal measure to minimize people's basic rights breaches, while protecting national security and citizen safety in response to New Terrorism.

II. Discussion of the Need for Enactment of Anti-terrorism Legislation

1. The need for enactment of terrorism prevention laws

1) Con enactment of terrorism prevention laws

Those who oppose the enactment of terrorism prevention laws suggest the following grounds for objection. First, an terrorism prevention act must meet the requirements of the principle of proportion, but anti-terrorism laws cannot be deemed as the appropriate measure to preventing terrorism, but if it can be deemed as appropriate the government must be able to present evidence to that effect (the principle of appropriateness from the principle of proportion). Second, current laws and systems cannot sufficiently establish and implement proper anti-terrorism countermeasures. Third, the functions and powers of the National Intelligence Service will be fortified which raise concerns over human rights infringements. Fourth, mobilizing military force in place of law

enforcement for purposes of maintaining law and order is unconstitutional. Fifth, the concept of "terrorism" and "terrorist groups" have yet to be defined which lead to grave concerns of human rights violations. Sixth, as the reason why Korea has become a high potential target of terrorism is mainly be due to Korea having deployed the third largest contingency to Iraq, it would be reasonable for the government to take full responsibility for the vulnerability to terrorism due to troop deployment and the withdraw troops from Iraq, rather than enacting an anti-terrorism law.

Of utmost concern to those that oppose enactment of terrorism prevention laws is that the National Intelligence Service could step beyond its realm of authority as an intelligence agency in the name of "preventing terrorism" and develop into an authoritative institution that commands and controls other administrative agencies thereby infringing upon citizens' basic rights.

2) Pro-enactment of terrorism prevention laws

Those pro enactment of terrorism laws argue as follows:

First, as the Executive Order on National Anti-terrorism Activity is an administrative regulation, to regulate anti-terrorism activities based on this directive would be contrary to the basic principles of legalism. Second, aspects of terrorism in recent require new approaches to counter-measures, due to wartime-resembling relentless toxic gas and biological attacks, use of weapons of mass destruction, the immediacy of terror and insufficient response times, and interconnection of organizational networks that render prior detection and prevention more difficult. Thus, anti-terrorism laws must be established to protect national security and the citizen's lives and property. Third, to detect and suppress terrorism prior to an incident an integrated counter-terrorism agency, that is able to plan and

direct anti-terrorism activities based on a comprehensive and integrated analysis of all intelligence collected through international intelligence exchange and that gathered through respective domestic intelligence agencies, should be established.

The main grounds for advocating enactment of anti-terrorism laws are based on the need for an anti-terrorism agency that can oversee an integrated intelligence network, data collection and sharing, as well as planning, in response to new aspects of terrorism such as New Terrorism.

2. Potential links between criminal organizations and terrorist groups

1) El Rukns and Jose Padilla in the United States

In 1985 gang members of Chicago were arrested, and surprisingly their conviction was based on terrorism acts of explosion and assassination. Gang (criminal organization) members related to the felony were involved in terrorist activities against the United States government. Jeff Fort, the leader of Black P. Stone Nation (a gang organized by Jeff Fort based in Chicago in the late 1950s) purchased various buildings that were known to be blackhouses or mosques (Islamic temples). During the time he was involved in the crimes, he made contacts with Islamic nationals and Islamic secret intelligence group members. El Rukns, a faction of the Black P. Stone Nation, dispatched its members to the Middle East and Libya, and when they were arrested machine guns, up-armored vehicles and aircraft weapons were found in their mosques. In June 2002, Jose Padilla who was a member of the gang Latin King, based in Chicago with a long history, was arrested for charges of throwing a bomb into a city in the United States. Latin King, the group of which Jose Padilla was a member, was involved in various crimes such as murder, and drugs and weapon trades, like El Rukns. Latin King and El Rukns were allies.

2) Motives behind connections between criminal organizations and terrorist organizations

(1) Religious motives

Criminal organizations are the media for communications among members, and require a religious pretext to hide their criminal activities. In the Black P. Stone Nation case, the group linked itself with Islamic Fundamentalism to conceal its brutalities. If the United States commits a bad deed or conducts dirty transactions, they believe that such makes it worth attacking to justify their actions (Orvis, Gregory P./Rush, Jeffery P., 2006: 115-116). Also, from this position of terrorist groups linked with Islamic Fundamentalism, they are able to easily liaison with such criminal organizations by taking advantage of their psychology. In this aspect, Americans may believe that Islamists despise their religious freedom, freedom of speech and freedom to elect their own government, and that Islamists target all Americans, Jews and Christians (Lee Heon kyung, 2003: 346-347).

