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Do We Need National Human Rights Institutions?

The Experience of Korea

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I. Background

Korea has experienced a drastic transformation in the ‘rule of law.’¹ For a great deal of its history, the country was governed by a monarchy, and democracy was far from the Korean collective consciousness.² During the colonization era, it was nearly impossible for Koreans to foster appropriate human rights.³ The Korean War further seriously damaged seriously the human rights consciousness in Korea: after all no one expected a poor, starving people to protect human rights.⁴ Again interrupting addressing human rights was the military coup by General Jung-hee Park, an authoritarian and dictatorial leader. Military governments ruled the country for 30 years, and it was not until the end of the 1980s that democracy returned.⁵ However, due to the financial crisis in Asia towards the end of the 1990s, little progress was made in the field of human rights.⁶ In 1998, Dae-Jung Kim who has been persecuted under the former military regime, was elected President and now exemplifies the progression of Korea “from a victim of human rights violations to a human rights leader.”⁷ Following President Dae-Jung Kim’s election

¹ See ChoHyo-je, *Human Rights in Korea at the Crossroads: A Critical Overview*, Korea Journal, Vol.42, no.1., 204 (Spring 2002); Hahm Chaihark, *Human Rights in Korea* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 265 (RANDALL PEERENBOOM, et.al. ed., 2006) ; IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA AND TAIWAN (2002), at 68-98; Jinsok Jun, *South Korea: Consolidating Democratic Civilian Control*, 121 in Muthiah Alagappa ed., COERCION AND GOVERNANCE: THE DECLINING POLITICAL ROLE OF THE MILITARY IN ASIA (2001); SunHyuk Kim, *South Korea: Confrontational Legacy and Democratic Contributions*, 138 in Muthiah Alagappa ed., CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE (2004).

² Ian Neary, *Id.*, at 68-9.

³ Hahm Chaihark, *supra* note 1, at 267.

⁴ Ian Neary, *supra* note 1, at 71-2.

⁵ *Id.*, at 71-9. See also Byunghoon Oh, *Civil Society and the National Human Rights Commission in Republic of Korea*, Santa Clara Summer Human Rights Program (27 June 2007) at 2-4.

⁶ ChoHyo-je, *supra* note 1, at 214-5.

⁷ HURIGHTS OSAKA, *Not for the People! National NGO Coalition for the Establishment of an Independent NHRC*, Asia-Pacific News No.18 Dec. 1999 http://www.hurights.or.jp/asia-pacific/no_18/no18_korea.htm

promises addressing human rights, representatives of the numerous human rights NGOs gathered and established the National NGO Coalition for the Establishment of an Independent National Human Rights Commission (NHRCK).⁸ There had been various public hearings to formulate a draft bill for the creation of the NHRCK by the National NGO Coalition.⁹

In 2001, the National Human Rights Commission was finally established under the mandate of the 2001 National Human Rights Commission Act. As an independent national institution with the sole purpose of promoting and protecting human rights, the National Human Rights Commission of Korea has made several remarkable achievements and contributions.

II. The legislative process for the establishment of the NHRCK

Compared to other legislative processes in Korea, the process of adopting the 2001 National Human Rights Commission Act is recognized as unprecedented because of the active participation by and debate between the civil society, government officials and politicians.¹⁰ For example, there were many proposals from various actors which inevitably drew public attention, caused tensions between political parties and lastly, expended three years until the 2001 NHRCK Act was adopted.¹¹

This was the first time in the legislative history of Korea that the civil society had been actively involved in the legislative process from the draft stages to the final adoption.¹² The first draft bill by the Ministry of Justice to establish the NHRCK under its full jurisdiction was abandoned because of the strong opposition from the civil society.¹³ It is also unusual that many

⁸ *Id.*

⁹ The first public hearing on the draft bill of the National Human Rights Commission of Korea was held in October 1998 by the Ministry of Justice. Mr. Brian Burdekin, the Special Advisor of UNOHCHR on national institutions, also met the representatives of the Ministry of Justice and questioned whether the draft bill would secure NHRCK's independence or not. The controversial issues in the first draft bill are: 1) subordination to the Ministry of Justice, 2) enactment of Presidential Decree, 3) limited jurisdiction for the investigation of human rights violations, 4) lack of power in the commission's decision and recommendations. *Id.*

¹⁰ See Woon-Jo, Baek, A STUDY OF THE LEGISLATIVE PROCESS BEHIND THE LAW OF NATIONAL HUMAN RIGHTS COMMISSION IN THE REPUBLIC OF KOREA, Doctoral Dissertation, Inha University (2002). [written in Korean]

¹¹ *Id.*

¹² *Id.* at 259.

