

# BALANCING THE ACT ON ANTI-TERRORISM IN SOUTH KOREA

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*The Act on Anti-Terrorism<sup>+</sup> for the Protection of Citizens and Public Security passed in 2016 despite the longest filibuster in the history of Korean legislation. While counterterrorism legislation can often present dangers of overreaching state authority and risks to citizens' rights in any country, the South Korean narrative is uniquely layered given the historical context of anti-communist discourse. This article argues that the Act mitigates accusations of human rights violations by assuming dual legal purposes of national security and disaster management as well as employing human rights discourse and safeguards within the law. However, expansive executive and agency discretion, ambiguities in terrorist discourse, and lack of due process undermine human rights compliance, endangering both citizens' and foreigners' rights against unwarranted government intrusion.*

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+ This article follows the Korean government's translation of the law, which uses "Anti-Terrorism" rather than "Counter-Terrorism" in the title of the Act. Korean names in the text begin with the surname and reflect commonly printed designations for public figures or otherwise personal preference. All other romanizations follow the official Korean government's revised romanization system.

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## INTRODUCTION

South Korea's longest filibuster lasted eight days in March 2016 in an attempt to block passage of the controversial Act on Anti-Terrorism for the Protection of Citizens and Public Security ("*Anti-Terrorism Act*").<sup>1</sup> The law passed despite the extensive filibuster. The opposing Minju (Democratic) party that had initiated the filibuster decided to end it due to the blockage of other legislation it wanted to pass.<sup>2</sup>

The passage of the *Anti-Terrorism Act* presents a narrative of partisan politics in which the then incumbent Park Geun-hye administration and the conservative Saenuri Party proclaimed the need for stronger protection against potential terrorist threats, while progressive party elements argued that the *Anti-Terrorism Act* would be a domestic tool for intrusive surveillance upon the general population and further used to label and criminalize South Korean dissenters as terrorists.<sup>3</sup> This controversial passage of counterterrorism legislation illustrates the ongoing international dilemmas of protecting citizens from terrorist acts without eroding civil liberties and human rights in the process. While terrorist threats are a real and grave concern necessitating strong security safeguards, the potential

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1. Gungminbohowa gonggonganjeoneul wihan tereobangjibeob [The Act on Anti-Terrorism for the Protection of Citizens and Public Security], Act No. 14071, Mar. 3, 2016 (S. Kor.) [hereinafter *Anti-Terrorism Act*], translated in Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=38450&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=38450&lang=ENG) [<https://perma.cc/TCT3-X6FT>] [hereinafter *Anti-Terrorism Act*].

2. Sohn Hyeong-joo, Deominju, oneul filibuster jungdan [*The Minjoo Party Halts Filibuster Today*], NEWS 1 KOREA (Mar. 1, 2016, 12:50 AM), <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=421&aid=0001916724> [<https://perma.cc/8K8D-ZBZK>] (amending the Public Official Election Act was blocked due to the filibuster, which was a burden to the opposition).

3. See, e.g., Kwon Oh-seong, Tereobangjibeob tonggwa dwi telegram euro teksodeoseut gasok [*After the Passage of Anti-Terrorism Act, Exodus to Telegram Accelerates*], HANKYOREH (Mar. 7, 2016, 7:30 PM), <http://www.hani.co.kr/arti/economy/it/733708.html> [<http://perma.cc/NC2H-RQNG>] (within a few days of the law's passage, concerns about government surveillance on the South Korean private messaging application Kakao caused a mass cyber-exodus to other non-Korean messaging applications).

for states to use terrorism discourse under the banner of national security and public safety to justify suppression of domestic political opposition deserves serious scrutiny.

In the post-9/11 era, many states face threats from radicalized Islamic networks within and from beyond their borders. The South Korean legislation is also a response against potential radical Islamic threats, but another narrative brews here. The conventional state-centered terrorist paradigm has long situated North Korea as the archenemy, though it primarily invoked the discourse of anti-communism, not anti-terrorism. The *Anti-Terrorism Act* is a contemporized example of intersecting discourses of terrorism and anti-communism. Contemporary terrorism discourse has become a political expedient to give more power to the state to control threats not just from Muslim terrorists and the North Korean state but also, by extension, foreigners with Muslim backgrounds and protesting citizens painted as pro-North. While the definition of terrorism under the *Anti-Terrorism Act* seemingly focuses on the Islamic State and other Muslim extremists, textual ambiguities, legal loopholes, and public distrust against the National Intelligence Service have raised fears of discretionary, broad surveillance against the general South Korean populace and unnecessary targeting of innocent migrants and asylum-seekers. In order not to sacrifice essential rights, the following questions must be asked: How does the *Anti-Terrorism Act* define its purpose, mechanisms, and target subjects? How and why does it differ from the pre-existing legislation already in place to deal with terrorist activities? What are the most contentious issues of the *Anti-Terrorism Act* in terms of institutional regulation and protection of the rights of citizens and non-citizens?

Part I explains how terrorism discourse has developed in South Korea. Part II explains the preexisting legal framework for counter-terrorism, the legislative history leading up to the current legislation, and contestations within the legal community. Part III details how the new legislation characterizes terrorism as both a national disaster and a special political crime to justify its implementation. Part IV analyzes whether government countermeasures are compliant with constitutional and human rights principles. Part V offers some recommendations for revisions. This article shows how the *Anti-Terrorism Act* mitigates accusations of human rights violations by assuming dual legal purposes of national security and disaster management as well as employing human rights discourse and safeguards for rights protection. However, expansive authority, ambiguities in terrorist discourse, and lack of due process endanger both citizens' and foreigners' rights against government intrusion.

## I. THE DEVELOPMENT OF TERRORISM DISCOURSE IN SOUTH KOREA

After the Korean War of 1950–53, South Korea's experience with terrorism has primarily been in its relations with North Korea. North Korean agents made several attempts to assassinate sitting South Korean

presidents. These include the raid on the Blue House in 1968, another attempt on Park Chung-hee in 1974, and numerous other incursions into South Korean territory. The assassination attempt on President Chun Doo-hwan in the Rangoon Bombing in 1983 and the downing of Korean Air Flight 858 in 1987 were both decried as acts of terror by the Korean representative to the UN Security Council.<sup>4</sup> After the Korean Air Flight 858 bombing, the U.S. Government subsequently listed and sanctioned North Korea as a State Sponsor of Terror in 1988.<sup>5</sup> The US State Department also considered the abduction of Japanese citizens during the 1970s and 1980s as acts of terrorism.<sup>6</sup> North-South relations thawed during the administrations of Kim Dae-jung (1998–2003) and Roh Moo-hyun (2003–2008), but tensions escalated again in 2010 with the sinking of the South Korean Cheonan vessel and the bombardment of the South Korean Yeonpyeong Island. Under the following two South Korean administrations, North-South relations steadily worsened as North Korea continued its missile development and nuclear tests. The Bush administration, however, delisted North Korea as a State Sponsor of Terror in 2008 in efforts to have North Korea denuclearize. The South Korean government also suspects North Korea of cyber-attacking government and commercial industries since 2009.<sup>7</sup>

In 2015, the ruling Saenuri Party called South Korean Kim Ki-jong's knife attack on US Ambassador Mark Lippert "pro-North Korea terrorism," precipitating further calls to pass counterterrorism bills.<sup>8</sup> The assassination of Kim Jong-nam, the eldest son of Kim Jong-il, in Malaysia on February 13, 2017, has strengthened calls in U.S. Congress for re-listing North Korea as a State Sponsor of Terror.<sup>9</sup>

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4. U.N. SCOR, 3627th mtg., at 8–9, U.N. Doc. S/PV.3627 (Jan. 31, 1996).

5. See MARK E. MANYIN ET AL., CONG. RESEARCH SERV., R43856, NORTH KOREA: BACK ON THE STATE SPONSORS OF TERRORISM LISTS? 1 (2015), <https://fas.org/sgp/crs/row/R43865.pdf>.

6. U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2005), <https://2009-2017.state.gov/j/ct/rls/crt/45392.htm> [http://perma.cc/NCP6-4HHT].

7. The cyber-hacking of Sony in 2014 has also raised concerns, but whether cyber-attacks count as terrorism is open to debate. JOSHUA STANTON, ARSENAL OF TERROR, NORTH KOREA, STATE SPONSOR OF TERRORISM 94 (2015); see also Mohammad Iqbal, *Defining Cyberterrorism*, 22 JOHN MARSHALL J. COMPUTER & INFO. L. 397 (2004).

8. Kim Kyung-wook, *Ruling Party Calls for "Terror Legislation" After Attack on US Ambassador*, HANKYOREH (Mar. 10, 2015, 4:40 PM), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/681592.html](http://english.hani.co.kr/arti/english_edition/e_national/681592.html) [http://perma.cc/C8A9-BMJQ]. The conservative party accused Kim Kijong of being pro-North based on the similarities between his blog post and North Korean propaganda.

9. MANYIN ET AL., *supra* note 5; STANTON, *supra* note 7. The latest bill was proposed in the House of Representatives in January 2017 and approved by the House in April of the same year. North Korea State Sponsor of Terrorism Designation Act of 2017, H.R. 479, 115th Cong. (2017); Christina Marcos, *House Votes to Move Toward Designating North Korea as State Sponsor of Terror*, HILL (Apr. 3, 2017 7:21 PM), <http://thehill.com/blogs/floor-action/house/327106-house-votes-to-move-toward-designating-north-korea-as-state-sponsor> [http://perma.cc/9TVD-ZE45].

The South Korean government clearly invoked the language of terrorism in response to the Rangoon and Korean Air Flight 858 bombings, but the word “terror” had not been used with great frequency until after 9/11. In the decades prior, the more common discourse revolved around North Korea being depicted as the enemy state, and anti-communist language being used to describe those who protested for workers’ rights, freedom of speech and assembly, and democracy against the administrations of Park Chung-hee and Chun Doo-hwan. Conservative politicians, government-controlled media, and conglomerates employed words such as “red” (*ppalgaengyi*) or pro-North Korea (*jongbuk*) to paint striking workers and protesters as socialists or communists. The *jongbuk* label continued under the Park Geun-hye administration. For example, the label was used against those who opposed state efforts to rewrite history textbooks, and against vocal parents and relatives of the children who died in the Sewolho ferry sinking incident, who persistently demanded deeper investigations against the state. Notwithstanding these usages, President Park then made the link to terrorism explicit in a Cabinet meeting after a major coordinated protest,<sup>10</sup> when she described the protesters wearing masks as terrorists, comparing them to terrorists from the Islamic State. However, the masks were in response to the police taking photos and videos.<sup>11</sup> Perceived and framed as radicalized leftists who had become violent, these protesters were compared to terrorists in order to justify police repression and criminal penalties. Thus, discourses of anti-communism and terrorism became interlinked in the contemporary South Korean context.

