

The Problem of Excessive Human Rights Safeguards in a Counter-Terror Measure: An Examination of the Human Security Act of the Philippines

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I. INTRODUCTION

Harsh measures, it is said, do not stop terrorism.¹ But do gentle ones counter them?² This Article examines the counter-terror law of the Philippines, the

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Human Security Act of 2007 (HSA).³ The Article begins with an analysis of the HAS's most controversial provision, Section 3, which enumerates the acts that constitute the crime of terrorism.⁴ The Article proceeds to discuss

1. Andrew Silke, *Fire of Iolaus: The Role of State Countermeasures in Causing Terrorism and What Needs To Be Done*, in *ROOT CAUSES OF TERRORISM: MYTHS, REALITY AND WAYS FORWARD* 254 (Tore Bjorgo ed., 2005).

2. *Id.*

3. An Act to Secure the State and Protect Our People from Terrorism [Human Security Act of 2007], Republic Act No. 9372 (2007).

4. *Id.* § 3. This Section provides that —

Sec. 3. Terrorism. — Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:

A. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);

B. Article 134 (Rebellion or Insurrection);

C. Article 134-a (Coup d' etat), including acts committed by private persons;

D. Article 248 (Murder);

E. Article 267 (Kidnapping and Serious Illegal Detention);

F. Article 324 (Crimes Involving Destruction)[;] or under

(1) Presidential Decree No. 1613 (The Law on Arson);

(2) Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);

(3) Republic Act No. 5207 (Atomic Energy Regulatory and Liability Act of 1968);

(4) Republic Act No. 6235 (Anti-Hijacking Law);

(5) Presidential Decree No. 532 (Anti-piracy and Anti-highway Robbery Law of 1974); and[]

(6) Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of [40] years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as [A]mended.

Id.

how the provision did away with the issues of vagueness and of freedom fighting and, in the process, compares the provision with its international equivalents. The Article then discusses the numerous human rights safeguards embedded in the law, the increased involvement of the Judiciary in the law's counter-terror measures, and the review and accountability systems. As will be observed, the Article adverts to the voluminous congressional records in order to ascertain legislative intent. The Article then argues that the HSA, despite its criticisms, extends due regard to human rights; and that, by being too sensitive to possible violations of human rights and by placing too many safeguards against government abuses, it may not have enough fangs to counter terrorist acts, thus putting into doubt its capacity to in fact protect human rights.

II. ON THE DEFINITION OF TERRORISM

A. Section 3 of the Human Security Act

In a bold attempt to describe that which the world has struggled to comprehensively define,⁵ the Philippine Legislature, in Section 3 of the HSA, laid down the scope of the crime of terrorism by imposing punitive sanctions on predicate felonies in the Revised Penal Code⁶ and other penal statutes⁷ and by adding the following elements:

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5. See OMER Y. ELAGAB & JEEHAAN O. Y. ELAGAB, INTERNATIONAL LAW DOCUMENTS RELATING TO TERRORISM xxv (2007).
 6. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932).
 7. See generally REVISED PENAL CODE, arts. 122, 134, 134-A, 248, 267, & 324; Amending the Law on Arson, Presidential Decree No. 1613 (1979); An Act to Control Toxic Substances and Hazardous and Nuclear Wastes, Providing Penalties for Violations thereof, and for Other Purposes [Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990], Republic Act No. 6969 (1990); An Act Providing for the Licensing and Regulation of Atomic Energy Facilities and Materials, Establishing the Rules on Liability for Nuclear Damage, and for Other Purposes [Atomic Energy Regulatory and Liability Act of 1968], Republic Act No. 5207 (1968); An Act Prohibiting Certain Acts Inimical to Civil Aviation, and for Other Purposes, Republic Act No. 6235 (1971); & Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition, of Firearms, Ammunition or Explosives or Instruments Used in the Manufacture of Firearms, Ammunition or Explosives, and Imposing Stiffer Penalties for Certain Violations thereof and for Relevant Purposes, Presidential Decree No. 1866 (1983).

- (1) “[S]owing and creating a condition of widespread and extraordinary fear and panic among the populace[;]”⁸ and
- (2) “[I]n order to coerce the government to give in to an unlawful demand.”⁹

The draft bills initially contained an enumeration of acts subjectively perceived as acts of terrorism.¹⁰ However, after a painstaking discussion on each individual act, the legislators decided to delete the enumeration altogether. Thus, with the intention to make the acts more precise, the enumeration was replaced with, as aforesaid, references to crimes under existing laws.¹¹ While cognizant that overt acts perpetuated by terrorists such as bombing structures are already punishable under current laws, the Legislature was likewise aware that the present statutes were qualitatively and quantitatively lacking to satisfactorily address the evolving crime; thus, it found the need to incorporate in a single legislation existing felonies, and to modify and qualify the same to cope with the development of the transnational crime.¹²

The Legislature, sensitive to the centuries-old Muslim struggle¹³ in the southern part of the Philippines¹⁴ and the communist insurgency in the country,¹⁵ and conscious not to upset the continuous peace negotiations and

8. Human Security Act of 2007, § 3.

9. *Id.*

10. *See* An Act Defining Terrorism, Establishing Institutional Mechanisms to Prevent and Suppress Its Commission, Providing Penalties Therefor and for Other Purposes, H.B. No. 4839, 13th Cong., 1st Reg. Sess. (2005) & An Act to Deter and Punish Acts of Terrorism and for Other Purposes, S.B. No. 2137, 13th Cong., 1st Reg. Sess. (2005).

11. S. JOURNAL, Sess. No. 39, at 662-63, 13th Cong., 3d Reg. Sess. (Nov. 8, 2006).

12. House of Representatives, Committee on Justice, Transcript of Session Proceeding 14-16 (Nov. 29, 2005).

13. *See generally* WAN KADIR CHE MAN, MUSLIM SEPARATISM: THE MOROS OF SOUTHERN PHILIPPINES AND THE MALAYS OF SOUTHERN THAILAND 22-25 & 55-59 (1990); DAVID JOEL STEINBERG, THE PHILIPPINES, A SINGULAR AND A PLURAL PLACE 23 & 90-91 (2000); & CESAR ADIB MAJUL, THE CONTEMPORARY MUSLIM MOVEMENT IN THE PHILIPPINES 17 (1985).

14. *See* House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 89-99 (May 11, 2005).

