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Corresponding author  
E-mail: [pws7897@naver.com](mailto:pws7897@naver.com)

Peer reviewer  
E-mail: [editor@j-institute.jp](mailto:editor@j-institute.jp)

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## A Study on the Problems and Improvement of Investigation in the Act on Anti-TERRORISM for the Protection of Citizens and Public Security

Park Woong-shin

*Sungkyunkwan University, Seoul, Republic of Korea*

### Abstract

*The provisions of the “Act On Anti-Terrorism For The Protection Of Citizens And Public Security(Act on Anti-Terrorism)” of 2016, which are concerned with the limitation of the human rights, have been continuously discussed since the 18th National Assembly, and the provisions of the current law have balanced at least the security rights of the people and the fundamental rights of the human rights. However, there is a system deviating from the center of the controversy even though there is a possibility of infringing on the fundamental rights of the people. It is the right of investigation by the staff of National Intelligence Service prescribed in Articles 2 and 9 of the Act on Anti-Terrorism.*

*The investigation of the “Act on Anti-Terrorism” is similar to the preliminary domain investigation in Germany, but it is futuristic in that it aims to prevent crime, but at the same time, And the process of searching for relevant information in a situation where the existence of the allegation is uncertain. The problem is, in principle, that there is no provision on the subject, scope and limitations of the right to investigate, even though the exercise of the investigation, which has a precautionary nature, may infringe the fundamental rights of the people as described above. First, this study explores the legal nature of the right to investigate “Act on Anti-Terrorism” and opens up the possibility of applying the due process principles.*

*Next, I pointed out the problems of criminal law in the field investigation and submission order system, which is the concrete type of investigation, and suggested ways to improve them. In other words, the specific type of investigation is substantially similar to the compulsory disposition, and the lawful procedure such as the constitutional warrant is stifled as the cause of the investigation. In this study, we explored problems and remedies for field investigation and submission order, which are highly similar to those of forced disposal.*

**[Keywords]** *Terror, Investigation, On-Site Investigation, Requirement of Submission, Due Process*

## 1. Introduction

Since the September 11, 2001 terror attacks, many countries have taken various institutional measures to protect the safety of the nation from terrorism and to protect the lives and property of the people. However, despite the necessity of such an institutional apparatus, it is true that there is a considerable controversy to the present in that it paradoxically violates human rights of the people and restricts fundamental rights[1].

“Act on Anti-Terrorism” was not free from such controversy, but it was argued that the legislation was essential for the national security and national security from the time of the legislation[2], and that the possibility of human rights abuses and the abuse of authority of national intelligence agencies(such as National Intelligence Service, NIS), But the result was that the necessity was asserted.

In the reality that the problem of the “Act on Anti-Terrorism” is still being discussed, this study examines the right of counterterrorism investigation which has not received

much attention from the “Act on Anti-Terrorism”. The investigation is formally an administrative investigation, but it is necessary to review it because it has substantial substance of investigation.

## **2. The Concept and Necessity of Investigation in “Act on Anti-Terrorism”**

### **2.1. The concept of investigation in “act on anti-terrorism”**

The Article 2 of the “Act on Anti-Terrorism” stipulates that activities that require site investigation, document reading, sampling and to collect information or data necessary for counter-terrorism activities, or requests data to be submitted and statements are subject to counter-terrorism investigation to director of NIS.

### **2.2. Necessity of investigation for the counter-terrorism**

The most important asset for identifying terror crimes as well as the substantive truths of criminal offenses is “Intelligence[3]”. In order to prevent the Terror crime in advance, we have learned from the experience of foreign countries that it is important to get the “Intelligence” in advance and analyze it. However, considering the possibility of infringement of the fundamental rights of the people because of the threat of terrorism[4] and “the chilling effect doctrine”, it is necessary to conduct an internal investigation before transferring the criminal procedure. In addition, there are a variety of legislative forms (such as “Financial Investment Services and Capital Markets Act” and “Monopoly Regulation and Fair Trade Act”) that provide forcible investigation to relevant agencies (such as “Financial Services Commission”, “Fair Trade Commission”) in order to prevent crime proactively and to decide whether to incorporate it into future criminal procedure.

The problem is that although the investigation is not a form of criminal procedure but a kind of administrative investigation, it has a form of actual criminal procedure, which is a possibility of infringing the fundamental rights of the people, it is abstractly defined.

## **3. Review of the Nature of Investigation in the “Act on Anti-Terrorism”**

In this way, regardless of the formal aspect, the right to investigate can infringe fundamental rights regardless of whether or not the subject is actually perceived. It is necessary to identify the nature of the investigation and seek legislative supplementary measures because it can infringe on the fundamental rights of the people without the rule of law.