¹³ Byunghoon Oh, *supra* note 5, at 5.

other countries and international human rights organizations had showed their concerns and interest in the process.¹⁴

It is my contention that at the very least, the whole legislative process for the establishment of the NHRCK shows the possibility of *social change* in human rights issue in Korea. Through their experiences in this active legislative process, the various actors such as civil movement activists, politicians, and government officials learned what encompasses the achievements and limits of the NHRCK in future and also realized the necessity for consolidation for the NHRCK's efficient work in the protection and promotion of human rights.

III. Structure of the NHRCK: *All-inclusive* system

The NHRCK has jurisdiction over all types of human rights violations and discrimination.¹⁵ As Nohyun Kwak, former Secretary General pointed out the NHRCK is “an all-in-one human rights institution.”¹⁶ In 2009, there were 164 staff members comprising the following divisions:¹⁷ human rights policy, human rights education, and communication and cooperation under the Policy and Education Bureau; and investigation coordination, civil rights, anti-discrimination and disability rights under the Investigation Bureau. There are also three regional offices in Busan, Gwangju and Daegu.

Because of insufficient staffing, the NHRCK cannot fully and efficiently investigate all human rights violations and discrimination cases: since its establishment, it has received over 30,000 complaints.¹⁸ Its *all-inclusive* system, however, is preferable for a country new to protecting human rights since it allows for the application of a unified and coherent human rights policy to disparate human rights violation cases. Additionally, it is more economical than

¹⁴ *Id.*

¹⁵ See The 2001 National Human Rights Commission Act, Art. 2, 19 and 30.

¹⁶ Nohyun Kwak, *The Dilemma and Vision of an All-in-One NI: NHRC-Korea's experience*, Conference Paper, National Human Rights Commission of Korea (4 Dec. 2006) at 1-2.

In countries like Canada, Australia and the U.K., the jurisdiction of NHRI is rather limited as they already have specialized human rights protection systems such as the police and military ombudsman, equal employment opportunity commissions, gender discrimination commissions, disability rights commissions, etc. *Id.*

¹⁷ Human Rights Commission of the Republic of Korea, ANNUAL REPORT 2008 (hereafter The Annual Report)

¹⁸ *Id.*

diffusing the fiscal resources across several new human rights bodies, especially for developing countries.¹⁹

IV. Interdependency of the NHRCK

As a national institution, it is hard for the NHRCK to directly reflect the opinions of civil society in its policy-building and decision-making process. It is also difficult for it to unquestioningly follow the government's human rights policy, given the fact that most human rights violations are still committed by various governmental institutions.²⁰

Thus, the last seven years in the experience of the NHRCK show that it is very hard to establish the appropriate relationship with the civil society and the government: somehow a tension with both groups appears natural.

Seonghoon Lee, Director-General of the NHRCK also emphasizes NHRI's *interdependence* between the civil society and government institutions.²¹ As he puts it, the National Assembly, the mass media, the human rights NGOs and the academia, for example, all have different interests and voices. Thus, in reality, what is important for the NHRCK is its interdependence on other human rights related actors rather than its complete independence. Furthermore, the independence of the Commission itself does not mean isolation.²² I also believe that one of the important conditions for the NHRCK's effectiveness is not so much its neutrality from both civil society and government institutions, but its impartiality to all related human rights actors.²³

The NHRCK is subject to another tension: that between the international human rights standard under the U.N. structure and Korea's national interest and public opinion.²⁴ For the last seven years, it has raised its capacity to creatively interpret and apply international human rights

¹⁹ Nohyun Kwak, *supra* note 16, at 5.

²⁰ Byunghoon Oh, *supra* note 5, at 8.