In South Korea, terrorism discourse functions as a replacement for an increasingly outdated narrative of anti-communism, the traditional apparatus for political repression under past authoritarian rule. Since the transition to democracy in 1987, South Korea has advanced constitutional rights and human rights significantly with a vibrant civil society, the establishment of the Constitutional Court and an independent judiciary, and vastly updated laws. Anti-communist discourses are no longer a sufficient political frame for oppression of workers, protesting students, and others who find fault with government policies. This is especially true for the younger generation of South Koreans who do not have the same

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10. Minjungcholgolgi, 민중총궐기, translated as “General Rising of the People,” was a serial protest coordinated by trade unions, political parties, and NGOs against various policies of the Park Geun-hye administration.

11. Kwak Sang-ah, Siwidaereul IS aie biyuhan daetongnyeong bareone daehan han oesingjauui baneung [*Response of Foreign Journalists on the President’s Remark, Likening the Protestors to IS*], HUFFPOST: KOREA (Nov. 25, 2015, 11:51 AM), [http://www.huffingtonpost.kr/2015/11/25/story\\_n\\_8643562.html](http://www.huffingtonpost.kr/2015/11/25/story_n_8643562.html) [<http://perma.cc/AA42-8MMC>]. Oppression of liberty is referred as one of the main reasons for wearing masks in the protest. Kang In-kyu, ‘Bongmyeongeumji’ anira ‘cheolmyeonpi geumjibeob’i piryohada [*We Need “Anti-Shamelessness Act” Not Prohibition on Masks*], OHMY NEWS (Nov. 28, 2015, 8:33 PM), [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0002163706](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0002163706) [<http://perma.cc/8ML5-6XFX>].

anti-communist experience as the preceding generations have. Labeling North Korea as the terrorist threat was apparent in the legislative process of the Act.<sup>12</sup> While the Park Geun-hye administration resurrected the anti-communist language of *jongbuk* due to the waning utility of the *National Security Act* (discussed next),<sup>13</sup> terrorist discourse further sustains and enlarges the scope of suspect pools—these being members of the Islamic State and other radicalized Muslim groups, Muslim refugees and migrants, anyone of a Muslim background or religion, the North Korean state, pro-North sympathizers, and South Koreans who are potentially identified as liberal progressives or are otherwise critical of the Park administration.<sup>14</sup> The new administration under President Moon Jae-in has called for various institutional reforms, but it remains to be seen how the *Anti-Terrorism Act* will be remedied in the near future to address concerns about the potential for rights infringement by the executive branch and its agencies.

## II. THE EVOLUTION OF COUNTERTERRORISM LEGISLATION

While the *Anti-Terrorism Act* is new legislation and yet to be publicly invoked in relation to any domestic terror incidents, it is worth tracing the history of laws related to counterterrorism to understand any deficiencies in the legal framework that the *Anti-Terrorism Act* is meant to cure. This section explains the pre-existing legal framework on dealing with terrorism, the legislative history behind the *Anti-Terrorism Act*, and the contentions raised by the Korean legal community with respect to its passage.

### A. Pre-existing Legal Framework

Before the current *Anti-Terrorism Act* was enacted, South Korea had a pre-existing legal framework in place for acts tantamount to terrorism via the Criminal Code, *National Security Act*, disaster management laws, and various other laws. For example, acts tantamount to terrorism

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12. Park Geun-hye, Presidential Speech in National Assembly (Feb. 16, 2016), in CHOSUN BIZ (Feb. 16, 2016), [http://biz.chosun.com/site/data/html\\_dir/2016/02/16/2016021601144.html](http://biz.chosun.com/site/data/html_dir/2016/02/16/2016021601144.html) [<http://perma.cc/H263-RQFA>] (stating that North Korea could make non-conventional attacks such as terrorism); Lee Soo-kyeong, Yeo buk tereo jinhaenghyeongtugokoeuijang saibeotereobangjibeob jikgwonsangjeonghaeya [*Conservative Party Claims that North Korean Terrorism is an On-Going Issue, the Speaker of the National Assembly Should Refer the Bill on the Cyber-Terrorism Act to the Plenary*], AJU BUS. DAILY (Mar. 15, 2016, 10:31 AM) <http://www.ajunews.com/view/20160315102104261> [<http://perma.cc/AAW9-L88T>].

13. Sang-young Rhyu, *McCarthyism in South Korea: The Naked Truth and History of Color Politics*, E. ASIA FOUND. POL'Y DEBATES, no. 68, Mar. 28, 2017, at 5–6.

14. Kim Jin-woo & Kim Moo-sung, Kim Moo-seong 'tereobangjibeob pyegihameon gungminburan deo keojil geot' [*Kim Moo-seung Claims that the Abolition of the Anti-Terrorism Act Will Aggravate People's Fear*], EDAILY (Mar. 30, 2016) [http://www.edaily.co.kr/news/news\\_detail.asp?newsId=02840486612588568&mediaCodeNo=257&OutLnkChk=Y](http://www.edaily.co.kr/news/news_detail.asp?newsId=02840486612588568&mediaCodeNo=257&OutLnkChk=Y) (head of the conservative party stating that the abolition of the *Anti-Terrorism Act* will send wrong message to North Korea and IS).

are punishable under exhaustive provisions found in the Criminal Code and the penalty provisions of related laws such as the *Military Criminal Act*, *Aviation Act*, *Safety of Aircraft Operation Act*, *Toxic Chemical Control Act*, *Atomic Energy Act*, and the *Protection of Military Bases and Installations Act*. The Criminal Code contains a number of provisions that delineate crimes potentially constituting terrorism.<sup>15</sup> Furthermore, the *Act on Prohibition against Financing of Terrorism and Proliferation of Weapons of Mass Destruction* took effect in 2007 to implement the *International Convention for the Suppression of the Financing of Terrorism*, which South Korea had ratified in 2004.<sup>16</sup> This law was instructive for outlining a definition of terrorism, explaining what steps to take to prohibit financing of terrorism or proliferation of weapons of mass destruction, and listing penalty provisions for financial transactions or attempts toward these ends.

The *National Security Act* is the paramount legislation in dealing with national security issues vis-à-vis North Korea. Enacted in 1948 to deal with communist threats, the *National Security Act* delineates crimes and punishment for “anti-government organizations” that aim at “rebellion against the State.”<sup>17</sup> However, the *National Security Act* by itself does not address terrorist acts. Essentially a law against treason, it primarily targets pro-North Korean forces seeking to overthrow the South Korean government, also making it a crime for anyone who “praises, incites or propagates the activities of an antigovernment organization.”<sup>18</sup>

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15. See, e.g., Hyeongbeob [Criminal Act], Act No. 293, Sep. 18, 1953, *amended* by Act No. 14415, Dec. 20, 2016, art. 107 (Assaults, etc. against Foreign Sovereign), art. 108 (Assaults, etc. against Foreign Envoy), art. 136 (Obstruction of Performance of Official Duties), art. 141 (Invalidity of Public Documents, etc. and Destruction of Public Goods), art. 166 (Setting Fire to Other Structures, etc.), art. 172 (Burst of Explosive Substances), art. 172–2 (Discharge of Gas, Electricity, etc.), art. 173 (Obstruction to Supply of Gas, Electricity, etc.), art. 179 (Inundation to Other Structures), art. 185 (General Obstruction of Traffic), art. 186 (Obstruction of Train and Vessel Traffic), art. 192 (Obstruction of Use of Drinking Water), art. 193 (Obstruction of Use of Water Supply System), art. 258 (Aggravated Bodily Injury on Other or on Lineal Ascendant), art. 261 (Special Violence), art. 278 (Special False Arrest or Illegal Confinement), art. 281 (Death or Injury caused by Arrest, Confinement, etc.), art. 289 (Trafficking in Persons), art. 367 (Destruction of Structure for Public Use), art. 368 (Aggravated Destruction and Damage), art. 369 (Special Destruction and Damage), *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=40950&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=40950&lang=ENG) [http://perma.cc/4VHP-J7U3]

16. Gongjung deung hyeopbang mokjeong min daeryang salsang mugi hwak-saneul wihan jageum jodal haengwiui geumjie gwanhan beobyu [Act on Prohibition Against the Financing of Terrorism and Proliferation of Weapons of Mass Destruction], Act No. 12710, May 28, 2014, *amended* by Act No. 14116, Mar. 29, 2016, *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=39571&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=39571&lang=ENG) [http://perma.cc/8JPC-Y7N5].

17. Gukga boan beop [*National Security Act*], Act No. 3318, Dec. 31, 1980, *amended* by Act No. 13722, Jan. 6, 2016, art. 2, *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=39798&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=39798&lang=ENG) [http://perma.cc/D4CH-P42A].

18. *Id.* at art. 7. This ambiguous and therefore contentious provision has led to

Nonetheless, certain provisions appear to overlap with terrorism. “National security” has been the main conceptual framework in dealing with threats against the State, but the term “terrorism” has not been explicitly linked to this concept in legislation until recently. Legislative references to terrorism have been either inferred in the Criminal Code or found minimally in terms of which institution is responsible for handling terrorist-related acts.

Prior to the current Act, institutional responsibility for combating terrorist acts was under the jurisdictions of the National Intelligence Service (NIS), the National Police Agency, and the Prosecutor’s Office for intelligence collection, prevention and handling, and prosecution, respectively. Under the provisions of the *National Intelligence Service Act* (NIS Act) and the *Act on the Performance of Duties by Police Officers* (Police Duties Act), both the NIS and the police have the respective authority to deal with terrorism.<sup>19</sup> The NIS Act authorizes the NIS to collect intelligence related to “anti-communism, subversion of the Government, counter-espionage, counterterrorism, and international criminal syndicate,”<sup>20</sup> while the Police Duties Act explicitly lists counterterrorism operation as under police authority.<sup>21</sup>

Specifically, the Seoul Police Office has its own Special Forces under its control for the repression of terrorism and other special crimes, the prevention of serious crimes, and the execution of rescue missions.<sup>22</sup> Normally, criminal investigation and prosecution fall respectively within the jurisdiction of the police and Prosecutor’s Office (the latter of which has the authority to oversee the duties of the police),<sup>23</sup> unless the terrorism

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numerous cases of arrest, which have been the subject of human rights advocacy in relation to freedom of expression.