Following the 9.11 terrorist attacks, Korea has been proactively engaged in international coalitions against terrorism, deploying noncombatant-oriented peace building reconstruction troops in support of the United States' War on terror. Strong diplomatic ties with the United States and presence of U.S. forces in Korea are factors that make Korea a target of Islamic extremists. (Baek Jonggab, 2006: 45). From the year 2005 Islamic international movements have been gathered around Korea. There are twenty to thirty thousand Islamic missionaries in Korea with some 100 to 150 thousand followers of the religion. Korea's current circumstances indicate that there is a high risk that terrorism groups and criminal organizations may connect based on religious motives.

(2) Similarity of technology

During the War in Afghanistan, Alkaida training

tapes were discovered by the U.S. military. The training tapes covered ambush attacks of law enforcement staff and use of motorcycles as shooting grounds for assassination purposes. The tape analyst believed that they were spending a lot of time on training on outdated attack methods, such as in small groups armed with small weapons. Therefore, these exercises were activities in which criminal organizations had already engaged, and the terrorist groups were benefiting because they were able to bring in people with prior training (Farah, J., 2002: 12).

(3) Procurement of terrorism funds

Terrorist groups are showing a tendency to connect themselves with drug-related criminal organizations and are involving themselves directly and indirectly in drug smuggling, as a means of securing funds for their activities. In the 1990's, FARC of Columbia, Sendero Luminoso of Peru, Hamas and Hezbollah of the Middle East, Taliban of Afghanistan all were involved in the opium trade to procure illegal funds in a small amount of time. These terrorist organizations linked up with transnational criminal organizations to build their sales network for illegal drug trafficking (Baek Jong gab, 2006: 32).

III. Comparison of Anti-terrorism Laws in Korea

1. The development of terrorism prevention legislation proposals

For Korea, the time when the government initiated enactment of counter-terrorism measures on a pan-national scale started from enactment of the 1982 Executive Order, National Anti-terrorism Activities Directives, established to respond to North Korean terrorism and threats from international terrorism groups on participating athletes' safety. As governing anti-terrorism activities based on an executive order is contrary to the basic principles of constitutionalism,

following the 9.11 attacked against the United States in 2005, legislation on terrorism prevention acts started to be proposed based on the need for legal grounds for anti-terrorism tasks for national security and citizen safety.

First the 'Terrorism Prevent Act' legislation was proposed to the National Assembly on November 28, 2001, led by the National Intelligence Service. After incorporating various points of criticism against this legislation, a bipartisan consensus for an amendment was called to order. Thereafter, an amendment bill proposed by Assemblymen Hong Jun pyo, Ham Seung heui and Kim Deok gyu was passed, but was automatically annulled due to termination of their terms in office in the 16th National Assembly(as of May 29, 2004).

In the 17th National Assembly, Assemblyman Gong Seong jin and others from the Grand National Party proposed the 'Counter-terrorism Systems Establishment and Anti-terrorism Activities Act' legislation on March 15, 2005. Assemblyman Cho Seong tae of the Woori Party submitted the 'Terrorism Prevention and Preservation from Damage Act' legislation on August 26, 2005. Thereafter, Assemblyman Chung Hyeong geun and others of the Grand National Party proposed the 'Terrorism Prevention and Counter-measures Act' legislation on February 14, 2006. On that year, the Legislation Evaluation Sub-committee did not bring the legislation before the main Assembly sessions, and instead decided to supplement the contents of all three proposed legislation for submission as the alternative. Thereafter, the alternative legislation was passed through the sixth session of the Intelligence Committee session during the 269th session of the National Assembly on November 22, 2007, but was not brought up to the main Assembly sessions and thereafter automatically expired due to the terminations of assemblymen's terms in office, just as with the 16th

National Assembly session. Recently, in the 18th National Assembly sessions Assemblyman Gong Seong jin and others proposed the 'National Anti-terrorism Activities Basic Act' to the National Assembly on October 28th, 2008. However, with strong resistance from the opposition party and citizen groups, it appears that referring this bill to the main session will not be an easy task (Cho Sung je, 2009: 174-175).