### **3.1. Investigation from the perspective of administrative law**

In general, an administrative investigation means any administrative action in which an administrative agency decides a policy or conducts site investigation or document reading to gather data or information necessary for administration, or makes a request for data submission and a statement of attendance to the person to be investigated[5]. These administrative investigations are understood not as realizing the specific results required by the administration but as an auxiliary means for the collection of the data necessary for a specific administrative purpose.

### **3.2. Investigation from the perspective of criminal law**

Considering the concerns of the infringement of the fundamental rights of the people, investigation should be differentiated from the investigation that has the relation of general investigation and criminal sanctions[6]. The investigation can be regarded as confirmation of the fact before the allegation of the crime, and it is the procedure of judging whether the allegation of the crime is judged in the criminal procedure[7]. The problem is that it is not possible to clearly distinguish the facts before the charge and judge the existence of the charge.

For this purpose, if the investigation is conducted with the aim of collecting basic data for pure administrative purposes, it is a pure administrative investigation, but if the investigation is carried out by an investigation agency (such as, NIS, The National Police Agency etc) and the basic data acquired here can be grounds for future criminal sanctions,

And it can be placed as a clue to criminal investigation proceedings.

## **4. Problems and Improvement of Investigation on “Act on Anti-Terrorism” from the Perspective Criminal Law**

### **4.1. The nature of the on-site investigation and the due process principles**

#### **4.1.1. Introduction**

In order to collect information and materials necessary for counter-terrorism activities, a civil servant belonging to the NIS agencies enters the office or workplace suspected of being related to a terrorist crime, and reports the status of work, books, documents, It is similar to a search for a material forcible disposition with the authority to investigate materials or objects. However, even though i) it is not subject to warrants, ii) it is an investigation whose purpose is similar to the search which is the premise to investigate specific data or specific persons, and iii) The fact that there is no detailed provision in the case that it is a possibility means that the field investigation of the “Act on anti-terrorism” is suspected that it violates the Due Process.

#### **4.1.2. Limitations of the on-site investigation**

Since the on-site investigation has the nature of arbitrary survey, but there are no specific regulations and procedures for site investigation, it is necessary to know the limits of the on-site investigation, the effect of the investigation deviating from the limitation and how to evaluate the evidence evidenced in the investigation procedure do.

Since the on-site investigation has a predisposing nature of other investigative rights, it is necessary to establish a prestigious rule for the point of time at which the site investigation begins. Although it is not possible to uniformly define the scope of data or information necessary for the suppression of terrorist crime, even if the criminal procedure does not lead to the initiation of investigation or the issuance of a warrant, the minimum threshold for the exercise of the authority of the NIS. It may be considered that the on-site

investigation can be initiated if the “NIS can refer to” [8] it as “objective evidence” that there is “minimal relevance” or “minimum violation of the law”. And the organization conducting this verification process should be performed by an independent body, such as a The Court or Intelligence Committee of The National Assembly.

#### **4.1.3. Improvement of the on-site investigation**

The field investigation system in the “Act on Anti-Terrorism” is a system for preventing terror crime through the smooth collection of information related to terrorism. However, since the field survey system has an atypical nature, it is necessary to take measures to prevent it from expanding unlimitedly. First of all, it is specific to the field survey. Anti-terror investigation is not a procedure after the alleged terror crime is confirmed, but it is the stage of conducting basic investigation about the relation with terrorism, so it can not demand the level such as seizure and search. Since the field survey has a logical inevitable relation with the concept of place, it is necessary to judge the scope of the field survey as a matter of question, and it is judged that it is not a forced disposition.

Considering the prevention and suppression of terror crime, it can be divided into proactive control and post - as a lexical control system, it is possible to consider the participation guarantee system in the field survey and the notification system of the survey result. The participation guarantee system in the field investigation is in line with the guarantee of the participation rights of the parties etc. in the seizure of the criminal procedure law[9]. Participation rights guarantee system is aimed at securing the procedural fairness of seizure search and protecting the interests of those who are executed, and it is a system for reasonably restricting the seizure scope by excluding the confiscation of evidence irrelevant to the allegations. The on-site investigation in the “Act on Anti-Terrorism” will be able to check the unlimited expansion of the field investigation in the first place, if the opportunity to participate is provided to the

subject in accordance with the guarantee of the right to participate in the penal law.

In addition, it may consider the purpose of the investigation after the completion of the fieldwork, the period and place of the investigation, the name and position of the investigator, and the procedure of notifying the investigator of the scope and contents of the investigation. This is because it not only guarantees the right of information to be controlled by the respondent but also serves as a basis for the investigator to contest the legality of the investigation.