15. International Crisis Group, The Communist Insurgency in the Philippines: Tactics and Talks (An Unpublished Report) 1, *available at* <http://www.crisisgroup.org/~media/Files/asia/south-east-asia/philippines/202>

dialogues,¹⁶ emphasized that the new measure was not aimed at targeting Muslim insurgents¹⁷ and militant activists.¹⁸ Cognizant of the difficulty in defining terrorism on a worldwide scale and noting that a terrorist to one group could be a freedom fighter to another,¹⁹ thus the difficulty in reaching a comprehensive definition,²⁰ the legislators were in agreement in taking extra caution in defining the acts that would constitute terrorism, in distinguishing the new crime from existing crimes, and in ensuring that conviction under the law would only be possible if all the set parameters were met.²¹

B. Distinguishing Terrorism from Ordinary Crimes

The commission of any of the predicate crimes is only considered as an act of terrorism if and when the aforementioned two elements are attendant.²² The act, for example, of rising publicly and taking arms to overthrow the government, which is conceptually rebellion under existing Philippine laws, will not be punished under the HSA absent a showing of the presence of the added elements.²³ This position was emphasized by the legislators in the Bicameral Conference Committee meeting, specifically when one of the congressmen, who was then facing a charge of rebellion in conspiracy with military rebels, raised the point that the definition may cover the charge against him.²⁴ By parity of reasoning, then, kidnapping for ransom, bombing

[%20The%20Communist%20Insurgency%20in%20the%20Philippines%20Tactics%20and%20Talks.pdf](#) (last accessed Sep. 12, 2013).

16. See MARITES D. VITUG & GLENDA M. GLORIA, UNDER THE CRESCENT MOON: REBELLION IN MINDANAO 95-102 & 154-55 (2000).
17. House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 29-31, 40-42, & 56 (May 11, 2005) & House of Representatives, Committee on Justice, Transcript of Session Proceeding 66 (Dec. 12, 2005).
18. Minutes of the Bicameral Conference Committee Meeting on the Disagreeing Provisions of H.B. No. 4839 & S.B. No. 2137 15-17 (Feb. 8, 2007).
19. House of Representatives, Committee on Justice, Transcript of Session Proceeding 9-11 (Nov. 29, 2005).
20. ELAGAB & ELAGAB, *supra* note 5, at xxv.
21. S. JOURNAL, Sess. No. 86, at 1074-75 & 1202, 13th Cong., 2d Reg. Sess. (May 22-26 & 29-31, 2006).
22. S. JOURNAL, Sess. No. 54, at 1087, 13th Cong., 3d Reg. Sess. (Dec. 20, 2006).
23. See REVISED PENAL CODE, art. 134. See also Human Security Act of 2007, § 3.
24. Minutes of the Bicameral Conference Committee Meeting on the Disagreeing Provisions of H.B. No. 4839 & S.B. No. 2137, at 15-17.

of buses and ferries, and burning of a “hospital, dormitory, hotel, lodging house[,] or shopping center,”²⁵ which are typical atrocities of the Abu Sayyaf Group (ASG),²⁶ will only fall under terrorism if these cause widespread and extraordinary fear and panic and were intended to coerce the government to accede to the group’s demand.²⁷ The added elements, therefore, set apart a terrorist from a rebel, an insurgent, a militant activist, or, for that matter, a freedom fighter.

Indeed, in defining the acts that will amount to terrorism, “it will have to include a description of who may be the perpetrator, what the motive is, the character of his act[,] and on what basis he chooses his target (property or public). In short, there is a need to identify what makes the terrorist different.”²⁸ In this respect, the HSA has achieved this.

C. On “Widespread and Extraordinary Fear and Panic” and “Unlawful Demand”

Criticism is nevertheless thrown at Section 3 of the HSA by liberalists and activists for its vagueness. It has been posited that the law “does not provide comprehensible standards to guide the authorities and the suspect as to what acts constitute ‘terrorism’ [because the] ... qualifying phrase [(the additional elements)] does not really qualify at all.”²⁹ It is respectfully submitted, however, that while the qualifiers in Section 3 seem to be unclear at first, a deeper analysis coupled with the use of the tools of statutory construction, shows that they bear specific meanings. The vagueness of the terms is, in other words, more apparent than real.

Incidentally, the Philippine Supreme Court (SC), the highest court in the country, dismissed on procedural grounds *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*,³⁰ ruling that under

25. S. JOURNAL, Sess. No. 54, at 1086.

26. PATRICIO N. ABINALES & NATHAN G. QUIMPO, THE US AND THE WAR ON TERROR IN THE PHILIPPINES 157–62 (2008) & International Crisis Group, Philippines Terrorism: The Role of Militant Islamic Converts (An Unpublished Report) 16–18, available at http://www.crisisgroup.org/~media/Files/asia/south-east-asia/philippines/110_philippines_terrorism_the_role_of_militant_islamic_converters.pdf (last accessed Sep. 12, 2013).

27. S. JOURNAL, Sess. No. 54, at 1086–87.

28. ELAGAB & ELAGAB, *supra* note 5, at xxv.

29. Harry L. Roque Jr, *The Human Security Act and the IHL Law of the Philippines: of Security and Insecurity*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 316–17 (Victor V. Ramraj, et al. eds., 2012).

30. *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 632 SCRA 146 (2010).

existing jurisprudence, a litigant is not permitted to mount a facial challenge against a penal statute for being either vague or overbroad.³¹ Rather than restricting speech, the HSA restricts conduct; thus, the Court would not be able to conduct a facial analysis.³² Also, while the void-for-vagueness ground is allowed in an as-applied challenge to a penal statute, the vagueness analysis could not be performed in *Southern Hemisphere* because the petitioners were not facing actual or imminent charges under the law.³³ The petitioners, thus, had no legal standing³⁴ and no actual case or controversy to present for resolution.³⁵ Assuming, however, that an as-applied challenge is mounted, the HSA will successfully hurdle the void-for-vagueness test because it clearly identifies what crime has been committed, that is, the predicate crimes in Section 3 attended by the two elements.³⁶

Furthermore, and importantly, a court construing the wordings of the two attendant elements will, as abovementioned, recognize that they bear specific meanings. In the interpretation of a statute, “the primary rule is to search for and determine the intent and spirit of the law,”³⁷ hence, “[a] construction should be rejected that gives to the language used in a statute a meaning that does not accomplish the purpose for which [it] was enacted, and that tends to defeat the ends which are sought to be attained by the enactment.”³⁸ In this respect, the deliberations of the Legislature are replete with specific scenarios in which the law will likely operate. These legislative discussions are primordial in any attempt to interpret the Section 3 definition. With sufficient guidelines having been laid down, the attack based on the law’s vagueness loses force.

To elucidate, for an act to be covered by the new law, the widespread and extraordinary fear and panic that it causes must be “so great as to require the government to act affirmatively or negatively to a demand of the person

31. *Id.* at 186.

32. *Id.* at 191–92.

33. *Id.* at 193.

34. *Id.* at 167.

35. *Id.* at 175.

36. Brent H. Lyew, *An Examination of the Philippines Anti-Terror Law — Suaviter in Modo, Fortiter in Re*, 19 PAC. RIM L. & POL’Y J. 187, 198–200 (2010). *See also* Human Security Act of 2007, § 3.

37. *MCC Industrial Sales Corporation v. Ssangyong Corporation*, 536 SCRA 408, 443 (2007).