2. Comparison of terrorism prevention bills

This research will seek enactment of terrorism prevention laws that can ensure citizens' basic rights are protected and guarantee national security, by means of comparing the contents the 'Terrorism Prevention Act' (hereinafter referred to as government bill) that was established with the lead of the National Intelligence Service; the 'Terrorism Prevention and Preservation from Damage Act' (hereinafter Assemblyman Cho's bill) which was proposed during the 17th National Assembly by Assembly man Cho Seong tae; and the 'National Anti-terrorism Activities Basic Act'(hereinafter Assembly man Gong's bill) that was recently submitted to the 18th National Assembly.

1) The definition of a terrorist organization

The government bill provides in Article 2 Section 2, "A terrorist group is a domestic or foreign group or society whose members continue to commit acts of terror, regardless of its founding objective." Assembly Cho's bill stipulates in Article 2, Section 2, "A terrorist group is a domestic or foreign society or group that was designated as a terrorist group by the United Nations and that which supports or receives support from such organizations, whose activities relate to terrorism such as preparation, promulgation, instigation or execution thereof. Assemblyman Gong's bill provides in Article 2, Section 2, "A terrorist group is a domestic and foreign society or group whose

objectives are those of terrorism, a group designated by the United Nations as a terrorist organization, and groups designated as such, subject to Article 8, Section 3.4. and those that support or receives support for such organizations."

The government bill identifies a 'terrorist group' as one whose member continue to commit acts of terror regardless of whether its founding objectives; and its head is punishable by death, life or more than 10-year imprisonment, its key leaders punishable by life or more than 7 years of imprisonment, and those who recommend, instigate or support joining a terrorist group is punishable by more than 2 year's term imprisonment. The clause, "regardless of its founding objectives" may be considered to be contrary to the principle of *nulla poena sine lege* (principle of legality) because the definition may apply to all types of organizations and does not limit it to terrorist organizations. Moreover, because the concept of terrorism is vague and extendable, on these premises, the fact that those who are a member, became a member, supported or recommended becoming a member of a terrorist group may be punishable in by death or at least more than 2 years imprisonment can be deemed as excessive and arbitrary exercise of punishment rights contrary to the principles of legality.

Assemblyman Cho's bill stipulates a terrorist group as a domestic or international group or society that is related to preparation, promulgation, instigation or execution of terrorism, designated as such by the United Nations, and those that support or receive support from terrorist groups designated by the United Nations in the aspects of terrorism. However, because the United Nations has not definitively stipulated what may be considered a 'group designated as a terrorist group by the United Nations' the standard with which terrorist groups may be identified is vague and bears the risk of violating citizens' basic rights to assembly and association. Assemblyman Gong's bill defines a

terrorist group as a group designated as a terrorist group by the United Nations, one that was deliberated and voted in as a terrorist group by the National Terrorism Counter-measures Council, and one that supports or receives from such a terrorist group. First, the aforementioned criticism may also apply to the standard, 'designated as terrorist group by the United Nations'. The standard, 'deliberated and voted in as a terrorist group by the National Terrorism Counter-measures Council' does not provide for a clear stipulation as to which criterion would apply in determining a terrorist group, therefore bears a significant risks of violating the people's basic rights based on arbitrary findings of the government.

2) Counter-terrorism organizations

The government bill provides for names of counterterrorism organizations in Article 2, as Article 4 (National Counter-terrorism Council), Article 5 (Counter-terrorism Center), Article 6 (Establishment of Terrorism Incident Counter-measure Headquarters in Respective Fields), Article 7 (Establishment of Subjugation Strategies and Rescue Organizations) and Article 8 (Regional Counterterrorism Council, etc.).

Assemblyman Cho's bill does not provide for a separate article for this issue, but stipulates as counter-terrorism organizations in Article 4 (National Counter-terrorism Council), Article 5 (Standing Committee), Article 6 (Counter-terrorism Center), Article 7 (Establishment and Operations of a Counter-terrorism Headquarters), Article 8 (National Counter terrorism Council), Article 9 (Counter-terrorism Standing Committee), Article 10 (National Counter-terrorism Center), and Article 11 (Establishment and Operations of a Terrorism Incident Counter measures Headquarters).