## **4.2. The legal nature and problems of the requirement of submission**

### **4.2.1. Introduction**

NIS staff can not only view documents to collect information or data necessary for counter-terrorism activities. That is, the right to request arbitrary submission to the respondent to collect necessary information or data. Because there is "consent" of the other party, it can be regarded as stipulating the seizure system not based on the warrant stipulated in Article 218 of the Criminal Procedure Act. The Criminal Procedure Act also allows for the search without warrants in certain cases, which allows for six specific types of cases, each with its own legal basis[10]. In the case of terror crimes, there is a necessity in view of the urgency. However, in the reality that the data submission request is practically meaningless, the legislative attitude, such as the existing law, which grants the right to submit data and statements to the NIS without special permission, should be improved.

### **4.2.2. Improvement of the requirement of submission**

In order to collect information or data necessary for counter-terrorism activities to suppress terror crimes, it is necessary to obtain specific information or data from the intelligence agencies inevitably[11]. However, the current law does not specify the detailed object and procedure of the data submission request by the intelligence agency, so it is necessary to specify detailed procedures. First of all, it is possible to consider introducing pro-

visions such as the seizure procedure prescribed in Article 427 of the "Financial Investment Services and Capital Markets Act" and Article 8 of the "Tax Code Punishment Procedure Act" to the "Act on Anti-Terrorism". However, there is a great difference between these laws and the legislative purpose of the "Act on Anti-Terrorism" and the "Financial Investment Services and Capital Markets Act", and when considering the characteristics of terror crimes, it is necessary to acknowledge the data obtained by respecting the judgment in the field. In other words, considering the fact that 1) it is a preventive struggle of terror crimes, the application of collective warrants in the investigation stage of intelligence agencies is not valid, 2) but from the viewpoint of the respondent it is clear that it has a meaning similar to a warrantless seizure, and 3) because the current law is silent on the requirements, limitations and control measures of the request for data, It is necessary to make systematic supplementary measures to create new control measures.

Of course, the current "Act on Anti-Terrorism" also requires the "National Counterterrorism Commission", which is chaired by the prime minister, to report beforehand or afterwards as counter-measures to counter-terrorism investigation and tracking rights. However, in order to deal with counter-terrorism, it is necessary to report to the "National Counterterrorism Commission", which deliberates and resolves the important issues of counter-terrorism activities, and the basic purpose of this regulation is to guarantee the basic rights. Therefore, the counter-terrorism control measure can take into consideration the obligation to "an Ex Post Facto Warrant system", the court's examination thereof, and the notification system to the parties, in that the request for submission of data has a meaning similar to that of a material forced disposition.

An Ex Post Facto Warrant system should be recognized firstly(necessity and urgency), because it is the information and data necessary for counter-terrorism activities because of the relevance to the terror crime when the NIS officer reasonably judges it, The criticism

that the right to investigate infringes on warrants system is infringed by the fact that the legality of the request for submission is not only an internal judgment (ie, an internal review of the intelligence agency after receipt), but also allows for an independent judgment by an independent court. It will be able to dispel.

In addition, if the submitted data proves to be irrelevant to a terror crime, it must be returned to the holder or other holder. However, there is no explicit article about "Right to Request the Return of Seized Articles[12]". Furthermore, even if there are arbitrary submissions of the subject under the request for submission of data, it is possible to consider the introduction of the duty to prepare and distribute the seizure list in accordance with Articles 129 and 219 of the Criminal Procedure Act, since it is practically confiscated.

## 5. Outro

It is natural that the most effective way to struggle with terror crime is to effectively suppress terrorist crimes before they occur[13]. However, in order to prevent all crimes including terror, necessary and appropriate intelligence is needed, and intelligence and investigation agencies should make efforts to collect this information. To this end, our "Act on Anti-Terrorism" has been granted the right to investigate by the NIS. However, since these necessities and legitimacy are separate, we have confirmed that the right to investigate the "Act on Anti-Terrorism" has room for improvement in terms of legality. In particular, it can be seen that the concrete type of the investigation is substantially similar to the forced disposition, and that the lawful procedure such as the warrant in the Constitution Law is inadequate.

In this study, although the nature of the anti-terrorism investigation started from the investigation in the administrative law, it can be seen in the same way as the investigation. Although the right to investigate of "Act on anti-terrorism" can be viewed as a compul-

sory disposition, it should be applied to warrants. However, due to the nature of terrorist crimes, it is not possible to carry out warrants at the same level as ordinary criminal proceedings.

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**Author**

**Park Woong-shin** / Sungkyunkwan University Senior Re-  
searcher

B.A. Sungkyunkwan University

M.A. Sungkyunkwan University

Ph.D. Sungkyunkwan University

Research field

- Problems on Internet Packet Interception, In Ha Law Re-  
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- A Study on Improving Measures Against Terrorism in Met-  
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Major career

- 2016~present. Sungkyunkwan University of The Institute  
of Legal Studies, Senior Researcher.

- 2016~present. International Society for Justice & Law, Ed-  
itor in Administrator.