38. *Id.*

doing the act.”³⁹ While the Legislature has given ample latitude for the Judiciary to come up with a definitive interpretation of when “fear and panic” should be regarded as “widespread,”⁴⁰ as indeed such a consideration calls for an appreciation of the factual circumstances of each case, the Legislature laid down examples from which courts should be guided in developing its case law on the matter.⁴¹ By way of illustration, fear and panic caused by the ASG to a “sparsely populated [village]” will not be considered as widespread because its extent is not so great as to coerce the government, which has the full force of the armed forces to control and contain the situation, to accede to such pressure.⁴² As borne by the legislative deliberations, the “massiveness” of the injury, damage, or destruction caused by terrorists should approximate 9/11 or the London and Spain bombings.⁴³ On this logic, the blowing up for whatever reason of an empty building, causing no casualties, will not fall under the definition.⁴⁴

The Senate Bill’s sponsor⁴⁵ stressed this high threshold of the additional elements when he regarded the Communist Party of the Philippines-New People’s Army, which has been staging a rebellion against the government for about 50 years now,⁴⁶ as not having really instilled “that kind of fear ... attendant to a series of bombings and unabated killings” necessary to enliven Section 3 of the HSA.⁴⁷ After tracing the history of terrorism from the French Revolution to the Balkan Wars,⁴⁸ the Senate Bill’s sponsor further observed that terrorist acts were characterized by the use of violence on a direct target to pressure an indirect target into yielding to the perpetrators’ desired objective.⁴⁹ In crafting Section 3 therefore, the Legislature identified government as the indirect primary target, with the population as the direct target, and included as an essential element the assertion of the actor of an unlawful demand.⁵⁰

39. S. JOURNAL, Sess. No. 10, at 143, 13th Cong., 3d Reg. Sess. (Aug. 14, 2006).

40. S. JOURNAL, Sess. No. 54, at 1087.

41. *Id.* at 1085-87.

42. *Id.* at 1087.

43. S. JOURNAL, Sess. No. 10, at 143-44.

44. S. JOURNAL, Sess. No. 54, at 1086.

45. S. JOURNAL, Sess. No. 86, at 1074.

46. International Crisis Group, *supra* note 15, at 1.

47. S. JOURNAL, Sess. No. 13, at 259, 13th Cong., 3d Reg. Sess. (Aug. 14, 2006).

48. S. JOURNAL, Sess. No. 86, at 1200-01.

49. *Id.* at 1201.

50. *Id.* at 1203.

It is submitted that this “unlawful demand” qualification in the law operates in two ways that, rather than contributing to the perceived vagueness of the provision, actually provide specificity to the crime in Section 3. First, a violent act calculated to sow widespread fear, if unaccompanied by a demand, will not fall under the law, but may be embraced by other penal statutes. As stressed in the legislative deliberations, the perpetrator’s desire to accomplish a specific end or objective proves important in considering if the crime is to be considered terrorism.⁵¹ Following this logic to its extreme, a suicide bombing in Manila of 9/11 proportions will not be a terrorist act absent a demand from the perpetrators. Second, it is only when the demand is “unlawful” that the violent act will be embraced by the subject provision. A group for example who plants and detonates a bomb in an airport, similar to the bomb attacks of the Moro Islamic Liberation Front,⁵² to pressure the government to accede to demands of secessionism, autonomy, recognition of independence, or freedom from oppression and exploitation; or demands for equal treatment in terms of the provision of educational, employment, or health benefits, of the giving of dole-outs or social security benefits, or of the allocation of public funding, will hardly be considered as engaging in a terrorist act. With this second attendant element then, a high standard is again laid down by the Legislature, making it all the more difficult to mount a charge of terrorism.

Fears that Section 3 is “too broad and too sweeping, covering many crimes that are already punishable under existing laws[,] ... [blurring] the distinction between real acts of terrorism and ordinary crimes[;]”⁵³ that “[Section 3] can be interpreted to include all acts in pursuit of legitimate dissent[;]”⁵⁴ and that “the law can and will be used to illegalize the legitimate activities of critics and opponents of the [ruling] administration[;]”⁵⁵ thus become chimerical. With the additional two elements, the law has not only done away with the issue of vagueness, but also and importantly, it has addressed the worldwide definitional impasse on the term terrorism by

51. S. JOURNAL, Sess. No. 3, at 39, 13th Cong., 3d Reg. Sess. (July 26, 2006).

52. See International Crisis Group, Southern Philippines Backgrounder: Terrorism and the Peace Process (An Unpublished Report) 7, available at [http://www.crisisgroup.org/~media/Files/asia/south-east-asia/philippines/080_southern_philippines_backgrounder_terrorism_n_peace_process.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/philippines/080_southern_philippines_backgrounder_terrorism_n_peace_process.pdf) (last accessed Sep. 12, 2013).

53. S. JOURNAL, Sess. No. 64, at 1451-52, 13th Cong., 3d Reg. Sess. (Feb. 7 & 8, 2006).

54. *Id.* at 1452.

55. *Id.*

making it harder to attribute the said crime to acts of rebels, militant groups, or freedom fighters.⁵⁶

D. Section 3 of the Human Security Act and its International Equivalents

Enacting a law quite belatedly, the Philippine Legislature had the benefit of examining the experiences of other nations, specifically those of the United States (U.S.), which previously colonized the archipelago and experienced what is regarded as the most gruesome terrorist act of recent times.⁵⁷ Interestingly, however, the legislative deliberations are filled with references to the mistakes of the Bush administration and with the Legislature's circumspection not to tread the same path that the U.S. had taken.⁵⁸ The Philippine Senate was precise in its vision not to enact a law that would be taken as an act of waging "war against terrorism" but rather "simply [as the institution of] defensive and punitive legal action against deviants who might commit [acts of terrorism]."⁵⁹ A senator, in fact, maintained during the deliberations that "no state has ever collapsed because of terrorism[,] unlike ... rebellion or revolution."⁶⁰ Terrorism is, accordingly, "a [mere] technique, [a] part of the violence used in insurgency or in [a] rebellious effort."⁶¹ It is thus "very important to perceive the characterization of the terrorist as both missionary and warrior, so that if [he] fails in his mission and is caught, there [is] a law under which to punish him."⁶²

While the Philippine Legislature, in drafting Section 3, found it prudent to refer to specific crimes in existing penal laws to achieve precision, it was also cognizant of the rush in which the USA Patriot Act⁶³ was enacted, and of the challenges brought against the law after its enactment.⁶⁴ Thus, it did

56. *Id.*

57. See generally Internet Archive, Understanding 9/11, available at <http://archive.org/details/911> (last accessed Sep. 12, 2013).

58. S. JOURNAL, Sess. No. 53, at 1056-59, 113th Cong., 3d Reg. Sess. (Dec. 19, 2006) & S. JOURNAL, Sess. No. 64, at 1451.

59. S. JOURNAL, Sess. No. 53, at 1057.

60. *Id.* at 1058.

61. *Id.*

62. *Id.*

63. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act of 2001), 115 Stat. 272 (2001).

64. House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 18-19 & 34-36 (May 4, 2005).

not, as what the U.S. Legislature did, make a sweeping reference to all “violation[s] of the criminal laws.”⁶⁵ Section 3, in other words, is more specific and is fastidious in choosing the predicate crimes that would constitute acts of terrorism.