19. Beomjoe susa gyuchik [Criminal Investigation Regulation], Police Directive No. 526 of 2008, *amended by* Police Directive No.774 of 2015, art. 21. In case of concurring jurisdiction, police and NIS have to consult on the jurisdiction issue.

20. Gukga jeongbowon beob [National Intelligence Service Act], Act No. 3313, Dec. 31, 1980, *amended by* Act No. 12948, Dec. 30, 2014, art. 3, *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=33396&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=33396&lang=ENG) [<http://perma.cc/XNB8-H5F3>].

21. Gyeongchalgun jingmu jipaeng beob [Act on the Performance of Duties by Police Officers], Act No. 3427, Apr. 13, 1981, *amended by* Act No. 14839, July 26, 2017, art. 2, *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=45723&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45723&lang=ENG) [<http://perma.cc/6GX6-APX4>].

22. Seoul teukbyeolsi jibang gyeongchalcheonggwa gyeongchalseoui jojing min samubunjang gyuchik [Organization and Division of Work between Seoul Metropolitan Police Agency and Korean National Police Agency], Seoul Metropolitan Police Agency Directive No. 313, art. 26 (2017).

23. Hyeongsa sosong beob [Criminal Procedure Act], Act No. 341, Sep. 23, 1954, art. 195, *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=38892&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=38892&lang=ENG) [<http://perma.cc/3F5P-AMGA>] provides, “[w]here there is a suspicion that an offense has been committed, a prosecutor shall investigate the offender, the facts of the offense, and the evidence.” Article 196(1) provides, “[i]nvestigators, police administrative officers, police superintendents, superintendents, police captains, or police lieutenants shall receive instructions from a prosecutor with regard to all investigations, while serving as

at issue falls under NIS investigation.<sup>24</sup> From the reading of the pre-existing framework, the NIS's role regarding terrorism should be restricted to intelligence collection and prevention, allowing the police and prosecutor's office to handle investigation. Meanwhile, the relevant acts governing NIS surveillance are the *Personal Information Protection Act*, the *Protection of Communications Secrets Act*, and the *Telecommunications Business Act*, which are addressed separately below in Part IV.

## B. *Legislative History*

Legislative proposals for heightening counterterrorism measures in South Korea began in the wake of 9/11. Between 2001 and 2016, legislators proposed over ten bills toward an overarching counterterrorism law with most expiring at the end of the National Assembly's respective term. Usually, new bills were drafted after triggering events, such as 9/11, preparation for the APEC summit in South Korea in 2005 (especially in light of South Korean military presence in Iraq), the 2004 Madrid train bombing and the 2005 London bombings, the hijacking of Korean ships by Somali pirates since 2006, the rise of the Islamic State, and the resulting UN Security Council Resolution 2178 (2014) regarding the threat of terrorism to international peace and security.

The current Act can be viewed as a culmination of the various bills, which were initiated under different administrations, sometimes as a conservative-led, bipartisan, or an opposition-led response. The Kim Dae Jung administration initiated the first response to 9/11, defining terrorism as serious criminal actions by individuals or organizations that have the purpose of spreading political, religious, ideological, and national values.<sup>25</sup> Under this initial bill, perpetrators were punished more severely than as provided under the Criminal Code. A Counterterrorism Council consisting of cabinet members would be the supreme body to decide counterterrorism policy, while the Counterterrorism Center would be an executive body, whose chief would be nominated by the NIS director subject to presidential approval.<sup>26</sup> This bill expired in 2004 at the end of the National Assembly session. Nonetheless, it is worth mentioning that the Korean Bar Association opposed this bill for the following reasons: (1) existing laws already addressed counter-terrorism; (2) the ambiguity between the status of a terrorist and a criminal; (3) the significant threat to protection of citizens' human rights; (4) the difficulties in efficiency and

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senior judicial police officers.”

24. National Intelligence Service Act, *supra* note 20, art. 3(1) provides:

The NIS shall perform each of the following services:

3. Criminal investigation into the crimes of insurrection and foreign aggression provided for in the Criminal Act, the crimes of rebellion and illegal use of cryptogram referred to in the Military Criminal Act, the crimes provided for in the Military Secret Protection Act, and crimes specified in the *National Security Act*.

25. Tereo bangji beob in [Bill of Anti-Terrorism Act], Bill No. 161251, art. 2(1) (2001).

26. *Id.* at art. 4.

promptness of the new counterterrorism institutions; (5) investigatory conflicts between the NIS and the Prosecutor's Office; (6) administrative redundancy and budgetary inefficiency due to already established and operating counterterrorism mechanisms in government institutions; and (7) ignoring or displacing existing laws.<sup>27</sup> These arguments were to be revisited again in passing the most recent counterterrorism legislation.

Other bills followed in successive years, with some variations or as revivals of expired bills, which also referred to UN designations of terrorist organizations,<sup>28</sup> permitted surveillance on persons of terrorist threat in conformity with the *Protection of Communications Secrets Act*,<sup>29</sup> or gave the Counter-Terrorism Council the authority to request removal of contents inciting or facilitating terrorism in internet posts, news journals, publications, etc.<sup>30</sup> The only bipartisan effort was carried out in 2005 in preparation for the APEC summit meeting. Twenty-two National Assembly members from both parties signed the bill led by the progressive party.<sup>31</sup> This bill largely followed the definitions on terrorist organizations and counterterrorism activities as those of the expired 2001 bill, but also relied in part on the international treaties listed in the *International Convention for the Suppression of the Financing of Terrorism* and required that the acts pose a threat to public safety and national security.<sup>32</sup> However, the bill expired in 2008 at the end of the National Assembly's 17th session. After a series of subsequent aborted bills, 73 conservative National Assembly members led a concerted effort to present legislation in

2015 after the UN Security Council adopted Resolution 2178.<sup>33</sup> Within a year, the opposition party countered with another bill to substitute the term "terrorism" with "the act of public harm" instead, adding that

27. Chung Seong-yoon, Daehanbyeonhyeop, tereobangjibeob jejeonge bandae [*KBA Against Introduction of Anti-Terrorism Bill*], LAW TIMES (Jan. 11, 2002, 1:18 AM), <https://m.lawtimes.co.kr/Content/Article?serial=6746> [<https://perma.cc/KYV8-9JWY>]. The Korean Bar Association submitted its opinion on the Bill on Anti-Terrorism Act presented to the Legislation and Judicial Committee of the National Assembly of Korea, Jan. 3, 2002.

28. Tereodaeung chegyeui hwangnipgwa daetero hwaldong deunge gwanhan beobyul an [Bill on Act on Establishment of Terrorism Response System and Anti-Terrorism Activities], Bill No. 171483, art. 2(2) (2005).

29. Gukga daetero hwaldonge gwanhan gibbon beob an [Bill on Framework Act on National Counter-Terrorism Activities], Bill No. 1801620 (2008); see also Gukga daetero hwaldonggwa pihae bojeon deunge gwanhan gibbon beob an [Bill on Framework Act on Counter-Terrorism and Compensation for Victims], Bill No. 1904298 (2013).

30. Tereoyebang min daeunge gwanhan beobyul an [Bill on Act on Counter-Terrorism for Protection of Public Safety], Bill No. 1914264 (2015).

31. Tereobangji min pihae bojeon deunge gwanhan beobyul an [Bill on Act on Prevention of Terrorism and Compensation to Victims], Bill No. 172489 (2005).

32. *Id.* at art. 2.

33. Tereoyebang min daeunge gwanhan beobyul an [Bill on Act on Counter-Terrorism for Protection of Public Safety], Bill No. 1914264 (2015).

the purpose of the bill shall not restrict the rights of Korean nationals.<sup>34</sup> However, the Saenuri Party's bill passed, with only a slight modification, without accepting the Minju Party's proposal.<sup>35</sup> Meanwhile, three other bills to counter cyber-terrorism moored in the National Assembly but were discarded in May 2016 as the 19th session expired.<sup>36</sup>

The *Anti-Terrorism Act* was ultimately enacted on March 3, 2016.<sup>37</sup> In sum, the Act defines conduct constituting terrorism, creates institutional arrangements for counterterrorism oversight and regulation under the Office of the Prime Minister, permits specific government actions for counterterrorism purposes, includes human rights safeguards, and stipulates compensation for victims and penalties for terrorists.<sup>38</sup> Currently, the Act overrides other related laws on counterterrorism,<sup>39</sup> but questions remain on which laws take precedence when it comes to certain provisions, such as those regarding the collection of information on terror suspects.<sup>40</sup>

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34. Gukje gonggong wihae danche min wihae danche haengwi deungui geumjie gwanhan beobyul an [Bill on Act on Prohibition of Actions of Public Harm and Organization of Public Harm], Bill No. 1918487, art. 2 (2016).

35. See also, Kwak Jae-hoon, Tereo bangjibeop, 1siganmane tonggwattsauenuri jeonwon chauseong [*Anti-Terrorism Act Passed within One Hour, Every Saenuri Assembly Member Votes Yay*], PRESSIAN (Mar. 2, 2016), <http://www.pressian.com/news/article.html?no=133716> [<https://perma.cc/CA7J-27UW>].

36. Gukga saibeo tereo bangjie gwanhan beobyul an [Bill on Act on National Counter Cyberterrorism], Bill No. 1904459 (2013); Saibeotereo bangji min daeunge gwanhan beobyul an [Bill on Act on Prevention and Response to Cyberterrorism], Bill No. 1915777 (2015); Gukga saibeo tereo bangji deunge gwanhan beobyul an [Bill on Act on National Counter Cyberterrorism], Bill No. 1918583 (2016). All of the above bills were discarded on May 29, 2016 with the expiration of the 19th Session of National Assembly.

37. *Anti-Terrorism Act*, *supra* note 1.

38. Gungmin bohowa gonggong anjeoneul wihan tereo bangji beob sihaengryung [Enforcement Decree of the Act on Anti-Terrorism for the Protection of Citizens and Public Security], Presidential Decree No. 27203, May 31, 2016, *amended by* Presidential Decree No. 27971, Mar. 29, 2017, *translated in* Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=43561&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=43561&lang=ENG) [<https://perma.cc/8DNL-RHKW>] [hereinafter *Anti-Terrorism Act Enforcement Decree*] (corresponding Enforcement Decree expands in more details upon the *Anti-Terrorism Act*).

39. *Anti-Terrorism Act*, *supra* note 1, at art. 4 (stating, “[w]ith regard to counterterrorism activities, this Act shall apply in precedence over other Acts.”).