²¹ Interview with Seonghoon Lee, Director-General of NHRCK, conducted in 12 June, 2009.

²² *Id.*

²³ *Id.* See also Seonghoon Lee, *the Universal Declaration of Human Rights and the Commission's Future*, Window: Human Rights Policy Dialogue (NHRCK, Sept. 2008); Hyoje Cho, A LANDSCAPE OF HUMAN RIGHTS, (Gyoyangin, 2008) [written in Korea]

²⁴ Interview with Byunghoon Oh, Senior Consultant on Foreigners, NHRCK, conducted in 3 June, 2009.

conventions and treaties to meet the domestic situation. There has been severe criticisms both at the international and the national level, however.²⁵ The NHRCK has dealt with many controversial issues, step by step, for instance, the human rights of migrants²⁶ and has developed an aptitude for applying international human rights standards and simultaneously responding to public opinion.²⁷

V. The NHRCK's main achievements

Since its establishment in 2001, the NHRCK has been a driving force in enhancing the human rights situation in Korea. Some of its most significant achievements are highlighted below.

First, there have been more than 30,000 complaints submitted and investigated.²⁸ The number of cases has increased every year as the following table shows.

[Table] Complaints, Counseling, Guide and Civil Appeal Cases by Year (Number of Cases)²⁹

Year	Complaint	Counseling	Guide/Civil Petition	Total
2008	6,309	16,302	30,043	52,654
2007	6,274	13,387	20,780	40,441
2006	4,187	10,737	19,558	34,482
2005	5,617	9,136	18,684	33,437
Total	35,163	63,889	121,971	221,023

It is clear that the NHRCK has provided not only accurate information on legal and institutional solutions to victims of human rights violations, but has also actually assisted the victims in recovering from their sufferings and receiving effective remedies. Specifically, it has

²⁵ Interview with Seonghoon Lee, *supra* note 21.

²⁶ The Annual Report, *supra* note 17.

²⁷ Interview with Seonghoon Lee, *supra* note 21.

²⁸ As of November 2008, the total number of complaint cases was 35,163: 27,993 on human rights (civil and political rights) violations (79.6%), 5,380 on discrimination (15.3%) and 1,790 on other issues (5.1%).

See The Annual Report, *supra* note 17.

²⁹ *Id.*

dramatically improved the prisoners' and detainees' human rights in detention and protective facilities by operating a special task force team to handle in-person complaints on-site.³⁰

Second, it has issued more than 170 recommendations and opinions since its establishment in 2001 to improve human rights related legislation and government policies.³¹ And almost 85% of its recommendations have been accepted.³²

For instance, the Commission opposed the enactment of the anti-terrorism legislation by the National Assembly.³³ To eliminate any forms of discrimination on the ground of gender, the Commission also submitted its opinion to the Constitutional Court to review the unconstitutionality of the traditional Family Registry System of Korea (Ho-Ju jedo) which has been debated in Korea for a long time.³⁴ In 2006, the NHRCK presented the National Human Rights Commission's Action Plan to Promote Human Rights (2006-2008) to provide founding guidelines to draft the National Human Rights Action Plan (NAP)³⁵ and also to publicize in detail its obligation to promote human rights in Korea.³⁶ Under its Action Plan, the Human Rights Education Act was enacted in 2006 and the Anti-discrimination Act against Persons with Disability in 2007.³⁷

Other major recommendations and opinions by the NHRCK cover controversial issues such as the death penalty, the amendment to National Security Law, the inspection of elementary school students' diaries, legislation on non-regular workers, the practice of restricting students' hairstyles, the amendment to the National Education Information System (NEIS), the reservation and implementation of Article 21 of the U.N. Convention on the Rights of the Child (CRC), the legislation of the Anti-discrimination Act, the set-up of a national policy for the protection of refugees, the amendment to the AIDS Prevention Act, remedies for the Persons with Disabilities

³⁰ See National Human Rights Commission of Korea, FIVE YEARS EXPERIENCE, ACHIEVEMENT AND CHALLENGES (Feb. 2007) at 85-144. [written in Korea]

³¹ The Annual Report, *supra* note 17.