Section 3, as opposed to Section 802 of the USA Patriot Act, did not use big words such as “acts dangerous to human life,”⁶⁶ “intimidate or coerce a civilian population,”⁶⁷ “influence the policy of a government by intimidation or coercion,”⁶⁸ and “affect the conduct of a government by mass destruction,”⁶⁹ which to a great degree contributed to the criticism that Section 802 is vague.⁷⁰ The phrase “widespread and extraordinary fear and panic,” however, seems to carry the same meaning as the Americans’ “intimidate or coerce a civilian population,”⁷¹ which, as interpreted by the Supreme Court of New York in *People v. Morales*,⁷² denotes an intimidation of the “general public in a given area, or a broad category of the general public in a given area.”⁷³ In this respect, both provisions, Section 3 and Section 802, envision the terrorizing effect of a violent act to be indubitably substantial and wide-ranging.⁷⁴

As discussed above, Section 3 is responsive to the rhythmic unrest that has characterized the political history of the country to the effect that it did not adopt the American formulations of “[influencing] the policy of the government”⁷⁵ and “[affecting] the conduct of [the] government”⁷⁶ in drawing up the “unlawful demand” qualification. To its credit, the HSA

65. See Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 255, & 265 (2004).

66. USA Patriot Act of 2001, § 802.

67. *Id.*

68. *Id.*

69. *Id.*

70. See Richard Falk, *Encroaching on the Rule of Law: Post-9/11 Policies within the United States*, in NATIONAL INSECURITY AND HUMAN RIGHTS, DEMOCRACIES DEBATE COUNTERTERRORISM 34-35 (Alison Brysk & Gershon Shafir eds., 2007).

71. USA Patriot Act of 2001, § 802.

72. *People v. Morales*, 86 A.D.3d 147 (N.Y. 2011) (U.S.).

73. *Id.* at 160.

74. *Id.* at 156-60.

75. USA Patriot Act of 2001, § 802 (a) (5) (B) (ii).

76. *Id.* § 802 (a) (5) (B) (iii).

draws the line between freedom fighting and purely terrorizing, unlike the USA Patriot Act that seems to have blurred this distinction.

Interestingly, the Legislature, after much thought, deleted from the draft of Section 3 the phrase “either to advance, propagate[,] or promote a religious, political[,] or ideological belief,”⁷⁷ and rejected altogether suggestions that this qualification be instead reworded to the effect that the “[terrorist] act is intended to obtain some military, political[,] or philosophical end,”⁷⁸ or that the same is in “pursuit of political or ideological belief.”⁷⁹ With the non-inclusion of the said qualification, the HSA steers clear of the problematic issue encountered by the USA Patriot Act and the United Kingdom (U.K.) Terrorism Act 2000.⁸⁰ This issue is that Section 802 and Section 1, respectively, are generally regarded as broad and overinclusive;⁸¹ as not “providing an exclusion in [favor] of advocacy, protest[,] or industrial action” thus, they “encompass[] groups whose methods are generally non-violent and who[se] [aims are not] to intimidate or to coerce the government or the public;”⁸² and “as appli[cable] in cases that do not justify the use of speciali[z]ed powers and offen[s]es.”⁸³ As aforesaid, the employment of the “unlawful demand” qualification in the HSA, which is absent in its American and British counterparts, has narrowed down the coverage of the provision and made it applicable only in the most extreme of cases. In fact, during the legislative deliberations, the senators recounted the incident in mid-1980s when air traffic controllers in Manila staged a strike that paralyzed the country’s airports.⁸⁴ Aware that the industrial action was aimed at winning economic concessions for the

77. S. JOURNAL, Sess. No. 54, at 1087.

78. S. JOURNAL, Sess. No. 3, at 38.

79. S. JOURNAL, Sess. No. 10, at 144.

80. Terrorism Act 2000, c. 11, § 1 (U.K.).

81. KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM 181-82 & 255-57 (2011) [hereinafter ROACH, 9/11 EFFECT].

82. Ben Golder & George Williams, *What is Terrorism? Problems of Legal Definition*, 27 U.N.S.W. L.J. 270, 289 (2004).

83. ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION — THE TERRORISED LEGISLATOR? A COMPARISON OF COUNTER-TERRORISM LEGISLATION AND ITS IMPLICATIONS ON HUMAN RIGHTS IN THE LEGAL SYSTEMS OF THE UNITED KINGDOM, SPAIN, GERMANY, AND FRANCE 161-62 (2009).

84. United Press International, 7-Hour Philippine Strike Stops Air Traffic, L.A. TIMES, Aug. 2, 1986, available at http://articles.latimes.com/1986-08-02/news/mn-984_1_air-traffic-controllers (last accessed Sep. 12, 2013).

workers, whose demands were not per se “unlawful,” and hence did not deserve punitive action, the senators were in agreement that the draft Section 3 needed rewording so as not to cover the said scenario.⁸⁵

The inclusion, moreover, of the two elements, which as discussed above, limit the law’s coverage and eliminate the freedom fighter issue, provides Section 3 with a point of congruence to United Nation Security Council Resolution 1566,⁸⁶ which itself “presents a relatively narrow definition, limited to acts constituting sectoral offen[s]es (typically serious violence endangering life or property, and requiring an international element).”⁸⁷ However, the deletion of the words “religious, political[,] or ideological” as qualifiers in Section 3, and the use of “unlawful” to describe the nature of the demand accompanying the atrocious acts, make Section 3 vulnerable, similar to Resolution 1566, to the criticism that the definition encompass “private acts which terrorize, intimidate[,] or coerce.”⁸⁸

E. Section 3 of the Human Security Act and Human Rights

As discussed at length above, the terms used in Section 3 are not as vague as they appear to be. In fact, their specificity excessively restricts the scope of the law, which suggests that Section 3 does not truly curtail the people’s civil and political rights. For this same reason, however, the HSA is endowed with feet of clay. The restrictiveness of the coverage of Section 3 gives wide leeway for extremists and fundamentalists to wield terror without having to contend with the HSA. There is thus a conceptual difficulty in arriving at a proposition that Section 3 indeed protects human rights.

As already hypothetically hinted above, if a militant group with political and ideological objectives, and with demands for secessionism, massacres civilians from a sparsely populated village upon the government’s refusal to accede to their demands, an atrocity reminiscent of the ASG attacks,⁸⁹ they will not be covered by the law because their attack did not create such a “widespread and extraordinary fear,” and because the demand to secede is

85. S. JOURNAL, Sess. No. 15, at 216-17, 13th Cong., 3d Reg. Sess. (Aug. 28, 2006).

86. S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

87. BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 247 (2006).

88. *Id.*

89. See MARIA RESSA, SEEDS OF TERROR: AN EYEWITNESS ACCOUNT OF AL-QAEDA’S NEWEST CENTER OF OPERATIONS IN SOUTHEAST ASIA 108-09 (2004) & VITUG & GLORIA, *supra* note 16, at 192-93.

not intrinsically “unlawful.” How, then, can it be accepted that Section 3 protects human rights, specifically, the right to life?