40. The Director of the National Intelligence Service may collect information on terrorism suspects, such as information on their entry into and departure from the Republic of Korea, financial transactions, and use of communications. In such cases, the collection of related information, such as information on their entry into or departure from the Republic of Korea, financial transactions, and use of communications, shall be subject to the procedures provided for in the Immigration Act, the Customs Act, the Act on Reporting and Using Specified Financial Transaction Information, and the Protection of Communications Secrets Act.

*Id.* at art. 9(1)

### C. *Contestations within the Korean Legal Community*

The *Anti-Terrorism Act* was met with friction even within the legal community, especially after the Korean Bar Association (KBA) issued a statement giving full support for the bill despite its official opposition in the early 2000s.<sup>41</sup> The KBA's justifications for the bill are worth narrating here as they aligned with the rationale of the Blue House, the NIS, and the Saenuri Party. Essentially, the KBA argued for the necessity of the legislation given the rise in global terrorism associated with the Islamic State and because unlike the majority of OECD countries, South Korea had yet to enact counterterrorism legislation after 9/11. The KBA explained the need for organizing a centralized system and protecting the lives and property of Korean citizens in the event of a terrorist attack. It also specifically referred to the risk of terrorist threats from North Korea's nuclear testing and missile development as a justification for this legislation. The KBA statement also addressed the issue of potential human rights violations, explaining that the "control tower" of Anti-Terrorism Activities would be the Office of the Prime Minister rather than the NIS. It also mentioned that the possibilities of the human rights violation would be minimized because the law states that government officers shall make best efforts to not infringe citizens' constitutional rights and that a Human Rights Protection Officer would be designated. The statement also acknowledged that information collection by the NIS may raise concerns of rights infringement, but added that this should not be excessive in relation to the greater need to collect information for the prevention of terrorism. Furthermore, it stated that the requirement to report on the information collection to the Prime Minister should allay concerns of any human rights infringement.

The KBA leadership's alliance with the incumbent administration was obvious. The KBA's support of the bill incensed many of its members, mainly human rights lawyers, for both procedural and substantive issues. Lawyers opposing the bill immediately circulated a petition for signatures among bar members and protested the statement, calling for its invalidation and retraction due to the KBA's failure to follow the procedural rules of the bar association.<sup>42</sup> The Korean Lawyers Association

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41. Choi Hyun-joon, *Uriga tereobangjibeop chalseonghandago? hoewondeuldo moreuneun 'byeonhyeop uigyeonseo' [In Favor of Anti-Terrorism Act? Members Not Aware of KBA's Statement]*, HANKYOREH (Feb. 25, 2016), [http://www.hani.co.kr/arti/society/society\\_general/732219.html](http://www.hani.co.kr/arti/society/society_general/732219.html) (on February 24, 2016, the KBA submitted a written opinion on the *Anti-Terrorism Act* to the Policy Committee of Saenuri Party; the KBA was of the view that the surveillance authority conferred to NIS was not excessive because safeguard measures existed).

42. *Tereobangjibeoban 'chalseong' daehanbyeonhyeop myeongui uigyeonseo bipan gongikbyeonhosa 59in ipjang [Joint Statement of 59 Human Rights Lawyers Condemning the KBA's Statement Approving Anti-Terrorism Act]*, PEOPLE POWER 21 (Feb. 26, 2016), <http://www.peoplepower21.org/Peace/1394434> [<https://perma.cc/LD8Q-ELLH>] (immediately after the KBA's statement, numerous human rights lawyers and affiliated associations expressed human rights concerns about the *Anti-Terrorism Act*).

also publicly denounced KBA, arguing that the bar association rules were clearly violated because the KBA did not follow the due procedures which require the approval of the KBA General Assembly, and that the KBA's endorsement of the bill misrepresented the entire bar association when many individual members may hold different opinions.<sup>43</sup> Particularly, human rights lawyers argued that the statement was not circulated or deliberated on in a directors' committee meeting to the members of the Bar, which consists of over 20,000 lawyers nationwide, and that it was politically motivated as it was submitted directly to the Saenuri Party. Furthermore, the Korean Lawyers Association criticized the poor level of legal analysis within the statement, pointing to counter-arguments made by the KBA itself in the early 2000s. Some of these substantive issues will be explored in Part IV.

### III. TRANSPLANTING EXISTING LEGAL FRAMEWORKS

To consolidate control over counterterrorism responses, the *Anti-Terrorism Act* and its affiliated decrees overlap with and borrow from other legal sources, such as protection and financial rewards for informants based on the *National Security Act*, victim compensation based on the *Framework Act on the Management of Disaster and Safety*, and penalties based on the Criminal Code. This section explains how the Act integrates and transforms aspects from the existing legal frameworks of both national disaster management (via institutional oversight and victim compensation) and political crime management (via informant protection, financial reward, victim compensation, and penalties) for operational legitimacy and to strengthen executive control. Furthermore, the *Anti-Terrorism Act* relies on international legal regimes of counterterrorism in order to demonstrate that the counterterrorism measures set forth in the Act are consistent with international trends.

#### A. *Terrorism as National Disaster*

Under the current act and subsequent administrative decrees, terrorism can be viewed as a national disaster and safety concern, and therefore handled as such via institutional oversight and victim compensation. The *Framework Act on the Management of Disaster and Safety* ("*Disaster Act*") implicitly regulates the consequences of terrorism. Under the *Disaster Act*, the term "social accident" is defined as the situation where a serious degree of damage has occurred due to human inflicted incidents (including harm to life and property).<sup>44</sup> Prior to the

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43. Shin Jong-chul, Hangukbeopjoinhyeopoe tereobangjibeop uigyeon jipaengbu dokdanthachangu byeonhyeopoejang satoete [*Korean Lawyers Association Demands the Resignation of Ha Chang-woo, the President of KBA for the Arbitrary Statement on the Anti-Terrorism Act*], LAWISSUE (Feb. 26, 2016), <http://www.lawissue.co.kr/view.php?ud=25809> [https://perma.cc/4JNA-UJUF] (the Korean Lawyers Association is the association of lawyers from newly introduced law schools).

44. Jaenan min anjeon gwalli gibbon beob [Framework Act on the Management of Disasters and Safety], Act No. 7188, Mar. 11, 2004, *amended by* Act No. 14553, Jan.

introduction of the *Anti-Terrorism Act*, terrorist acts such as those involving arson, explosives, or attacks on state infrastructure, which cause significant damage, could have been interpreted as social accidents, since no legislation explicitly regulated the government's response to terrorism. According to a directive by the former Ministry of Public Safety and Security (now known as the Ministry of the Interior and Safety), terrorism was classified as an emergency situation along with fire, flooding, etc.<sup>45</sup> Also, the National Disaster Management Research Institute under the former Ministry of Public Safety and Security considered chemical and biological terrorism to be a sub-category of social accidents.<sup>46</sup> These practices indicated that terrorism had been regarded as a sub-category of disaster, and administrative bodies have previously taken measures based on such interpretation.

The *Anti-Terrorism Act* essentially duplicates the *Disaster Act's* institutional arrangement for managing the prevention and response of terrorist activities. For example, the National Counterterrorism Commission, a

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17,2017, translated in Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=42020&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=42020&lang=ENG) [<https://perma.cc/7U2K-TJMX>] [hereinafter *Disaster Act*]. Article 3 provides:

The term "disaster" means any of the following which actually causes or is likely to cause any harm to the lives, bodies, and property of citizens and the State: . . . (b) Social accidents: Damage, beyond the scale prescribed by Presidential Decree, caused by a fire, collapse, explosion, traffic accidents (including aviation accidents and marine accidents), chemical, biological, and radioactive accidents, environmental pollution incidents, etc.; damage caused by the paralysis of the State's infrastructure, such as energy, communications, transportation, finance, medical treatment, and water supply; and damage caused by the spread, etc. of infectious diseases under the Infectious Disease Control and Prevention Act or contagious animal diseases under the Act on the Prevention of Contagious Animal Diseases.

Jaenan min anjeon gwalli gibbon beob sihaengryung [Enforcement Decree on the Framework Act on the Management of Disaster and Safety], Presidential Decree No. 18407, May 29, 2004, amended by Presidential Decree No. 28266, Sept. 5, 2017, Article 2 provides:

Damage beyond the scale prescribed by Presidential Decree in subparagraph 1(b) of Article 3 of the Framework Act on the Management of Disasters and Safety (hereinafter referred to as the 'Act') means the following:

1. Harm to human life or property for which measures at the level of the State or local government are required;

2. Other harm deemed by the Minister of Public Safety and Security to be necessary for disaster control, and which is equivalent to the harm referred to in subparagraph 1.

45. Dajung iyong siseol deungui wigi sanghwang maenyueol jakseong bangbeob min gijun [Standard and Method of Establishing Manual on Emergency Situation in Mass Private Facilities], Administrative Rule of Ministry of Public Safety and Security, No. 2016-34, art.2(1) (established under the mandate of art. 34-6 of *Disaster Act*, regulating the private facilities to prepare for emergency situations; private facility managers bear the obligation to write manuals for emergency situations, which could be defined flexibly based on dangers which the facility is likely to face).

46. Explanations and Guidelines for Various Social Disasters, NAT'L DISASTER MGMT. INST., <http://www.ndmi.go.kr/promote/knowledge/human.jsp> [<https://perma.cc/6UNE-GRGH>].

twenty-member commission including twelve ministers and chaired by the Prime Minister, is analogous to the Central Safety Management Committee created under the *Disaster Act*, which was also comprised of ministers and chaired by the Prime Minister.<sup>47</sup> Both the National Counterterrorism Commission and the Central Safety Management Committee establish fundamental policies on terrorism and disaster, respectively, under the assumption that they require the cooperation of several ministries.<sup>48</sup> This institutional framework illustrates that terrorism is considered a national agenda where inter-ministerial cooperation is required for its prevention and response, hence the analogous structure. Also, the similarities between the Local Counterterrorism Council under the *Anti-Terrorism Act* and the City/Province Safety Management Committee under the *Disaster Act* demonstrate that counterterrorism is thought to require cooperation between central and local administrative bodies, just like disaster relief.<sup>49</sup>

Additionally, the *Anti-Terrorism Act's* compensation clauses stipulate that the state has the obligation to provide relief to the victims. For example, victims of terrorism will be compensated according to the same standard as that of victims of social disasters for material damages.<sup>50</sup> Victims or their families will receive relief compensation if they suffer economic hardship, and their housing costs will be financed if their homes are damaged by the terrorist attack.<sup>51</sup> The *Anti-Terrorism Act* also provides that the victims shall receive compensation for medical treatment and recovery fees for material damages, largely consistent with what disaster victims receive under the *Disaster Act*.<sup>52</sup>

## B. *Terrorism as Political Crime*

The *Anti-Terrorism Act* transforms the status of terrorism from an ordinary crime to a special crime of political character under the Korean criminal legal system.<sup>53</sup> The broadened scope of intelligence collection

47. The relevant ministries are of Strategy and Finance; Foreign Affairs; Unification; Justice; National Defense; Interior; Trade, Industry and Energy; Health and Welfare; Environment; Land, Infrastructure, and Transport; Oceans and Fisheries; and Public Safety and Security.