³² *Id.*

³³ Park Kyeongseo, *Evolution of the National Human Rights Institutions in Asia Pacific Region during 10 years after Vienna World Conference on Human Rights*, Final Proceeding at Asian Consultation on Vienna plus 10 (Dec. 15-6, 2003), at 3.

³⁴ *Id.*, at 4.

³⁵ NAP was finalized in May 2007 by the Ministry of Justice and is currently under implementation.

³⁶ National Human Rights Commission of Korea, ANNUAL REPORT 2006, at 27-32.

³⁷ *Id.*

Act, the amendment to the Communications Confidentiality Protection Act, the rights of North Korean refugees, the amendment to the Migrant Workers Act, etc.³⁸

In addition, the NHRCK can issue its opinions to courts.³⁹ Though not legally binding, they have played an important role and have influenced court decisions⁴⁰ in public-policy-related cases in the Supreme Court or the Constitutional Court such as the Family Registry System (Ho-Ju jedo) mentioned above. Overall, at the very least, one thing is clear: legal frameworks and the judicial enforcement of Korea's constitutional rights will contribute to the growth and recognition of international human rights, with the NHRCK's quasi-judicial abilities becoming part of such a contribution.

Lastly, the NHRCK's most important achievement is the gradual change of public awareness on the issue of human rights.⁴¹ When human rights violations by the government occur now, people have come to think of the Commission as the institution to solve their problems.⁴² While its recommendations and opinions against the government's human rights policy do not have a legally binding power, in most cases they have been respected and at least, seriously considered by the government. The reason is not only the strong advocacy by civil society, but also NHRCK's publishing power to release them to the public through the mass media.⁴³ Through its recommendations and opinions, even if they are not accepted by the government, people can become informed of a certain case, understand why there are human rights, and gradually begin to identify internationally recognized fundamental human rights.

³⁸ See National Human Rights Commission of Korea, ANNUAL REPORT 2002-2008.

³⁹ See The 2001 National Human Rights of Commission Act, Art. 28 (Presentation of Opinions to Courts and Constitutional Court).

(1) In case a trial, which significantly affects the protection and promotion of human rights, is pending, the Commission may, if requested by a court or the Constitutional Court or if deemed necessary by the Commission, present its opinion on *de jure* matters to the competent division of the court or the Constitutional Court.

(2) In case a trial with respect to matters investigated or dealt with by the Commission under the provisions of Chapter is pending, it may, if requested by a court or the Constitutional Court or if deemed necessary by the Commission, present the opinions on *de facto* and *de jure* matters to the competent division of the court or the Constitutional Court.

⁴⁰ See Kwak No-hyun, *National Human Rights Commission at Work: A Critical Reflection*, Korea Journal, Vol.42, No.3, 194-218 (Autumn, 2002)

⁴¹ Interview with Myung-Jai Lee, Director of Communications and Cooperation Division, NHRCK, conducted in 10 June, 2009.

⁴² *Id.*

⁴³ See The 2001 National Human Rights of Commission Act, Art. 25 (4).

VI. The NHRCK and International Cooperation

The U.N. Annual Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region has frequently recognized the development of NHRIs as an important factor in the growth of institutionalized regional cooperation in the field of human rights.⁴⁴ The importance of NHRIs and their network in the Asia-Pacific region was especially emphasized by the 1998 Asia-Pacific Human Rights Framework adopted in Tehran which stated that “[s]trengthening national human rights capacities is the strongest foundation for effective and enduring regional cooperation for the promotion and protection of human rights.”⁴⁵

Based on such initiatives, the NHRCK has been actively involved in the work of the International Coordinating Committee of National Human Rights Institutions (ICC) as a vice Chair since 2007 through its participation in the ICC conferences, its assistance in establishing the role of the ICC in the Human Rights Council, its attendance to the ICC Sub-Committee on Accreditation to review the accreditation and re-accreditation of other NHRIs.

With the firm belief that the Asia-Pacific Forum of the National Human Rights Institutions (APF) can be an effective networking tool that promotes the domestic implementation of international human rights norms by each NHRI in Asia-Pacific region, the NHRCK has also eagerly cooperated with the APF.