Indeed, as it has been aptly phrased, “[h]uman rights law forbids using the lives of one group of people instrumentally to secure the happiness (or ideology) of another, ‘people should always be treated as ends in themselves and never merely as means.’”⁹⁰ In this respect, Section 3 is inept in fulfilling the HSA’s policy, as stated in Section 2, “to protect life, liberty, and property from acts of terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations.”⁹¹ The HSA, in being too careful not to be overly inclusive, in being too nostalgic of its country’s past liberation struggle, and thus too sentient of freedom fighters and too soft-hearted to militants and rebels, unwittingly downplayed the fact that a counter-terrorism measure is primarily aimed at preventing “the perpetration of terrorist acts [that are] certainly [] attack[s] on the most basic human rights.”⁹²

For the HSA to be truly protective of human rights, it must achieve a balance between its effectiveness in countering terrorist acts that affront, foremost, the right to life, and its suitability as a measure despite its curtailment of democratic rights, which brings the discussion to the law’s safeguards on human rights.⁹³

III. THE LAW AND HUMAN RIGHTS

A. *Safeguards of the Human Security Act*

In their deliberations, the Legislature recalled excesses of the Executive and the military⁹⁴ during the dictatorial era⁹⁵ that exacerbated political dissension

90. SAUL, *supra* note 87, at 79.

91. Human Security Act of 2007, § 2.

92. Cástor Miguel Diaz-Barrado, *The Definition of Terrorism and International Law*, in INTERNATIONAL LEGAL DIMENSION OF TERRORISM 33 (Pablo Antonio Fernandez-Sanchez ed., 2009).

93. *Id.* at 34.

94. See House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 37 (May 31, 2005).

95. See House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 33-35 (May 11, 2005).

in the country.⁹⁶ Thus, as counter-terrorism measures were evocative of Martial Law, the legislators saw to it that the HSA had sufficient safeguards to prevent abuses and ensure the protection of fundamental rights.⁹⁷

The Legislature was also concerned with the predominant political climate.⁹⁸ Journalists and activists went missing and were later found lifeless.⁹⁹ To address fears that the law may be used by the unpopular Arroyo administration to put an end to “political opposition,” the legislators entertained the idea that the law would at least control the extrajudicial killings that rose rapidly in 2006 from the time former President Gloria Macapagal-Arroyo assumed office in 2001.¹⁰⁰ The Legislature was further alarmed by her pronouncement of an all-out war against rebels and her exultation of the military efforts of a general perceived by the public to be responsible for the killings and disappearances.¹⁰¹

The draft bill thus went through several amendments and revisions, significant of which are the deletion of the provisions punishing “proposal”¹⁰² and “threatening to commit terrorism”¹⁰³ (the crime of conspiracy to commit terrorism is however retained in the law);¹⁰⁴ the deletion of the provision penalizing membership in a terrorist organization;¹⁰⁵ the insertion in Section 6,¹⁰⁶ so as not to “criminaliz[e]

96. VITUG & GLORIA, *supra* note 16, at 30.

97. S. JOURNAL, Sess. No. 5, at 67, 13th Cong., 3d Reg. Sess. (Aug. 1, 2006).

98. *Id.*

99. House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 24-25 (May 4, 2005).

100. S. JOURNAL, Sess. No. 5, at 67

101. *Id.* at 66.

102. S. JOURNAL, Sess. No. 15, at 217.

103. *Id.*

104. Human Security Act of 2007, § 4. This Section provides that —

SEC. 4. *Conspiracy to Commit Terrorism.* — Persons who conspire to commit the crime of terrorism shall suffer the penalty of 40 years of imprisonment.

There is conspiracy when two or more persons come to an agreement concerning the commission of the crime of terrorism as defined in Section 3 hereof and decide to commit the same.

Id.

105. S. JOURNAL, Sess. No. 54, at 1097.

106. Human Security Act of 2007, § 6. This Section provides that —

neutral acts such as supplying food to a [suspected terrorist,]" and of a second paragraph which provides that relatives assisting an offender will not be treated as accessories;¹⁰⁷ and the addition of a paragraph in Section 39 that would allow a suspected terrorist, whose assets had been seized, to obtain sufficient sums for his and his family's needs.¹⁰⁸

Another noteworthy feature of the law is the award of liquidated damages of ₱500,000.00 per day, in cases of unproven charges of terrorism resulting in acquittal or dismissal of charges, for the length of time that properties, assets, or funds are seized in Section 41, or for the period of detention without warrant in Section 50.¹⁰⁹ As a deterrent to the filing of flimsy charges, the said amount will be taken from the annual appropriation of the law enforcement agency or the Anti-Terrorism Council (ATC) created in Section 53, that brought or sanctioned the filing of the charges against the accused.¹¹⁰

B. On Surveillance, Intercepts, and Wiretaps

SEC. 6. *Accessory*. — Any person who, having knowledge of the commission of the crime of terrorism or conspiracy to commit terrorism, and without having participated therein, either as principal or accomplice under Articles 17 and 18 of the Revised Penal Code, takes part subsequent to its commission in any of the following manner: (a) by profiting himself or assisting the offender to profit by the effects of the crime; (b) by concealing or destroying the body of the crime, or the effects, or instruments thereof, in order to prevent its discovery; (c) by harboring, concealing, or assisting in the escape of the principal or conspirator of the crime, shall suffer the penalty of 10 years and one day to 12 years of imprisonment.

Notwithstanding the above paragraph, the penalties prescribed for accessories shall not be imposed upon those who are such with respect to their spouses, ascendants, descendants, legitimate, natural, and adopted brothers and sisters, or relatives by affinity within the same degrees, with the single exception of accessories falling within the provisions of subparagraph (a).

Id.

107. S. JOURNAL, Sess. No. 41, at 687, 13th Cong., 3d Reg. Sess. (Nov. 14, 2006).

108. S. JOURNAL, Sess. No. 54, at 1099.

109. Human Security Act of 2007, §§ 41 & 50.

110. S. JOURNAL, Sess. No. 54, at 1085.

Section 7 of the HSA, which carves out an exception to the Anti-Wiretapping Law of the Philippines,¹¹¹ permits, upon *ex parte* judicial application, the interception and recording of the communication of suspected terrorists.¹¹² Noticeably, the HSA, in an effort to avoid abuses and to give due regard to the right to privacy, lays down a rigid procedure before surveillance is permitted. A law enforcement officer must first obtain clearance to file an application¹¹³ from the ATC composed of seven Cabinet members.¹¹⁴ After hurdling this first challenge, the police officer then files the application in court. The court must be satisfied that there is probable cause, the degree of such satisfaction being similar to that required in the issuance of search warrants.¹¹⁵ In other words, the application must be “based on personal knowledge of facts and circumstances that the crime is to be committed.”¹¹⁶ Additionally, it must be shown that the essential evidence for conviction or prevention will be obtained through no other effective means than the surveillance.¹¹⁷ It must be noted at this point that the courts have interpreted “personal knowledge” strictly against law enforcement units.¹¹⁸ It must further be noted that the court that hears the application is the Court of Appeals, which in the Philippine judicial hierarchy ranks second to the SC and is generally perceived as more credible than courts of lower rank.¹¹⁹

A proviso in Section 7 was also inserted that disallows granting of authorization to wiretap communications between certain classes of persons.¹²⁰ The Legislature maintained that

lawyers and their clients must have confidentiality of communication [which] is vital for the administration of justice; physicians need to be able to prescribe certain medical treatment to their patients without being

111. An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes, Republic Act No. 4200 (1965).

112. Human Security Act of 2007, § 7.

113. *Id.* § 8.