The 'Regional Counterterrorism Council' provided in the government bill is not stipulated in Assemblymen Cho nor Gong's bills. Counter-measures organizations

in The government bill, Assemblyman Cho's bill and Assemblyman Gong's bill all provide for the National Counter-terrorism Council as a deliberative and voting organization immediately under the auspices of the Presidential Office. The Council Chair is provided as the Prime Minister, and Assemblyman Gong's bill adds the Director of the National Intelligence Service as the Vice Chair. Assemblyman Cho's bill adds the Directors of the Korea Customs Service, the National Police, the National Emergency Management Agency, the Korean Coast Guard as members of the National Counter-terrorism Council, unlike in the government bill where these positions would not be Council members. Assemblyman Gong's bill newly adds as members the Directors of the Financial Supervisory Commission, and the Presidential Security Service, as well as the Presidential Office First Secretary to Foreign Affairs and National Security. Clearly stipulating Directors of the Korea Customs Service, the National Police, the National Emergency Management Agency, the Korean Coast Guard that carry out terrorism-related services as members of the National Counter-terrorism Council is the desirable approach.

As the National Counter-terrorism Council's issues of deliberation and resolution, the government bill provides for ① directives for the establishment of national terrorism policies, ② counter-measures for incidents of terrorism acts, ③ establishment of various counter-terrorism measures and evaluations of its implementation, and ④ other government initiatives concerning terrorism prevention. Assemblyman Cho's bill lists ① national policy on counter-terrorism activities, ② establishment of various counter terrorism measures and evaluation of its implementation, and ③ other issues related to planning and coordination of counter-terrorism activities with related agencies. Assemblyman Gong's bill sets forth ① establishment and evaluation of national policies on

counter-terrorism activities, ② promulgation of terrorism alerts, ③ designation and dismissal from designation of terrorist organizations, ④ designation and establishment of counter-terrorism special forces, and ⑤ other matters that the Council Chair or the Counter-terrorism Standing Committee Chair in Article 9 proposes as worthy of deliberation and resolution in the National Counter-terrorism Council. Assemblyman Gong's bill clearly adds promulgation of terrorism alerts and designation and dismissal designation of terrorist groups as an issue for the National Counter-terrorism Council's deliberation and resolution. This delineates the National Counter-terrorism Council as the determining body of whether a situation is that of terrorism or whether a given group is one of terrorism. Therefore, terrorism alerts and designation and withdrawal of designation as terrorist groups being decided based on a careful inquiry and voting process by the National Counterterrorism Council members will reduce the risk of violating the people's basic rights, unlike if a certain government agency were to independently make such determinations, and as a result should be the proper legislative approach. The government bill provides in Article 7, Section 1, "the Minister of National Defense, the Minister of Public Administration and Security, and the Director of National Police, etc. may designate or establish a special forces unit for subjugation of terrorism, and rescue forces for purposes of protecting residents through rescue efforts and emergency response at terrorism sites". However, Assemblyman Gong's bill provides for this matter as an issue of deliberation and resolution by the National Counterterrorism Council for a more careful process of designating and establishing special forces that carry out suppression of terrorism and rescue efforts at terrorism sites.

The government bill, Assemblyman Cho's bill and Assemblyman Gong's bill all stipulate the establishment of

a Standing Committee in the National Counter-terrorism Council. The government bill provides in Article 4, Section 4 that the Standing Committee shall inquire and vote on matters assigned to them by the National Counterterrorism Council, and Assemblyman Cho's bill sets forth in Article 5, Section 1 that the Standing Committee shall process tasks delegated by the National Counter-terrorism Council. Assemblyman Gong's bill in Article 9, Section 3 provides that ① terrorism prevention issues, ② terrorism response and post-incident measures, and ③ other issues deliberated and voted by the National Counter-measures Council and processing of other assigned tasks shall be the jurisdiction of the Standing Committee. While the government bill and Assemblyman Cho's bill prescribe 'tasks assigned by the National Counter-terrorism Council' as tasks under the Standing Committee's jurisdiction, the recent bill expands it to include 'issues related to terrorism prevention, terrorism response and post-incident counter-measures decision-making, and other matters determined by the National Counter-terrorism Council'.

In direct performance of counterterrorism tasks, the government bill provides in Article 5, Section 1 that a Counter-terrorism Center shall be established within the National Intelligence Service, whereas Assemblymen Cho and Gong's bills stipulate that the Counter-terrorism Center shall be established under the auspices of the Office of the Director of the National Intelligence Service. The three bills are similar in the aspects that the Counter-terrorism Center is to be installed within the National Intelligence Service, and that the Center plays an actual role in counter-terrorism activities. Assemblyman Gong's bill is unique in that it stipulates terrorism alert promulgations and terrorist group designations and dismissal of such designations as matters to be inquired and voted upon by the National Counter-terrorism Council. The Counter-terrorism

Center is stipulated to propose promulgation of terrorism warnings and make suggestions on terrorist group designations and withdrawal of such designations. This clearly delineates the jurisdiction of the Counter-terrorism Center that in actuality exercises a wide-range of authorities related to terrorism. Also, in the aspect that haste decision-making, that may take place if terrorism alert promulgations were to be directly assigned to the Counter-terrorism Center, may be prevented is a positive legislative approach as it may reduce the risk of violating the basic rights the people.