⁴⁴ See Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General submitted in accordance with Commission resolution 1998/44 para.4-7. (15 March, 1999) U.N. Doc. E/CN.4/1999/94; See also Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General submitted in accordance with Commission Resolution 1997/34 para.28-30. (19 February, 1999) U.N. Doc. E/CN.4/1999/93.

⁴⁵ Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, Report of the Secretary-General submitted in accordance with paragraph 27 of Commission on Human Rights Resolution 1997/45 Annex I (12 March 1998) U.N. Doc. E/CN.4/1998/50:

“[C]ommitted to developing and strengthening national capacities, in accordance with national conditions, **for the promotion and protection of human rights through regional cooperation and the sharing of experiences**, the workshop hereby adopts a **Framework for Regional Technical Cooperation in the Asia-Pacific** to develop, *inter alia*: National plans of action for the promotion and protection of human rights and the strengthening of national capacities; Human rights education;
- **National institutions for the promotion and protection of human rights**; and
- Strategies for the realization of the right to development and economic, social and cultural rights;”
(emphasis added). *Id.*

Furthermore, networking between NHRIs can give each NHRI a chance to share human rights information and practices in other countries.⁴⁶ It is a long process to detect an injustice, understand why it is an injustice, and finally accomplish mounting a sustained campaign against it.

Thus, the NHRCK has regularly exchanged staff with other NHRIs to work and conduct research in best practices and has sought appropriate ways to apply them to Korea.⁴⁷ It has invited government officials from other developing countries, for example, East Timor, Afghanistan and Iraq, for a training program designed to provide an opportunity for the Commission to deliver its experiences and knowledge to the NHRIs of developing countries or those considering establishing an NHRI.⁴⁸ Such cooperation can bring in the grassroots experience of those fighting for human rights and also give other NHRIs the added advantage of learning from others' practices, and thus strengthening the campaign.

VII. Conclusion

“The National Human Rights Commission is the national institution whose role it is to constantly criticize the government’s wrongful acts and human rights violations. In its nature, it is inevitable for the Commission to have a conflict with the government. If there is no more tension between an NHRI and the government, such institution is not an NHRI anymore.”⁴⁹

I believe that just as the civil society movement in 1987 became the tipping point in the democratization process in Korea, the establishment of the NHRCK in 2001 was the tipping point for human rights.

While there are still problems in the Commission,⁵⁰ it has gradually changed the government’s top-down approach toward human rights policy to a more horizontal and

⁴⁶ See <http://www.nhri.net/nationaldatalist.asp> This website has been developed by the Danish Institute for Human Rights in cooperation with the Office of the High Commissioner for Human Rights. It is an international forum for researchers and practitioners in the field of NHRIs and an information platform for the NHRIs around the world for the promotion and protection of human rights.

⁴⁷ Interview with Yunkul Jung, International Cooperation officer, NHRCK, conducted in 17 June, 2009.

⁴⁸ *Id.*

⁴⁹ Kyung Hwan, Ahn, former Chairperson of NHRCK, *Interview: the government remains short but human rights last long*, The Hankyoreh, Mar. 28, 2009.

⁵⁰ For example, there is a concern about the Lee Myung-Bak administration’s move to downsize the National Human Rights Commission. It is considered a threat to the independence of NHRCK and the Commission filed a

cooperative relationship.⁵¹ Overall, the Commission has become an active driver for the promotion and protection of human rights in Korea.

complaint with the Constitutional Court against this plan. See Forum-Asia, *South Korea Government Announces Personnel Reductions for NHRCK*, Asian NI Watch, Mar. 1, 2009. http://www.forum-asia.org/news/press_releases/pdfs/NI%20Watch_Issue1.pdf ; *NHRCK strongly opposes government's plan to reduce their personnel*, The Hankyoreh, Mar. 24, 2009. http://english.hani.co.kr/arti/english_edition/e_national/345846.html ; *Editorial: Plan to reduce NHRCK should be withdrawn*, The Hankyoreh, Mar. 24, 2009. http://english.hani.co.kr/arti/english_edition/e_editorial/346305.html ; Asia Pacific Forum, *South Korea: NHRCK staff cut by 21 per cent, bureaus reduced*, <http://www.asiapacificforum.net/news/south-korea-nhrck-staff-cut-by-21-per-cent-bureaus-reduced.html> ;

⁵¹ Yi-Young Cho, *Human Rights Commission's Controversial Advice*, The Dong-A Ilbo, Apr. 15, 2005.