114. *Id.* § 53.

115. S. JOURNAL, Sess. No. 3, at 41.

116. Human Security Act of 2007, § 8.

117. *Id.*

118. *Kho v. Lanzas*, 489 SCRA 444, 466 (2006) & *Alvarez v. The Court of First Instance of Tayabas*, 64 Phil 33, 46 (1937).

119. Human Security Act of 2007, § 8.

120. *Id.* § 7.

intruded upon by law enforcement agencies; the sanctity of communication between journalists and their sources must be maintained as it is part of the freedom of speech and of the press under the Constitution; and business correspondence should remain confidential as enterprises need to have the freedom to operate in accordance with the law.¹²¹

While the law deems the ATC authorization papers and the court order authorizing the surveillance as classified, the law allows the suspect to challenge the legality of the interference after having been notified of such order.¹²² While this does not really assist the suspect much because he was already subjected to surveillance, this may however affect any request for extension of the period of surveillance.¹²³ After the fact, the recordings, treated as classified information, are then deposited to the authorizing court¹²⁴ and will only be used in evidence in a prosecution if the authorizing court will allow the same.¹²⁵ To obtain this second level of authorization, the Department of Justice, the government's prosecutorial arm, must first obtain again a clearance from the ATC and must notify the person subject of surveillance that the recording will be used against him.¹²⁶

Perhaps the best protection to human rights afforded by the law, in relation to surveillance, is its prohibition in Section 16 against unauthorized or malicious interception and recording of communications.¹²⁷ The HSA

121. S. JOURNAL, Sess. No. 54, at 1096.

122. Human Security Act of 2007, § 9.

123. *Id.* § 10.

124. *Id.* §§ 11 & 12.

125. *Id.* § 13.

126. *Id.* §§ 13 & 14.

127. *Id.* § 16. This Section provides that —

SEC. 16. *Penalty for Unauthorized or Malicious Interceptions and/or Recordings.* — Any police or law enforcement personnel who, not being authorized to do so by the authorizing division of the Court of Appeals, tracks down, taps, listens to, intercepts, and records in whatever manner or form any communication, message, conversation, discussion, or spoken or written word of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism shall be guilty of an offense and shall suffer the penalty of 10 years and one day to 12 years of imprisonment.

In addition to the liability attaching to the offender for the commission of any other offense, the penalty of 10 years and one day to 12 years of imprisonment and the accessory penalty of perpetual absolute disqualification from public office shall be imposed upon any police or

imposes penalties of 10 to 12-year imprisonment and perpetual absolute disqualification from public office on any law enforcement personnel who intercepts and records communications without judicial authorization, or who maliciously obtains the said authorization.¹²⁸ As can be seen, the law has laid down strict measures in the conduct of surveillance. Though with the stringency of the requirements, there is a possibility that law enforcement officials will resort to, despite the prohibition in Section 16, the conduct of covert operations.

C. On Detention

Sections 18 and 19 of the HSA further provide only three days as the maximum period of detention without warrant.¹²⁹ Originally, it was 15 days in the draft bill but it was then reduced to five days.¹³⁰ Taking note that the 48-hour period in U.K. law to be too short which may tempt law enforcers pressed with time “to resort to extralegal measures such as forcing the accused to confess or incriminate himself[.]”¹³¹ the Legislature eventually settled for three days in line with the period of detention allowed when the privilege of the writ of *habeas corpus* is suspended under the Philippine Constitution.¹³² The failure to present the detainee to a judicial authority within the three-day period will further subject the apprehending officer to penal sanctions.¹³³

law enforcement personnel who maliciously obtained an authority from the Court of Appeals to track down, tap, listen to, intercept, and record in whatever manner or form any communication, message, conversation, discussion, or spoken or written words of a person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism: Provided, That notwithstanding Section 13 of this Act, the party aggrieved by such authorization shall be allowed access to the sealed envelope or sealed package and the contents thereof as evidence for the prosecution of any police or law enforcement personnel who maliciously procured said authorization.

Human Security Act of 2007, § 16.

128. *Id.* § 16.

129. *Id.* §§ 18 & 19.

130. S. JOURNAL, Sess. No. 41, at 688-89.

131. *Id.* at 689.

132. See House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 34 (May 25, 2005) & PHIL. CONST. art. VII, § 18.

133. Human Security Act of 2007, § 20.

The law further mandates that a detainee immediately after arrest must be read his Miranda rights,¹³⁴ and be provided the services of counsel if he is unable to afford one.¹³⁵ The custodial unit of the police must also maintain a logbook¹³⁶ detailing each and every fact and circumstance surrounding the detention.¹³⁷ As an added human rights safeguard, Section 18 includes a proviso that the arrest and detention “must result” from the sanctioned surveillance under Section 7 and the permitted examination of bank deposits under Section 27.¹³⁸ These are the only “reasonable bas[es] for an arrest without warrant.”¹³⁹

D. On Torture and Extraordinary Rendition

The HSA outlaws any form of torture and imposes the penalty of 12 to 20 years of imprisonment to any person who uses threat, intimidation, or coercion, exerts mental, moral, or psychological pressure, or inflicts pain in any investigation or interrogation for terrorism.¹⁴⁰ It may be well to note that this proscription was subject to heated debate in the congressional floor. The Legislature was concerned with the reports about the prevalence of torture in the interrogation by the police and the military of Muslims and suspected terrorists in the South.¹⁴¹ A legislator, however, pointed out the country’s lack of capacity to conduct “long-term surveillance” as compared to developed nations, and hence entertained the idea that some “torture tactics” should be permitted in cases of “stonewalling.”¹⁴² This met opposition from the bill’s sponsor asserting that “it is not right to resort to

134. PHIL. CONST. art. III, § 12 (1). This Section states that —

Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

Id. See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

135. PHIL. CONST. art. III, § 12 (1).

136. S. JOURNAL, Sess. No. 13, at 261.

137. Human Security Act of 2007, § 23.

138. *Id.* § 18.

139. S. JOURNAL, Sess. No. 47, at 936, 13th Cong., 3d Reg. Sess. (Nov. 14, 2006).

140. Human Security Act of 2007, § 25.

141. House of Representatives, Committee on Justice joint with Committee on Foreign Affairs, Transcript of Committee Meeting 11–18 (May 25, 2005).