The Terrorism Prevention Act's provision that the Counter-terrorism Center shall be established within the National Intelligence Service and shall perform actual and comprehensive counter-terrorism activities bears a high risk for violation of people's basic rights due to the strengthening the power the National Intelligence Services may exercise. According to Article 3 of the National Intelligence Service Act, the National Intelligence Service shall perform duties that include ① collection, generation and dissemination of domestic and international security intelligence (public attacks or antigovernment subversions, espionage, counter-terrorism, and international criminal organizations), ② securing national security documents, materials, facilities and regions (excludes security inspections of respective agencies), ③ investigations on insurrection and foreign currency convictions in criminal law; and rebellion, code misuse, and other convictions related to confidential military intelligence based on the code of military justice, ④ investigations on crimes related to the National Intelligence Service, and ⑤ intelligence and security planning and coordination. Due to the prowling nature of intelligence agencies, if they were to perform investigative functions, there will be high risk of people's basic rights infringements. Thus, the National Intelligence Service Act, Article 3 limits such

investigative authorities to those related to convictions for insurrection and foreign currency based on criminal law; and for rebellion, code misuse, and confidential military intelligence based on the code of military justice. Even if the Counter-terrorism Center was to be established within the National Intelligence Service, investigative authority on counter-terrorism activities shall be exercised by the prosecutors and the police as with existing criminal investigations. Although the Counter-terrorism Center would fall under the hierarchy of National Intelligence Service, as the Center is in itself an independent agency provisions that the Center does not have its own investigative authority would be the desirable legislative approach that is faithful to protecting the basic rights of the people.

To address concerns that the Terrorism Prevention Act will inevitably strengthen the power of the National Intelligence Service and lead to the violation of people's basic rights, a dualism approach to the Counter-terrorism Center may be worth considering. Based on Assemblyman Gong's bill, the National Counter-terrorism Center under the auspices of the National Intelligence Service should have jurisdiction in the areas of ① collection, analysis, generation and dissemination of international terrorism intelligence, ② devising measures against international terrorism, ③ planning and coordination in international terrorism activities, ④ detecting signs and proposing warnings against international terrorist groups, ⑤ intelligence gathering on international terrorism key figures, ⑥ proposals for designations as international terrorist groups and withdrawal of such designations, ⑦ terrorism intelligence collaboration with foreign intelligence agencies, and ⑧ other international matters upon which the National Counter-terrorism Council or the Standing Committee deliberates and votes. In addition, another National Counter-terrorism Center should be established under the Director of the

National Police to perform functions in the fields of ① collection, analysis, generation and dissemination of domestic terrorism related intelligence, ② seeking counter-measures to domestic terrorism, ③ planning and coordination of domestic counter-terrorism activities, ④ detection of signs and proposals for domestic terrorism alert promulgations, ⑤ intelligence gathering on key domestic terrorism threat figures, ⑥ proposals for designation of domestic terrorist groups and withdrawal of such designations, ⑦ administrative tasks related to operations and meetings for the National Counter-terrorism Council and the Standing Committee, and ⑧ other domestic issues deliberated and voted in by the National Counter-terrorism Council and Standing Committee.

3) Establishment of counter-terrorism special forces and military forces support

(1) Establishment and operations of counter-terrorism special forces

The government bill, in Article 7, Section 1, provides, “The Minister of National Defense, the Minister of Public Administration and Security, and the Director of National Police may designate or establish special forces for subjugation of terrorism, or rescue forces for the purpose of protecting residents through rescue efforts and emergency response at terrorism sites; and in Article 14 stipulates, “the head of the Counter-terrorism Center may request support from the head of respective special forces or rescue forces units in the event of a terrorist attack”. Assemblyman Cho’s bill does not provide for a separate clause related to the establishment or operations of any counter-terrorism special forces. Assemblyman Gong’s bill, in Article 21, Section 1, states, “The Ministry of National Defense, the Director of National Police or the Director of the Korean Coast Guard may designate or establish counter-terrorism special forces followed by the National

Counter-measures Council’s inquiry” and in Section 2 provides, “If the Minister of National Defense, the Director of National Police, or the Director of Korean Coast Guard mobilizes counter terrorism special forces under their respective auspices, they must immediately notify the Director of the National Counter terrorism Council and the Director of the Counter terrorism Center”