Appendix: The NHRCK's major issuance of recommendations and opinions for the improvement of legislation and government policies related to human rights.

(Source: The National Human Rights Commission of Korea, Annual Report 2002-2007)

Recommendation or Opinion Presented	Description	Date	Entities Concerned	status
Opinion: Disability Discrimination Bill	Agreed that the status of the organization to address discrimination should be re-examined, in relation to the proposed Disability Discrimination Bill, and presented the opinion that the definitions of discrimination, disabilities, and remedies should be the same with ones specified in the discrimination prevention recommendations offered to the Prime Minister by the Commission on July 24, 2006.	Jan. 25, 2007	Health and Welfare Committee of the National Assembly	Partially accepted
Opinion: Partial Amendment to the AIDS Prevention Act	Presented opinion on the Amendment to the AIDS Prevention Act proposed by the Ministry of Health and Welfare, and recommended that the Ministries of Health and Welfare, and Labor should revise their policy on AIDS.	Feb.25, 2007	Ministry of Health and Welfare, Ministry of Labor	Partially accepted
Opinion: Bill on the Prevention of Terrorist Financing	Presented opinion that the definition of terrorist acts should be deleted, conditions to designate those involved with terrorist acts should be more clarified, and failed attempts and accomplice for terrorist financing should be non-criminalized.	Apr. 9, 2007	Finance and Economy Committee of the National Assembly	Accepted
Recommendation: Establishment of National Action Plans	Recommendation for the government to establish a 5-year comprehensive Human Rights NAP (2007-2011), considering the Human Rights NAP Recommendation prepared by the Commission.	Jan. 9, 2006	President of Republic Of Korea, Ministry of Justice	Partially accepted
Recommendation: Legislation of anti-discrimination act	Recommendation to draft and institute an Anti-discrimination act.	Jul. 24, 2006	Prime Minister	Accepted
Opinion: Partial amendment to the Labor Standard Act	Opinion that the provision on penalties for unwarranted dismissal should be maintained to guarantee the right to labor and right for workers from vulnerable groups. Penalties should be mitigated and the Act should be amended such that	Oct. 9, 2006	Minister of Labor	Partially accepted

	victims may opt to not be prosecuted. The provision of penalties on employers' unilateral alteration of employment rules to the disadvantage of workers should be maintained.			
Recommendation on abolishment of National Security Act	The National Security Act should be abolished given that it has been the subject of heavy criticism since the time of its legislation due to its potential for human rights violations.	Aug. 23, 2004	National Assembly, Ministry of Justice	Not accepted
Opinions: bill draft on amendment to the Immigration Act	Recommended that foreigners subject to fingerprints be clearly indicated as 'those who have received orders of deportation and those who are being investigated on charges of violations by other laws'	Jul. 14, 2003	Ministry of Justice	Not accepted
Opinions: regarding the bill draft on Punishment of Crimes within the Jurisdiction of the International Criminal Court	Recommended that the relevant provision be made clear, a provision on punishment be added in order to prevent abuse of indictment and political power under the bill, and war crimes included in the Rome Statute but not included in the bill be included in the bill.	Sep. 22, 2003	Ministry of Justice	Accepted
Opinions: on Hoju System	Expressed opinions on human rights violations of Hoju System	Mar. 10, 2003	Constitutional Court	Accepted
Recommendation on NEIS of the Ministry of Education and Human Resources Development	School affairs, educational affairs, admittance and transfer of school, health, personnel records of teaching staff should be excluded from the NEIS.	May. 12, 2003	Ministry of Education and Human Resources Development	Partially accepted
Opinion: on legislation of the "Anti-Terrorism Act"	The clauses providing for the definition of terroristic conduct, procedure and restructuring of government functions violate the Constitution and the norms under international human rights law, and even the existing statutes can provide sufficient and effective preventive means and countermeasures against terrorism.	Feb.20, 2002	National Assembly	Accepted