48. *Anti-Terrorism Act*, *supra* note 1, at art. 5; *Disaster Act*, *supra* note 44, at art. 9.

49. *Anti-Terrorism Act Enforcement Decree*, *supra* note 38, at art. 12; *Disaster Act*, *supra* note 44, at art. 11.

50. *Anti-Terrorism Act Enforcement Decree*, *supra* note 38, at art. 35(3).

51. *Disaster Act*, *supra* note 44, at art. 66 (providing assistance for housing and even education for the children of victims); sahoejaenan guho mit bokgu biyong budamgijun deunge gwanhan gyujeong [Presidential Decree on Relief and Recovery from Social Accidents], Presidential Decree No. 26687, Nov. 30, 2015, *as amended by* Presidential Decree No. 28211, July 26, 2017 (providing assistance for housing and even education for the children of victims); *Anti-Terrorism Act Enforcement Decree*, *supra* note 38, at art. 35(3) (applying the same standard to the victims of terrorism).

52. *Anti-Terrorism Act*, *supra* note 1, art. 15.

53. In this article, the term “political crime” refers to a certain type of crime that poses threat to the public order and the stability of government function, as classified under the civil law tradition. “Infraction politique” under French criminal law

and investigative jurisdiction, financial reward for informants, and compensation for the victims of terrorism illustrate that terrorism is treated not only as a crime against the victim but as a larger threat to Korean society and national security.

The *Anti-Terrorism Act* provides that crimes prescribed under the Criminal Code and other domestic law shall be punished accordingly under the relevant law, without any specific penalty clause on the act of terrorism.<sup>54</sup> It criminalizes only the act of forming or joining a terrorist organization, including incitement to join the organization, and provision of financial assistance to terrorists.<sup>55</sup> Therefore, most of the penalty provisions of the Criminal Code can apply to terrorist acts. The *Anti-Terrorism Act* reinforces the competence of the investigative authorities in dealing with terrorism without amending the Criminal Code and Criminal Procedure Code. The NIS, the police, and the Prosecutor's Office are regarded as "Related Agencies" which all have the authority to perform "Counterterrorism Activities."<sup>56</sup> Counterterrorism activities surpass the scope of normal investigation procedures, ranging from information collection to armed repression. For ordinary crimes, information collection is strictly limited to the purpose of procuring evidence for the specific crime. Under the *Anti-Terrorism Act*, however, the Related Agencies may collect information for the purpose of preventing terrorism. Also, the police may use armed force in counterterrorism investigations,<sup>57</sup> while in ordinary crimes the use of force is strictly regulated.<sup>58</sup>

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and "politische strafrecht" under German criminal law are analogous terms; see José LeFebvre, *Codifier l'Infraction Politique?*, in *LA POLITIQUE AILLEURS* (Eric Darras ed., 1998).

54. *Anti-Terrorism Act*, *supra* note 1, at art. 17(6).

55. *Id.* at art. 17.

56. *Id.* at art. 2(6).

The term 'counterterrorism activities' means activities related to preventing and countermeasures against terrorism, including the collection of information related to the terrorism defined in subparagraph 1, management of terrorism suspects, safety control of means of terrorism, such as dangerous materials which can be used for terrorism, protection of human resources, facilities and equipment, ensuring the security for international events, taking countermeasures against a terror threat, and armed repression.

(1) In order to take swift countermeasures against terrorist incidents, the Minister of National Defense, the Minister of Public Safety and Security, and the Commissioner of the National Police Agency shall establish and operate special counterterrorism task forces. . . . (3) The counterterrorism special forces shall perform the following duties: 1. Suppressing domestic and overseas terrorist incidents in connection with the Republic of Korea or the citizens thereof.

*Anti-Terrorism Act Enforcement Decree*, *supra* note 38, at art. 18.

57. *Anti-Terrorism Act*, *supra* note 1, at art. 2(6); see also *Anti-Terrorism Act Enforcement Decree*, *supra* note 38, at art. 18 (showing armed repression is very comprehensive authorization of the use of force, while its legal definition is relatively underdeveloped).

58. Gyeongchalgwang jingmu jipaeng beob [Act on the Performance of Duties by Police Officers], Act No. 3427, Apr. 13, 1981, amended by Act No. 14839, July 26, 2017, art. 10-3, 10-4, translated in Korea Legislation Research Institute online database,

Both the *National Security Act* and the *Anti-Terrorism Act* provide financial rewards to informants and civilians who apprehend a criminal or terror suspect.<sup>59</sup> The reward incentivizes reporting and encourages compliance from the public consistent with the national security paradigm with respect to the North Korean threat. For example, informants against terrorism receive police protection under the *Act on Protection of Specific Crime Informants* and a financial reward, up to 100 million won depending on their contribution to the prevention of terrorism.<sup>60</sup> This reward system is in line with that of the *National Security Act*, both of which provide a reward and meritorious recognition for those injured or killed in reporting or making a citizen arrest of a spy.<sup>61</sup>

The *Anti-Terrorism Act* also provides compensation known as “consolation payment” to the victims and their families in case of death or serious injuries.<sup>62</sup> The standards for consolation payments under the *Anti-Terrorism Act* are facially identical to that of the compensation provided to victims of ordinary crimes.<sup>63</sup> In deriving the sum of the compensation, the standard set forth by the *Crime Victim Protection Act* also applies to victims of terrorism.<sup>64</sup> However, despite the facial similarities, the relief fund under the *Crime Victim Protection Act* is in the form of a subsidy for tortious compensation while the compensation under the *Anti-Terrorism Act* is in the form of *ex gratia* payment.<sup>65</sup> That is, the *Crime Victim Protection Act* provides that only those who cannot receive sufficient compensation from the perpetrator are eligible to apply,<sup>66</sup> whereas compensation under the *Anti-Terrorism Act* does not depend upon whether the perpetrator compensated the victim.

### C. *Reliance on the Authority of International Law*

In the post-Cold War era, new dynamics of terrorism spurred international cooperation on counterterrorism development within the UN, resulting in essential treaties to combat terrorism.<sup>67</sup> Numerous

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[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=45723&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=45723&lang=ENG) [<https://perma.cc/37NN-MBH4>] (regulating the use of weapons in police administration).

59. National Security Act, *supra* note 17, at art. 21; Anti-Terrorism Act, *supra* note 1, at art. 14.

60. Anti-Terrorism Act Enforcement Decree, *supra* note 38, at art. 31.

61. National Security Act, *supra* note 17, at art. 21, 23.

62. Anti-Terrorism Act, *supra* note 1, at art. 16.

63. Anti-Terrorism Act Enforcement Decree, *supra* note 38, at art. 36.

64. *Id.* at art. 37; Beomjoe pihaeja boho beob [Crime Victim Protection Act], Act No. 10283, May 14, 2010, amended by Act. No.14583, Mar. 14, 2017, art. 22, *translated in* Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=42631&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=42631&lang=ENG) [<https://perma.cc/SD43-JCUH>] [hereinafter Crime Victim Protection Act].

65. Crime Victim Protection Act, *supra* note 64, at art. 16.

66. The nature of the compensation is to console the victim and the family. The victim is not eligible for compensation if another compensation is made according to law. See Anti-Terrorism Act Enforcement Decree, *supra* note 38, at art. 44.

67. *E.g.*, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256, <https://treaties.un.org/pages/ViewDetails>.

international treaties call for states to take action for the prevention and the punishment of terrorism.<sup>68</sup> The *Anti-Terrorism Act* emphasizes that the terms used in the Act are based on international law, implying that the legislation is an implementation of the relevant norms of international law.<sup>69</sup>

The resort to the international law is most evident in the definition of terrorism. The *Anti-Terrorism Act* defines terrorism in terms of conduct “having the purpose of impeding the exercise of the authority of the State, local government, or a foreign government . . . or for the purpose of causing it to conduct any affair which is not obligatory on it or threatening the public.”<sup>70</sup> This definition is consistent with that used in the *Act on Prohibition against Financing of Terrorism and Proliferation of Weapons of Mass Destruction* which defines “funds for terrorism against the public” as funds or assets for acts similar to those listed above “for the purposes of interfering with the State, a local government or foreign government. . . in exercising its rights or forcing it to perform a non-obligatory act, or threatening or endangering the public.”<sup>71</sup> The Act is the implementation of the *International Convention for the Suppression of the Financing of Terrorism*, under which “the purpose to intimidate a population or to compel a government . . . to do or abstain from doing any act” is a key element of terrorism.<sup>72</sup> By reflecting the subjective elements under the Conventions, the *Anti-Terrorism Act* acquires international authority, pressing the Korean public to conform with the international standard.

However, because of the subjective elements, this definition leaves considerable discretion to the states due to the ambiguity in interpreting the purpose and the potential for arbitrarily labeling one a terrorist.<sup>73</sup>

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aspx?src=IND&mtdsg\_no=XVIII-9&chapter=18&clang=\_en; International Convention for the Suppression of Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en); see also, HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 19–21 (2005).

68. E.g., International Convention on the Suppression of Terrorist Bombings, *supra* note 67, at art. 6; International Convention on the Suppression of the Financing of Terrorism, *supra* note 67, at art. 7 (calling upon the member states to establish criminal jurisdiction over the relevant acts).

69. E.g., *Anti-Terrorism Act*, *supra* note 1, at art. 2(2) (the definition of “terrorist organization” is dependent on the designation of such entities by the UN organs.).

70. *Id.*, at art. 2(1). As stated earlier, the specific acts include injuring, kidnapping, or killing a person, hijacking, seizing, destroying, or otherwise impeding the safety of aircraft or sea vessels, using explosives or other toxic materials to cause serious injury or death or to otherwise take control over public infrastructure or facilities, and using nuclear materials or exploiting nuclear facilities to harm persons, property, or general public safety.