Although Assemblyman Cho’s bill without a separate clause related to counter-terrorism special forces may seem like the better approach in reducing risks for violations of people’s basic rights, suppressing terrorism with only police forces without the support of military forces would rather reduce the risk of violating basic rights. In this aspect, it would in the best interest of protecting people’s basic rights to have a counter-terrorism special forces establishment and operations clause, while if a counter-terrorism special forces for terrorism suppression were to be established by the Minister of National Defense, Director of National Police or the Director of Korean Coast Guard, its establishment shall be brought up for the National Counter-terrorism Council’s inquiry so as to maintain checks and balances on arbitrary decision-making on the parts of the Minister of National Defense, Director of National Police or the Director of Korean Coast Guard. The Minister of National Defense, Director of National Police or the Director of Korean Coast Guard should obtain prior National Counter-terrorism Council’s approval to prevent arbitrary decisions in mobilizing counter-terrorism special forces from their respective agencies.

Allowing for the Minister of National Defense to designate or establish counter-terrorism special forces means that designation or operations of counter-terrorism special forces composed of military forces will be made possible. Based on Assemblyman Gong’s bill, to not have any checks and balances on

designation or establishment of counter-terrorism special forces by the Minister of National Defense may be considered unconstitutional as military forces will be mobilized outside the realms of the Marshall Law based on the Constitution. Meanwhile, in the outbreak of a terrorist attack, suppression solely with the National Police counterterrorism special forces may not be an easy task and there may be a need for military counterterrorism special forces that is superior in terms of training, equipment and facilities. We are faced with a dilemma of whether securing the people's security and public safety or protecting people's basic rights comes first. In this particular case, we may consider the public benefit that counter-terrorism measures as more important than protecting an individual's basic rights that may be violated due to such measures. However, if control measures were to be strengthened by mandating notification to the National Assembly prior to mobilizing counter-terrorism special forces designated and established by the Minister of National Defense, and by warranting an immediate withdrawal based on a National Assembly general voting quorum.

(2) Support through military and other forces

The government bill provides in Article 15, Section 1, "The National Counter-terrorism Council or the Standing Committee may request minimal military or national guard reserves support for protection and guarding of facilities, in cases where police forces are not sufficient to properly protect important national facilities and frequented public venues from terrorism", and in Section 2 states, "The President shall notify the National Assembly in advance when providing military or other supports based on suggestions in accordance with Section 1, and thereafter if the National Assembly requests withdrawal of such military or other supports, the request must be honored".

Assemblyman Cho's bill stipulates in Article 16,

Section 1, "The Chair of the Counter-measures Council may suggest to the President provision of minimal military or national guard reserves support in imminent circumstances where it is determined that it will be difficult to protect key national facilities and frequented public venues from terrorism with police forces", and in Section 2 states, "If the President, after having received such suggestion, decides to provide military or other supports, he must notify such to the National Assembly, and thereafter if the National Assembly requests withdrawal of such military or other supports with the majority of register members present and majority present voting for withdrawal, the President must immediately honor the request". In Section 3, the bill provides, "The military or other forces provided in support shall perform facility protection and guard functions under the command and direction of the Minister of National Defense."

Assemblyman Gong's bill in Article 22 provides for the same content as that in Assemblyman Cho's bill. The government bill allows for the Standing Committee to make suggestions for military and other supports, whereas Assemblymen Cho and Gong's bills stipulates only the National Counter-terrorism Council may suggest military and other supports. The government bill does not cover any provisions with regards to the number of voting members for the National Assembly's withdrawal request of military or other supports, whereas Assemblymen Cho and Gong's bills stipulates the general voting quorum with majority members present and majority present approval. The government bill does not provide for any specifics as to the command of support military or other forces, whereas Assemblymen Cho and Gong's bills sets forth the command to be under the Ministry of National Defense.

The issue of 'military and other supports' in anti-terrorism laws have been the most controversial. In the Constitution, Article 77 separates the functions

of the military and the police and provides, “The President may in accordance with the law declare into effect Marshall Law to respond to the needs of the military with military force in times of war, disaster or an equivalent national emergency, or when necessary to protect the peace and order of the public. When Marshall law is declared the President shall immediately notify the National Assembly, and if the National Assembly requests withdrawal of the declaration of Marshall Law with majority of registered members votes the President must dismiss the declaration”. Anti-terrorism laws may be unconstitutional in that military forces may be mobilized outside the realm of Marshall Law based on the Constitution but for purposes of sustaining order in civilian areas. As a circumstance in which it is difficult for just the counter-terrorism special forces and police force to protect key national facilities and frequented public venues from terrorism would be a circumstance equal to that of a ‘wartime, disaster or an equivalent national emergency’, retaining ‘military or other support’ as the bill’s provision does not seem to be worth the trouble of being criticized as being unconstitutional.