142. S. JOURNAL, Sess. No. 24, at 369, 13th Cong., 3d Reg. Sess. (Sep. 18, 2006).

extralegal means like torture out of fear of terrorist acts”¹⁴³ and “that it is enough to give law enforcement units the means to gather evidence beyond what is allowable under normal condition in a democratic society.”¹⁴⁴

Consistent with its abhorrence of the use of torture, the law also bans extraordinary rendition and will only allow the same if the suspected terrorist’s testimony is absolutely required in a judicial trial conducted in a foreign country.¹⁴⁵ The Government must however be satisfied with assurances by the requesting country that the suspect’s human rights will be protected and that the suspect will not be tortured and deprived of his right to counsel.¹⁴⁶

From what has been discussed so far, the HSA is filled with safeguards which protect human rights. A legislator even noted that they were able “to remove the sharpest teeth of the anti-terror bill that could bite the civil liberties of the people.”¹⁴⁷ A recurring theme further in the deliberations is that the foremost concerns in enacting the law are the “safeguarding [of] human rights and [the] observ[ance] [of] due process.”¹⁴⁸ To this end, the Legislature fashioned the law in such a way that the judicial branch actively participates in the counter-terrorism measure and that the system of checks and balances is well in play, as will be expounded in the succeeding section.

IV. THE LAW AND THE JUDICIAL BRANCH

A. The Pivotal Role of the Judiciary

Scattered all over the law are provisions which describe the active role played by the Judiciary in the country’s counter-terrorism efforts. In the evidence gathering through surveillance, the court vigorously participates, as it is the government branch that gives the final go for such state action.¹⁴⁹ It is also the storehouse of all surveillance recordings and the body that approves its consequent disclosure or use as evidence in any prosecution.¹⁵⁰

143. *Id.*

144. *Id.*

145. Human Security Act of 2007, § 57.

146. *Id.*

147. S. JOURNAL, Sess. No. 64, at 1455.

148. House of Representatives, Committee on Justice, Transcript of Committee Meeting 67 (Jan. 18, 2005).

149. *See* Human Security Act of 2007, §§ 27-39.

150. *Id.*

This is not to mention the court's function in the examination and consequent seizure of bank deposits and assets of suspected terrorists.¹⁵¹

The judge of a court may likewise authorize detention for more than three days.¹⁵² The judge further has the duty to observe, examine, and determine whether a suspect brought to him has been subjected to any form of torture.¹⁵³ Moreover, the court has the function of determining whether to restrict the right to travel of persons charged with terrorism.¹⁵⁴

Additionally, in the listing of terrorists, it is the court that performs the job of proscription.¹⁵⁵ The adversarial system is further mandated for the reason that "once proscribed there [are] a lot of implications," for example, "if [a financier] contributed to a [proscribed] terrorist organization and the money is used to commit a terrorist act, he would be charged as a conspirator."¹⁵⁶

The increased participation of the Judiciary in the country's counter-terrorism effort was precipitated by the general perception that courts are the "protectors of human rights." The Legislature thus highlighted the need for "judicial oversight to prevent [the] excesses" of law enforcement agencies;¹⁵⁷ and tasked the ATC to coordinate with the SC,¹⁵⁸ which has administrative supervision over all courts,¹⁵⁹ and hence "capable of evaluating the capacity, probity[,] and integrity of the members of the Judiciary," in the designation of the courts which will handle terrorism cases.¹⁶⁰ The designation of specific divisions or branches of courts was intended for them "to acquire some expertise" in the hearing and resolution¹⁶¹ of terrorism cases.¹⁶²

151. *Id.*

152. Human Security Act of 2007, § 19.

153. *Id.* § 18.

154. *Id.* § 26.

155. *Id.* § 17.

156. S. JOURNAL, Sess. No. 54, at 1097.

157. S. JOURNAL, Sess. No. 31, at 368, 13th Cong., 2d Reg. Sess. (Oct. 12, 2005); S. JOURNAL, Sess. No. 47, at 934-35 & 937; & S. JOURNAL, Sess. No. 13, at 261.

158. Human Security Act of 2007, § 54, ¶ 8.

159. PHIL. CONST. art. VIII, § 6.

160. S. JOURNAL, Sess. No. 13, at 261.

161. Human Security Act of 2007, § 48. This requires continuous trial to ensure the speedy resolution of cases.

162. S. JOURNAL, Sess. No. 54, at 1098.

B. Is Court Intervention Appropriate?

Whether or not the active involvement of the court in the Philippines' counter-terrorism measure is a good strategy still remains to be seen. At face value, the intervention of the Judiciary makes the law palatable to liberalists and human rights supporters because it indicates a system of checks and balances at work in a law which involves some intrusion into civil liberties. In Section 3, the Legislature laid down the parameters of the law to be implemented by the Executive, but left it for the court to interpret and apply the provision vis-à-vis the factual circumstances presented by each case, and thus scrutinize whether the Executive has implemented the law correctly. In the surveillance of suspects and in the other abovementioned counter-terror measures in the law, the court first examines, before the measure is implemented, whether the same is appropriate under the circumstances. Without derogating its conventional function, the court acts as an arbiter under the HSA.¹⁶³ Notably, however, it performs this judicial function not only after the commission of the crime but before the same has been committed. An accountability mechanism is then in place in that the independent Judiciary has the opportunity to assess the propriety of the counter-terror measure.¹⁶⁴

By involving the Judiciary, the HSA has further conveniently evaded the problems brought about by trying terrorism cases in military courts or special courts — for example, the “inappropriate[ness] for the trial of criminal offen[s]es involving civilian suspects” in military courts and the use of “exceptional procedures to be applied which do not comply with normal standards of justice” in special courts.¹⁶⁵ With trials performed by the regular courts, provided that the judges remain true to the degree of “competence, integrity, probity[,] and independence”¹⁶⁶ required of them, there is comfort in the thought that fair trial is guaranteed.

Nevertheless, the strategy of the HSA in involving the court poses other problems. With the importance of public trials in ensuring fairness,¹⁶⁷ with the adversarial system in the court, and with all the trappings of a regular

163. See Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 59 & 75 (2007) [hereinafter Roach, *Review and Oversight*].

164. *Id.* at 68 & 79.

165. HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 317-18 (2005).

166. PHIL. CONST. art. VIII, § 7, ¶ 3.

167. DUFFY, *supra* note 165, at 318.

court proceeding, the value of disclosing secret intelligence and their sources which may compromise national security and the country's foreign relations in regard to intelligence-sharing, will have to be weighed against the value of its non-disclosure which, on the other end of the spectrum, would compromise the determination of the guilt of the accused.¹⁶⁸ Interestingly, the HSA tilts the balance in favor of disclosure, which again raises the question of whether the law is an effective counter-terrorism measure.

The proceedings in the applications for judicial authorization for surveillance, while *ex parte*, do not guarantee the non-disclosure of secret intelligence. In fact, as discussed above, the suspected terrorist is given the right to question the order authorizing the said evidence gathering and, in the process, is also given access to classified information.¹⁶⁹ The suspected terrorist is further afforded the right to access the recording in order to establish a case that the surveillance was maliciously procured.¹⁷⁰ A detained suspect or his representative can also examine the entries in the custodial logbook.¹⁷¹

Another problem posed by increased judicial involvement is the tendency of the Judiciary, "when faced with a security threat," to "bend to the will of the [E]xecutive" and, in the process, "sanction present objectionable abuses of civil liberties" which are then immortalized in judicial precedents.¹⁷² The tendency to over-rely on the courts for the protection of liberties further makes the people inactive in the democratic process.¹⁷³ It must, however, be noted that the HSA promotes judicial activism through its stringent procedures, as discussed above. The HSA further espouses the designation of divisions or branches of courts to handle terrorism cases in order for these courts to develop expertise, which in the long run will lessen if not obliterate the court's bending to the will of the

168. Kent Roach, *The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations*, in COUNTER-TERRORISM AND BEYOND, THE CULTURE OF LAW AND JUSTICE AFTER 9/11 60 (Andrew Lynch et al. eds., 2010).