71. Act on Prohibition Against Financing of Terrorism and Proliferation of Weapons of Mass Destruction, *supra* note 16, at art. 1.

72. *Id.* at art. 2.

73. Concerns were raised that during violent confrontations between the police and protestors critical of the government, the government could label a protestor a terrorist for “obstructing state function.” See Lim Jin-Dae, Gungmin bohowa

Also, the definition used under this Convention is an indirect definition of terrorism, which only addresses the financing of terrorism.<sup>74</sup> Considering that the international community has yet to establish a comprehensive definition of terrorism,<sup>75</sup> the reliance on the international definition of terrorism has fragile legal basis. Furthermore, the discrepancy between the international discourse on terrorism, which is heavily focused on suicide bombings and religious extremism, and the Korean context, where the North Korean threat and pro-North Korean sentiments are the main concerns, reveals the arbitrary exploitation of international discourse on terrorism for political purposes such as suppressing dissent critical of the administration in power. Furthermore, the Korean legislation justifies itself by demonstrating consistency with international law in the realm of counter-terrorism, yet does not simultaneously address international human rights norms with respect to potential human rights violations.

#### IV. RIGHTS COMPLIANCE

Frequent invocations of terrorist discourse to protect the state and citizens risk subordinating civil liberties and violations of international human rights norms, such as the right to personal liberty, the right to freedom from arbitrary arrest and detention, the right to a fair trial, the right to counsel, and the right to privacy—all rights to be protected under the *International Covenant on Civil and Political Rights* (ICCPR).<sup>76</sup> Suspending rights for terror suspects has led to violations of international human rights norms as embodied in the ICCPR, *Convention against Torture and Cruel, Inhuman and Degrading Treatment*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>77</sup> While the ICCPR and European Court of Human Rights allow derogation of obligations for public emergency exceptions,<sup>78</sup> for which counterterrorism legislation is usually justified, the danger of violating the rights of

gonggong anjeoneul wihan tereobangjibeop pyeji beobyulan geomtobogo [Review of the Bill on the Abolition of the Anti-Terrorism Act], National Assembly of Korea Intelligence Committee, 2017, p14.

74. Under international law, certain acts of terrorism are defined by respective treaties without a general definition that encompasses all of these acts. For example, treaties such as the International Convention for the Suppression of Terrorist Bombings and the International Convention against the Taking of Hostages govern specific types of terrorism. See also DUFFY, *supra* note 67, at 23–24.

75. Various attempts to establish a comprehensive treaty on terrorism were unproductive. *Id.* at 21–22.

76. International Covenant on Civil and Political Rights art. 9, art. 14, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171,

[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en) [hereinafter ICCPR]; See also Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARVARD INT'L. L.J. 81 (2015).

77. DUFFY, *supra* note 67, at 266.

78. ICCPR, *supra* note 76, at art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, <https://treaties.un.org/pages/showDetails.aspx?objid=080000028014a40b>; DUFFY, *supra* note 67, at 347.

the average citizen, the innocent suspect, and even of the guilty suspect remains. The gravity of terrorism may seem to call for certain restrictions of human rights for the greater good of protecting the larger public, but the potential disproportionate impact on innocent citizens and non-citizens warrants closer scrutiny.

Likewise, South Korea's new domestic counterterrorism legislation also bears investigation to determine whether it complies with constitutional and international human rights standards. The Act tries to embed safeguards for human rights protection by expressly stating respect for basic constitutional rights and providing for a single human rights protection officer. The Act acknowledges the need for human rights protection by providing that the state and local governments "shall make their best endeavors not to infringe on the basic human rights of the people," and that public officials who enforce the Act "shall respect the basic rights enshrined in the Constitution" and "shall be obligated to observe due process prescribed by the Constitution and Acts."<sup>79</sup> The Act also tries to mitigate human rights concerns by providing for a Human Rights Protection Officer in order "to prevent the infringement of basic rights of the people which may be caused from counterterrorism activities of related agencies."<sup>80</sup> For example, duties include advising on human rights issues referred to the Counterterrorism Commission, processing civil petitions "related to the infringement of human rights as a consequence of counterterrorism activities," and other activities such as educating agencies on human rights.<sup>81</sup> However, the processing of civil petitions implies defense against legal claims initiated through the regular judicial or administrative process, meaning that the officer is more likely to counsel the state than to be an ardent citizens' rights advocate.

This section addresses whether the Act is compliant with constitutional and human rights principles by examining the most problematic provisions. First, the arbitrariness of the terms used in the Act will be scrutinized because clarity is necessary for proper protection of the right to privacy and the freedom of speech. Second, NIS surveillance under the Act will be reviewed under the perspective of the right to privacy and the due process of law. Third, the potential impact of the *Anti-Terrorism Act* on the freedom of speech will be analyzed. Lastly, the *Anti-Terrorism Act's* effect on the discrimination against foreigners will be examined.

#### A. *Arbitrariness of Terms*

The origin of the principle of clarity can be traced to the traditional civil law principle *nullum crimen, nulla poena sine lege*.<sup>82</sup> Using clearly defined terms in law deters the arbitrary use of power by authorities. This principle is also reflected in international human rights law such as the

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79. Anti-Terrorism Act, *supra* note 1, at art. 3.

80. *Id.* at art. 7.

81. *Id.* at art. 8.

82. Jeong Kuk-won, *Constitutional Court Cases and the Void-For-Vagueness Doctrine* 4, 15 PUB. L.J. (2014).

ICCPR.<sup>83</sup> The Korean Constitutional Court also follows the principle of clarity. Any promulgated law that restricts fundamental constitutional rights should be written clearly enough to prevent the arbitrary application of the law.<sup>84</sup> In other words, terms of law should not be ambiguous to the extent of allowing arbitrary interpretation by the administrative branch. Given that the Act endows powerful competence to certain state institutions, the essential terms of the Act must be examined to understand their human rights implications. Particularly, the clarity of the terms “terrorist suspect” and “counterterrorism activities” should be understood with regard to the potential arbitrary application of the law by the executive branch. Although ambiguity is not limited to these three terms, these are likely to pose the most serious peril to individual rights due to their significance in the *Anti-Terrorism Act*.

### 1. Terrorist Suspect

For an individualized definition in the *Anti-Terrorism Act*, a “terrorist suspect” means a member of such group, or “a person who has propagated a terrorist group, raised, or contributed funds for terrorism, or engaged in other activities of preparing, conspiring, propagandizing, or instigating terrorism, or a person who has a *reasonable ground to be suspected of having performed such activities*.”<sup>85</sup> This last clause is vague without a clear standard of what determines “reasonable ground” for suspicion. This discretion opens the door for administrative organs to interpret the law in an arbitrary manner, which means that persons with no connections to terrorism may potentially be targeted for NIS surveillance.<sup>86</sup> Also, while the term “preparation” and “conspiracy” are established under the Korean criminal law system,<sup>87</sup> the acts of

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83. *E.g.*, ICCPR, *supra* note 76, at art. 9(1) (stating that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”); *Abdelhamid Taright et al. v. Algeria*, Communication No. 1085/2002, Human Rights Committee, U.N. Doc. CCPR/C/86/D/1085/2002 (2006) (Human Rights Committee ruled that “arbitrariness” is not to be equated with “against the law,” but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and illegality.).

84. Constitutional Court [Const. Ct.], 2009Hun-ba42, Aug. 30, 2011 (23-2(A) KCCR 286) (S. Kor.) (stating that the fundamental rights, *droits fondamentaux* or *Grundrechte*, are the rights guaranteed by the constitution and protected by constitutional judicial organs. They overlap with international human rights to a great extent, but each country protects fundamental rights under respective domestic standards).

85. *Anti-Terrorism Act*, *supra* note 1, at art. 2(iv)(2), (3). (Korean Legislation Research Institute’s translation is “good ground to be suspected.” However, “reasonable ground” is the correct and consistent interpretation of the expression *Sangdanghan iyu* (상당한 이유), since it is an established term in criminal law.).

86. This expression appears in various legislations. *E.g.*, Criminal Procedure Act, *supra* note 23, at art. 70.1, 200-2, 200-3. A number of cases have been accumulated but no clear standard on the interpretation of “reasonable ground of suspicion” has been established. *See*, Supreme Court [S. Ct.], 2002Da23447, Feb. 22, 2002 (S. Kor.).

87. Criminal Act, *supra* note 15, at art. 28 (stating “[w]hen a conspiracy or the preparatory action for a crime has not reached commencement stage for the

“propagandizing” and “instigating” are controversial.<sup>88</sup> Merely expressing one’s opinion to the public, if radical enough, could be deemed as propaganda of terrorism depending on the authority’s interpretation. As a consequence, an individual’s right, such as the right to privacy and the freedom of speech, could be infringed based on the authority’s arbitrary interpretation of the law. Therefore, “terrorist suspect” lacks clarity and predictability as a legal term.

## 2. Counterterrorism Activities

The term “counterterrorism activities” is defined as “activities related to preventing and countermeasures against terrorism, including the collection of information related to terrorism . . . management of terrorism suspects, safety control of means of terrorism, such as dangerous materials which can be used for terrorism, protection of human resources, facilities and equipment, ensuring security for international events, taking countermeasures against a terror threat, and armed repression.” In other words, the concept encompasses various acts, from collection of information to armed repression of terrorists, its wide scope making it difficult to discern the limits in “activities related to preventing and countermeasures against terrorism.”<sup>89</sup> The term is problematic because it contains other non-exclusive, ambiguous and undefined terms (e.g., management, safety control, countermeasures), thus conferring significant comprehensive and discretionary powers to the investigative bodies. The over-inclusive nature “counterterrorism activities” means that there is a higher risk for rights violations, such as in respecting personal security, privacy, and due process. While human rights are meant to be protected under the *Anti-Terrorism Act*, the issue of information collection, for example, is examined next to see how these particular rights can be undermined.

### B. *Surveillance and Due Process Compliance*

The most controversial part of the Act concerns NIS surveillance.<sup>90</sup> Under international human rights law, the ICCPR provides that “[n]o

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commission of the crime, the person shall not be punishable, except as otherwise provided by Acts.”)

88. National Security Act, *supra* note 17, at art. 7(1) (concerning this article, constitutional complaints were raised against the expression “propagandizing.”); *see* Constitutional Court [Const. Ct.], 2012Hun-Ba95, Apr. 30, 2015 (ruling that propagandizing was constitutional despite the challenge it posed to the freedom of speech).