IV. Conclusion

A system in which national agencies may be organically overseen and coordinated is called for, in the aspect that a quicker and more effective response to new forms of terrorism, such as New Terrorism, and that governing counter-terrorism tasks based on an executive order is contrary to the principles of legalism. Additionally, with more and more terrorist groups connecting themselves with criminal groups based on the need to procure terrorism activity funds, religious motives, convenience of bringing in trained members, etc., accurate intelligence and analysis of such domestic and international terrorist organizations and criminal organizations is required, based upon

which a measure to specify the range of a terrorist group must be pursued. Therefore, an agency that organically oversees and coordinates national agencies in the areas of data collection and analysis, and terrorist group designation is needed, and a terrorism prevention law that may serve as the grounds for such an agency should be enacted.

Moreover, through an analysis of terrorism prevention bills that have been brought before the National Assembly, the following proposals are made as a means of reducing the risk of violating people’s basic rights with respect to establishing terrorism prevention laws.

First, terrorist group designation and withdrawals thereof shall be clearly set forth as a matter for the National Counterterrorism Council’s inquiry and resolution. As designation of terrorism organization and withdrawals thereof will be carefully executed through the Council member’s deliberation and resolution, this should be the legislative approach to reduce the risk of people’s basic rights violations which could occur if a certain national agency were to arbitrarily make the decision.

Second, functional dualism of the Counterterrorism Center is proposed, as a means of addressing concerns that terrorism prevention laws will inevitably empower the National Intelligence Service and as a result lead to the breach of people’s basic rights.

Third, ‘military and other supports’ may be unconstitutional, as it will allow for mobilizing of military force in civilian areas without grounds for Marshall Law based on the Constitution. As a circumstance in which the counterterrorism special forces and police force have difficulty protecting key national facilities and frequented public facilities from terrorist attacks would be a circumstance equal to that of a ‘wartime, disaster or an equivalent national emergency’, retaining ‘military or other supports’ in the provisions do not seem to be worth the trouble of being

criticized as being unconstitutional.

Unanswered Questions. *International Journal of the Sociology of Law*. 34(1): 1-41

<References>

- ▷ Kang, Dae Chool. 2008. Legislative Review of Terrorism Prevention Bills. Tasks and Prospects for Preventing Terrorism and Maintaining Law and Order. Korea Terrorism Society. *Korea Autonomy Police Society Autumn Seminar Presentations Compilations*.
- ▷ Baek, Jong Gab. 2006. An Analysis of the Risk of Terrorism and the Role of Intelligence. *International Security Guard Association Regular Academic Seminar Presentation*.
- ▷ Lee, Gye Soo. 2005. Legislative Background of Terrorism Prevention Laws. Terrorism Prevention Laws and the National Intelligence Service(PlanningWorkshop). *Coalition in Opposition of Enactment of Terrorism Prevention Laws*. March 17.
- ▷ Lee, Gye Soo. 2004. Issues of Controversy in Terrorism Prevention Laws. *Democratic Law Book No. 25*. Democratic Law Research Institute.
- ▷ Lee, Hoon Dong. 2008. Trends of Counter-terrorism Related Law Enactment in Various Nations. Public Safety Administration Academic Seminar. *Counter-terrorism Seminar Compilation*. November.
- ▷ Lee, Heon Gyeong. 2003. The Essence of Terrorism and Korea's Direction for Anti-terrorism. *Unification Strategy Publication*. 3.1. Korea Unification Strategy Society.
- ▷ Oh, Dong Seok. 2005. An Analysis of Terrorism Prevention Laws of the Grand National Party and the Woori Party. Terrorism Prevention Laws and the National Intelligence Service(Planning Workshop). *Coalitionism Opposition of Enactment of Terrorism Prevention Laws*. May 17.
- ▷ Cho, Sung Je. 2009. Research about Anti-Terrorism Law enactment as Plan for Guarantee of Nation 's Fundamental human right and National Security. *Korea Municipal Government Society Winter Seminar Compilations*.
- ▷ Farah, J. 2002. *Al-Qaida Training Tape Shows Another Side of Terror*. Whistleblower.
- ▷ Haubrich, Dirk. 2007. *Anti-Terror Laws and Civill Liberties: Britain, France and Germany Compared, Government and Opposition*. Blackwell Publishing. September 11.
- ▷ Orvis, Gregory P. and Rush, Jeffery P. 2006. Modern Gansters and Patriot Act. *Criminal Justice Studies*. Routledge.
- ▷ Whitaker, Beth Elise. 2007. Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World. *Third World Quarterly*. Routledge.
- ▷ Wong, Kam C. 2006. The USA PATRIOT Act: Some

昇宰賢: 2009년 8월에 한국외국어 대학교에서 박사학위를 취득예정에 있으며(논문: 양형의 규범적 판단 근거와 합리적인 양형기준방안에 관한 연구: 2009년 한국외국어대학교 우수박사논문 수상작), 한국외국어대학교 법학전문대학원 법률연구소의 선임연구원으로 재직 중 이다. 주요 관심분야는 현 양형위원회의 양형기준에 대한 평가와 개선방향 및 미국과 영국의 양형기준 및 가정폭력, 테러리즘 이다. 주요 연구로는 “경찰과 검찰간의 합리적 수사권 조정에 관한 쟁점과 논의(2009)”, “Analysis and Improvement Strategies for Korea's Cyber Security Systems Regulations and Policies(2009)”, “객관적 기속 기준에 대한 우리 관례의 입장에 대한 고찰(2008)”이 있다(june3651@hufs.ac.kr).
趙成濟: 경북대학교에서 법학박사학위를 취득하고(논문: 수사절차에 있어서 적법절차원리의 구체화, 2009), 현재 대구한의대 경찰행정학과 교수로 재직 중이다. 주요관심분야로는 위기관리법제, 테러방지법, 인권법 등이 있다. 주요연구로는 “수사기관의 피의자신문서 변호인참여 권과 피의자인권(2008)”, “범죄조직과 테러단체의 연계가능성과 그 의미에 관한 고찰(2009)”, “국민의 기본권보장과 국가안보를 위한 방안으로써 테러방지법 제정에 관한 연구(2009)” 등이 있다 (lawcho@dhu.ac.kr).

접수번호: #090501-01
접수일자: 2009. 05. 01.
심사완료: 2009. 05. 27.

The Need for Enactment of Counterterrorism Laws in the Republic of Korea and a Review of Counter-terrorism Laws Proposed to the National Assembly

Jea Hyen Soung, Sung Je Cho

This research will explore the need for a terrorism prevention legislation and conduct a comparative analysis of the terrorism prevention legislations that had been laid before the National Assembly, as a means of seeking the optimal measure to minimize human rights breaches, while protecting national security and citizen safety in response to New Terrorism. A system in which national agencies may be organically overseen and coordinated is called for, in the aspect that a quicker and more effective response to new forms of terrorism, such as New Terrorism. Therefore, an agency that organically oversees and coordinates national agencies in the areas of data collection and analysis, and terrorist group designation is needed, and a terrorism prevention law that may serve as the grounds for such an agency should be enacted. And through an analysis of terrorism prevention bills that have been brought before the National Assembly, the following proposals are made as a means of reducing the risk of violating people's basic rights with respect to establishing terrorism prevention laws. First, terrorist group designation and withdrawals thereof shall be clearly set forth as a matter for the National Counterterrorism Council's inquiry and resolution. As designation of terrorism organization and withdrawals thereof will be carefully executed through the Council member's deliberation and resolution, this should be the legislative approach to reduce the risk of people's

basic rights violations which could occur if a certain national agency were to arbitrarily make the decision. Second, functional dualism of the Counterterrorism Center is proposed, as a means of addressing concerns that terrorism prevention laws will inevitably empower the National Intelligence Service and as a result lead to the breach of people's basic rights. Third, 'military and other supports' may be unconstitutional, as it will allow for mobilizing of military force in civilian areas without grounds for Marshall Law based on the Constitution. As a circumstance in which the counterterrorism special forces and police force have difficulty protecting key national facilities and frequented public facilities from terrorist attacks would be a circumstance equal to that of a 'wartime, disaster or an equivalent national emergency', retaining 'military or other supports' in the provisions do not seem to be worth the trouble of being criticized as being unconstitutional.

Key Words: terrorism prevention legislation, counterterrorism center, human rights, terrorist group designation, terrorism prevention bills