89. Anti-Terrorism Act, *supra* note 1, at art. 2.6 provides:

The term “counterterrorism activities” means activities related to preventing and countermeasures against terrorism, including the collection of information related to the terrorism defined in subparagraph 1, management of terrorism suspects, safety control of means of terrorism, such as dangerous materials which can be used for terrorism, protection of human resources, facilities and equipment, ensuring the security for international events, taking countermeasures against a terror threat, and armed repression.

90. Park Byung-woog, Jejeong tereobangjibeobui munjejeomgwa jeongbogigwan

one shall be subject to arbitrary or unlawful interference with his privacy. . . . Everyone has the right to the protection of the law against such interference. . . .”<sup>91</sup> The Korean Constitution also guarantees the right to privacy and the dignity of human beings.<sup>92</sup> Furthermore, the Constitution and the case law of both the Korean Constitutional Court and the Korean Supreme Court require that due process of law must be respected in the collection of evidence by investigating authorities.<sup>93</sup> However, under the Act, the NIS is empowered to conduct surveillance on various kinds of information, such as location, financial transactions, and use of communications. This section briefly examines whether such surveillance poses a threat to the right to privacy and, as a method of evidence collection, whether due process is respected.

The collection of information (e.g., location information, financial transactions, use of communications) has normally been subject to the relevant procedures of the *Act on Reporting and Using Specified Financial Transaction Information* (ARUSFTI); *Act on Protection, Use, etc. of Location Information* (APULI); *Protection of Communications Secrets Act* (PCSA); and *Personal Information Protection Act* (PIPA).<sup>94</sup> The *Anti-Terrorism Act* and the corresponding amendments to the PCSA have significantly affected the legal framework regulating NIS surveillance.

First of all, regarding telecommunications surveillance, the NIS initially had the authority to conduct censorship and wiretapping on telecommunication information due to grave national security concerns, provided that court permission was obtained.<sup>95</sup> Prior to the introduction of the *Anti-Terrorism Act*, the court’s rejection rate on NIS requests for surveillance was close to zero, raising concerns about the thoroughness of the court’s examination.<sup>96</sup> With the introduction of the *Anti-Terrorism Act*, the provisions of the PCSA were amended so that censorship and wiretapping could also be conducted for counterterrorism activities as defined in the *Anti-Terrorism Act*.<sup>97</sup> Taking this into account, allow-

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hwaldongje daehan minjujeok tongje [*Establishment of the Anti-Terrorism Act and the Democratic Control over Intelligence Agency Activities*], 14 J. POLICE & L., June 2016, at 64.

91. ICCPR, *supra* note 76, at art. 17.

92. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 10, art. 17.

93. *Id.* at art. 12; Constitutional Court [Const. Ct.], 92Hun-ga8, Dec. 24, 1992; Supreme Court [S. Ct.], 2009Do10871, May 13, 2011.

94. Park Byung-woog, *supra* note 90, at 10, 31, 34.

95. Tongsin bimil boho beob [Protection of Communications Secrets Act], Act No. 4650, Dec. 27, 1993, amended by Act No. 14071, Mar. 3, 2016, art. 8, translated in Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=39120&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=39120&lang=ENG) [<https://perma.cc/2XT5-FPGV>] [hereinafter PCSA] (allowing ex post facto permission for urgent situations).

96. From 2003 to 2015, out of 81 requests by NIS on conducting surveillance on the contents of the telecommunication, 78 were fully approved, two were partially approved and only one request was disapproved. Park Byung-woog, *supra* note 90, at 31.

97. *Anti-Terrorism Act*, *supra* note 1, at art. 2(6) (the condition on the permission of the court remained intact, nonetheless); PCSA, *supra* note 95, at art. 7.

ing the NIS to conduct surveillance based on the broad and ambiguous term “counterterrorism activities” with insufficient judicial review poses a serious threat to the right to privacy. These provisions of the PCSA and the *Anti-Terrorism Act* constitute an excessive infringement on the privacy and the self-determination of personal information in the context of Korean constitutional law.<sup>98</sup> In particular, following the Korean Constitutional Court’s point of view, privacy is limited to sensitive information, such as criminal records, sexual life, and medical history, while “personal information” indicates all information that distinguishes an individual.<sup>99</sup> Thus, NIS has the discretion to surveil a broad range of information.

Secondly, ARUSFTI, APULI, and PIPA respectively govern the protection of financial information, location information, and personal information in general.<sup>100</sup> With the introduction of the *Anti-Terrorism Act* and the amendment of ARUSFTI, the NIS acquired the authority to request relevant information from various public and private bodies on grounds of investigating terrorism *without oversight by the judicial branch*. For example, the NIS can request financial transaction information necessary for the “investigation of persons who might be involved in terrorism” from the Financial Intelligence Unit under the Korean Financial Service Commission.<sup>101</sup> The NIS can also request the location and personal information of a terrorist suspect from public and private bodies holding such information.<sup>102</sup> Recently, the Korean Supreme Court ruled that an internet portal company’s provision of information to the NIS did not constitute a tortious act when legal ground exists for such provision.<sup>103</sup> Thus, the ruling implies that this method of evidence collection is legally permissible.

Utilizing the ambiguity of the definition of terrorism and the term “terrorist suspect,” it has become possible for the NIS to collect information on whomever it deems a “terrorist suspect” or finds necessary for counterterrorism activities, including, for example, a Korean or non-Korean citizen who is connected to Muslim communities or institutions. It is very probable that the right to privacy and the self-determination of personal information may be infringed. In addition, since the information will be collected without a court warrant or a review by an independent

98. Constitutional Court [Const. Ct.], 99Hun-ma513, May 26, 2005.

99. *Id.*

100. Financial information and location information are *lex specialis vis-à-vis* personal information, so information not covered by separate legislation will be governed by PIPA.

101. Teukjeong geumyung georae jeongboui bogo mit iyong deunge gwanhan beobyul [Act on Reporting and Using Specified Financial Transaction Information], Act No. 6516, Sept. 27, 2001, amended by Act No. 14839, July 26, 2017, art. 7(1), translated in Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=44449&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=44449&lang=ENG) [<https://perma.cc/8LKM-KEQF>].

102. Anti-Terrorism Act, *supra* note 1, at art. 9 (3).

103. Supreme Court [S. Ct.], 2012Da105482, Mar. 10, 2016.

body, it poses a serious threat to the due process of law in the evidence collection by the investigative agency.

### C. *Freedom of Expression*

Both the ICCPR and the Korean Constitution protect the freedom of speech but state that it can be legally restricted for national security reasons only to the extent that such restrictions are necessary.<sup>104</sup> The *Anti-Terrorism Act* restricts certain speech for national security reasons. Specifically, it punishes acts of propagandizing and instigating of terrorism and prohibits publicly expressing contents related to terrorism. It penalizes those who adhere to a terrorist organization and those who recommend or instigate others to join such an organization.<sup>105</sup> The issue here is that, again, it is unclear what the definitional threshold is on statements or acts that propagandize, recommend, or instigate terrorism. Furthermore, the head of a related agency<sup>106</sup> may request the relevant institution to eliminate or suspend “any writings or drawings, symbolic expressions that instigate and propagandize terrorism or manufacturing methods, etc. of making dangerous articles, such as explosives. . . circulated via the Internet, broadcasting, newspapers, bulletin boards, etc.”<sup>107</sup> The relevant institutions are then legally obligated to follow the instructions of the head of any related agency, including the NIS.<sup>108</sup> This means that certain statements or phrases uploaded online would be deleted. While these restrictions are necessary for dangers such as actual recruitment or making explosives, it remains unclear what statements qualify for “propagandizing and instigating terrorism” due to their broadness. The fear is that those who criticize the government and those who exhort the public to join anti-government protests may be at risk of being labeled or charged as terrorists depending on how the incumbent administration defines terrorism. Also, propagandizing and instigating terrorism is enough to classify a person as a terrorist suspect, who could then be targeted for investigation and surveillance by the NIS.<sup>109</sup> This would certainly be a valid operation upon someone who is an actual terrorist, but the understated potential for targeting and jailing non-terrorists calls for clearer thresholds.

### D. *Discrimination Against Foreign Minorities*

Foreigners and migrants face a greater risk of discrimination and suspicion of being terrorists under the *Anti-Terrorism Act*. Asylum seekers, refugees, and the migrant community may be targeted as terror

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104. ICCPR, *supra* note 76, at art. 17; HUNBEOB, *supra* note 92, at art. 21, art. 37.

105. *Anti-Terrorism Act*, *supra* note 1, at art. 17(3).

106. *Id.* at art. 2(7) (“Related agency” is defined as “a State agency engaged in counterterrorism activities, a local government, and any other agency prescribed by Presidential Decree.”).

107. *Id.* at art. 12.

108. *Id.* at art. 12(2).

109. *Id.* at art. 2(6).

suspects by virtue of their country of origin or Muslim background.<sup>110</sup> An example of this type of discrimination occurred on November 18, 2015, when the NIS director claimed without evidence that Islamic State members were among Syrian refugee applicants,<sup>111</sup> prompting NGOs and lawyer groups to condemn premature pronouncements stoking racial and religious discrimination against vulnerable groups who have a valid need for asylum.<sup>112</sup>

Pervasive xenophobic attitudes and fear of terrorism can compound racial profiling of people originating from Muslim nations. While both the ICCPR and the Korean Constitution prohibit discrimination in general, South Korea has yet to pass legislation prohibiting racial discrimination. As such, foreigners and migrants are susceptible to more discriminatory acts by the state. For example, human rights lawyers have consistently pointed out the negative impact of “the threat of Islamic terrorists” in the implementation of Korean refugee law by the local immigration authorities.<sup>113</sup> The Refugee Act states that a foreigner has the right to apply for asylum at airports or ports;<sup>114</sup> however, immigration authorities have the discretion to prevent such an application on suspicion of the asylee being a terror suspect.<sup>115</sup> With the introduction of the *Anti-Terrorism Act*, Korean immigration authorities could rely on the incorporation of the

110. *Id.* at art. 2(iv)(4) (the term “foreign terrorist fighter” means a Korean or foreigner who has joined or intends to join a terrorist group in a country of which he/she is not a national, for the purposes of committing, planning, or preparing for terrorism, or joining terrorism).

111. Yoon Dong-jin, Gukjeongwon “siria nanmin 200myeong hanggongpyeoneuro gungnae yuip” [*NIS Says Syrian Refugees Flown in on 200 Flights*], YONHAP NEWS (Nov. 18, 2015, 1:11 PM), <http://www.yonhapnews.co.kr/bulletin/2015/11/18/020000000AKR20151118106100001.HTML> [<https://perma.cc/2QC3-WGBT>].

112. Daehanminguk jeongbuneun nanminhyeomowa tereoe daehan duryeo-umeul geungeo eopsi yangsanhayeo gungmindeureul hodoharyeoneun sidoreul jeuk-gak jungdanhara [*Korean Government Should Stop Fabricating Groundless Fear and Misleading the Public*], ADVOCATES FOR PUB. INTEREST LAW (Nov. 19, 2015), <http://www.apil.or.kr/1831>.

113. On the influence of terrorism discourse on immigration and refugee law, see Il Lee, Tereoe wiheomnoni 2016nyeong hangugui nanminjedoe michineun yeonghyang [*The Influence of the Discourse of Terrorism Threat on the 2016 Korean Refugee Law*], ADVOCATES FOR PUB. INTEREST LAW (Apr. 15, 2016), <http://www.apil.or.kr/1898>.

114. Nanmin beob [Refugee Act], Act No. 11298, July 1, 2013, *amended by Act No.14408*, Mon. Day, 2016, art. 6, url [[perma](#)].

115. Churipguk gwalli beob [Immigration Act], Act No. 4522, Dec. 8, 1992, *amended by Act No. 14585*, Mar. 14, 2017, art. 73, *translated in* Korean Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=42633&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=42633&lang=ENG) [<https://perma.cc/6DEE-GS8Y>].

The captains of ships, etc. or forwarding agents shall comply with the following:

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4. To prevent the boarding of a person immigration control officials notify as ineligible for boarding a ship, etc. because of a failure to meet any of the requirements for departure or entry provided in this Act.

*Id.*

UN designation of terrorist organization as ground for prohibiting the entrance of foreigners with Muslim background.

Foreigners are also more vulnerable to surveillance and lack of due process. For example, the PCSA states that court permission is required for wiretapping on Korean nationals, but for foreigners who are suspected for anti-government activities, the president's written approval suffices for the same kind of surveillance.<sup>116</sup> Considering the ambiguity of the term "anti-government" and lack of reasonable cause for depriving due process for foreigners, such discrimination poses serious concern on the right to equal treatment in law under Korean constitutional law and international human rights law.<sup>117</sup>

## V. RECOMMENDATIONS FOR REVISIONS

Progressive party members of the National Assembly have proposed a bill to abolish the *Anti-Terrorism Act* due to concerns about the negative implications of the law on human rights.<sup>118</sup> It is currently before the National Assembly's Intelligence Committee for review. If abolishment is not achieved, Korean practitioners and scholars propose that a clarification of terms, enhancing transparency, and empowering check-and-balance mechanisms would provide useful guidelines to minimize the possibility of rights violation.<sup>119</sup>

First, in order to restrict arbitrary interpretation of the term "terrorism suspect," certain categories of persons should be more clearly defined to qualify as a terrorist (for example, only the following: a member of a terrorist organization, a person who practices or plans a terrorist act, a person who fundraises for a terrorist organization, and a person who incites an act of terrorism).<sup>120</sup> Also, the Act could be amended as to provide specific guidelines that NIS must follow to identify whether an individual is a terrorist suspect.<sup>121</sup> The term "counterterrorism activities" could be more specific in identifying which agencies are empowered to perform certain activities (e.g., the investigation of terrorists would be under the sole jurisdiction of the police and prosecutor, not the NIS, for criminal procedure purposes). Through the clarification of the competence of the respective agencies, their accountability for certain activities may be enhanced.

116. PCSA, *supra* note 95, at art. 7(1).

117. HUNBEOB, *supra* note 92, at art. 11; ICCPR, *supra* note 76, at art. 26.

118. Gungminbohowa gonggonganjeoneul wihan tereobangjibeop pyeji beobyul an [Bill on the Abolition of the Act on Anti-Terrorism for the Protection of Citizens and Public Security], Bill No. 2004364, Dec. 14, 2016 (simply abolishing the Anti-Terrorist Act and restoring the status quo legal system prior to the Act).

119. KANG HYUN-CHEOL, KOR. LEGIS. RESEARCH INST., A STUDY ON THE REVISION OF ACT ON ANTI-TERRORISM (2017); Park Ho-hyun Park & Kim Jong-ho, *A Study on the Act on Anti-Terrorism for the Protection of Citizens and Public Security*, 58 KOR. J. POLICE STUD. (2016).

120. KANG, *supra* note 119, at 66.

121. KANG, *supra* note 119, at 73–74.

Second, concerning transparency, procedures should be set forth to regulate the disclosure of information relating to the work of the counterterrorism bodies. Under the *Official Information Disclosure Act*, administrative agencies have the discretion to refuse the disclosure request when the information is related to national security and the disclosure could damage important state interest.<sup>122</sup> However, considering human rights concerns, special procedures for disclosure could be introduced for information related to counterterrorism activities, so that the executive branch's interpretation of the Act is placed under public scrutiny.<sup>123</sup> In addition, when serious national security issues are at stake, the information could be disclosed *a posteriori* after due period.<sup>124</sup>

Third, the counterterrorist activities of the administrative agencies should be subject to the scrutiny of external bodies. Under the *Act on the Inspection and Investigation of State Administration*, the National Assembly has the competence to inspect the administrative agencies and its subsidiaries.<sup>125</sup> However, the inspection takes place only once a year, and the investigation commences only at the request of more than a quarter of the committee members. In order to establish a check and balance mechanism for the counterterrorism bodies, it is necessary to form an independent committee appointed by the National Assembly, which can oversee and review the conduct of the counterterrorism bodies.<sup>126</sup>

## CONCLUSION

In analyzing the origin and anatomy of this Act, this article finds that the Act remains controversial in terms of definitional clarity, discretionary authority, and thus unclear rights protection for citizens and non-citizens. Terrorist acts resulting in harm to the public should be dealt with swiftly by the state to prevent or remedy damage, compensate victims, and punish perpetrators. However, these objectives were already operationalized in prior legislation. Enacted by the previous Park Geun-hye administration, the Act differs from pre-existing legislation by conferring more power to the executive branch and the NIS. It leverages existing legal frameworks such as disaster management, political crime

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122. Gonggongggigwanui jeongbogonggae gwanhan beobryul [Official Information Disclosure Act], Act No. 7127, Jan. 29, 2004, *amended by* Act No. 14185, July 26, 2017, art. 9(1), *translated in* Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=38898&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=38898&lang=ENG) [<https://perma.cc/538N-W8E9>] (“The disclosure of information shall be governed by this Act, except as otherwise expressly provided for in other Acts.”).

123. *Id.* at art. 4(1) (stating that if other laws provide specific procedures, the provisions of Official Information Disclosure Act could be overridden).

124. KANG, *supra* note 119, at 67.

125. Haengjeong josa gibonbeob [Act on the Inspection and Investigation of State Administration], Act No. 4011, Aug. 5, 1988, *amended by* Act No. 14374, Dec. 16, 2016, art. 2, *translated in* Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=40614&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=40614&lang=ENG) [<https://perma.cc/A5X7-34RR>].

126. KANG, *supra* note 119, at 67.

(national security), and international definitions of terrorism to legitimize the purpose and methods of the Act. However, it is not merely a conventional counterterrorism law aimed toward extremist Islamic networks but a more expansive mandate giving broad discretionary powers to the NIS to investigate without judicial warrant anyone whom they determine or pre-determine to be terror suspects. This potentially subjects foreigners of Muslim background, especially asylum-seekers, to various rights abuses. Furthermore, given the ongoing scandals of abuse of power by the NIS and its well-known bias towards conservative factions,<sup>127</sup> the Act has the latent capacity to transform into an apparatus for political oppression and surveillance.

To prevent the arbitrary application of the law by the executive branch, predictability of the law should be improved and the judicial and legislative branches should be empowered to oversee the executive branch. Ambiguous terms such as “counterterrorism activities,” “terrorist suspect,” etc. should be drafted in more detail, laying out specific conditions for the executive branch to exercise specific measures. Also, when the NIS conducts counterterrorism activities, such as acquiring information from institutions, court supervision should be reinforced, so that arbitrary surveillance is controlled. Furthermore, *ex post* review by an independent body, legislative branch, or possibly NGOs that monitor the government, should be held on a regular basis in order to prevent politically biased applications of the Act.

The full application of the Act has yet to be tested given the lack of a terrorist attack since its enactment, and the preventive counterterrorism activities of the NIS is publicly unobservable. The current administration under President Moon Jae In, whose party opposed the introduction of the *Anti-Terrorism Act*, now has the authority to conduct counterterrorism activities. In the 2017 presidential election campaign, Moon promised to “end illegal surveillance by state organs” and “protect personal information.”<sup>128</sup> However, despite the administration’s human rights friendly policies,<sup>129</sup> whether and how the administration will ensure rights protec-

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127. Certain NIS personnel are under investigation for charges of illegally intervening in the presidential election by hiring part-time employees to write politically biased comments on internet portals, etc. Kim Joo-hyung, Gukjeongwon jeokpye cheongsan TF, ‘daeseon daetgeulsageon’ gukjeongwon gaep hwagin [NIS Task Force for Rooting Out the Accumulated Corruption Confirmed NIS Intervention on the Comment Case], YONHAP NEWS (Aug. 3, 2017, 7:00 PM), <http://www.yonhapnews.co.kr/bulletin/2017/08/03/0200000000AKR20170803156200001.HTML> [https://perma.cc/TJ4W-RT2H]. The former Director of NIS is standing trial for illegal intervention in elections. See Kim Min-jeong, Gukjeongwon daetgeult Won Sehune 4 nyeonhyeong guhyeong [Prosecutor Pleads for 4 Years Sentence for Won Se-hoon], KOREA TIMES (July 24, 2017, 8:25 PM), <http://www.hankookilbo.com/v/0382bbf78a0f4153ab2f-0d98440ad5f1> [https://perma.cc/P4TV-VCQ9].

128. Korean Democratic Party Presidential Election Pledge (April 28, 2017) ([http://theminjoo.kr/President/pledgeDetail.do?bd\\_seq=65856](http://theminjoo.kr/President/pledgeDetail.do?bd_seq=65856)).

129. Choi Kyeong-cheol, Moon daetongnyeong, ingwonwi wisang ganghwa naseott’teukbyeolbogo’ jeongnyehwa [President Moon Orders Reinforcement

tion under the Act remains to be seen. Citizens and non-citizens need to be informed and vigilant about how and when the state can collect private information without their knowledge and without a clear legal basis for such surveillance.