169. Human Security Act of 2007, § 16.

170. *Id.*

171. *Id.* § 23.

172. Fergal Davis, *Extra-constitutionalism, Dr. Mohamed Haneef and Controlling Executive Power in Times of Emergency*, in COUNTER-TERRORISM AND BEYOND, THE CULTURE OF LAW AND JUSTICE AFTER 9/11 220-21 (Andrew Lynch et al. eds., 2010).

173. *Id.* at 232.

Executive in regard to deciding issues involving secret intelligence, national security, and national emergency.¹⁷⁴

In any event, should the court become too cooperative with the Executive, or should it decide a terrorism case rightly or wrongly, the HSA, in line with its effort to integrate in itself the system of checks and balances, mandates the submission to the Congress and to the President of a semi-annual report by the courts on the status of terrorism cases.¹⁷⁵ Suffice it to state that the Legislature may, by amending or even repealing the HSA, overturn a judicial precedent perceived to be a dangerous interpretation of the statute. This leads to a discussion on the issue of accountability.

V. ON ACCOUNTABILITY

Section 59 of the HSA creates a Joint Oversight Committee tasked to review the law, to interview law enforcement agencies with regard to actions they have taken in the implementation of the HSA, and to submit semi-annual reports and recommendations to both Houses of Congress as regards, among others things, providing a sunset clause to, amending any portion of, or even repealing the HSA.¹⁷⁶ The Committee also reassesses the “effects of globalization on terrorist activities[,]”¹⁷⁷ entailing an analysis of the effectiveness of the HSA as a counter-terrorism measure. Observably, this Committee, while referred to as an “Oversight Committee,” does not really perform the functions of an overseer in that it is not “briefed on ongoing actions” and is not tasked to “approve or veto the operations of the agency” it oversees.¹⁷⁸ This Committee rather performs the function of reviewing both the “propriety” and the “efficacy” of the HSA.¹⁷⁹ The endowment of dual functions to the committee, however, is fraught with the danger of the Committee not giving “full consideration” to either function.¹⁸⁰ Hence, it may focus more, for example, on reviewing the appropriateness of a law enforcement agency’s implementation of the surveillance provisions in the law rather than on reviewing the effectiveness of such measure in countering terrorism.

174. ROACH, 9/11 EFFECT, *supra* note 81, at 454-55.

175. Human Security Act of 2007, § 59.

176. *Id.*

177. *Id.*

178. Roach, *Review and Oversight*, *supra* note 163, at 78-79.

179. Human Security Act, § 59.

180. Roach, *Review and Oversight*, *supra* note 163, at 74-75.

The review of the “propriety” of the counter-terror measures is further highlighted through the empowerment of the Commission on Human Rights (CHR), an independent and constitutionally created body,¹⁸¹ to investigate and also prosecute public officials who have violated the civil and political rights of suspected terrorists.¹⁸² It must be noted that previously, the CHR only had investigative, not prosecutorial, powers.¹⁸³ This grant of an additional power is commendatory because it guards against the likely collusion between law enforcement officials and prosecutors, who both belong to the Executive, in sugarcoating abuses. Parenthetically, the provision empowering the CHR was not in the original draft but was only inserted during the period of amendments.¹⁸⁴

Likewise created by the HSA is a Grievance Committee tasked to receive and evaluate complaints against law enforcement officials, and file appropriate cases against erring ones.¹⁸⁵ The Ombudsman, the constitutionally created¹⁸⁶ government watchdog,¹⁸⁷ heads this Committee.¹⁸⁸ The addition of the Solicitor General, the Government’s legal counsel, and an Undersecretary of the Department of Justice in the Committee’s composition may however, on one hand, pose credibility issues as the latter two members, who also compose the majority, are identified with the Executive.¹⁸⁹ On the other hand, these two, in the Committee’s function of propriety review, may lend their expertise on national security issues and share information not commonly disclosed outside the executive branch.

It can be readily gleaned from the above accountability mechanisms that the Legislature, in enacting the HSA, has placed disproportionate importance

181. PHIL. CONST. art. XIII, §§ 17-19.

182. Human Security Act of 2007, § 55.

183. See Christina Mendez, *Escudero bats for granting of prosecutorial powers to CHR*, PHIL. STAR., May 17, 2011, available at <http://www.philstar.com/headlines/686509/escudero-bats-granting-prosecutorial-powers-chr> (last accessed Sep. 12, 2013). See also JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 1275 (2009 ed.).

184. S. JOURNAL, Sess. No. 52, at 1045, 13th Cong., 3d Reg. Sess. (Dec. 18, 2006).

185. Human Security Act of 2007, § 56.

186. PHIL. CONST. art. XI, § 5.

187. Office of the Ombudsman, available at <http://www.ombudsman.gov.ph/index.php?home=1&navId=MQ=&subNavId=ODU=> (last accessed Sep. 12, 2013).

188. Human Security Act of 2007, § 56.

189. Office of the Ombudsman, *supra* note 187.

on measures to check the “propriety” of the law, paying little attention to enquiries on the law’s “efficacy.”¹⁹⁰ The law thus suffers from the lack of a more focused mechanism for review of its effectiveness in countering terrorism.

The review mechanisms in the law are further uncoordinated, “duplicative,” and “excessive.”¹⁹¹ The law does not provide for coordination among the committees and the CHR. The functions of the CHR and the Grievance Committee overlap. Further, while a complaint-system for reviewing excesses of law enforcement officials is embedded in the law, no audit-system of the activities of law enforcement agencies, especially of the ATC, is provided, which would have been instrumental in “revealing improprieties that otherwise may have remained secret and ... are especially necessary to reveal inefficiencies in national security activities.”¹⁹²

In the final analysis, however, the HSA, in involving the three branches of the government and the other constitutional bodies in the overall operation of its counter-terror measures, and in providing a system of checks and balances “for transparency, participation, and legal control of national security policy,” has achieved “horizontal accountability.”¹⁹³

VI. CONCLUSION

When the draft bill was first presented in the Senate, the bill’s sponsor recounted the 2005 Valentine’s Day bombing¹⁹⁴ in the Philippine cities of Makati, Davao, and General Santos, and pointed out that the country needed an anti-terrorism law that would be “comprehensive” and “balanced” and which, “while it recognizes the human constitutional rights of citizens, [would] give the State the reach, the mobility[,] and [the] flexibility to [leave] terrorists no space for comfort anywhere in the Philippines.”¹⁹⁵ From the discussion above, however, it appears that this grand vision was not realized.

The HSA, with good intentions, has provided numerous safeguards for the protection of the people’s constitutional rights and fundamental liberties.

190. Human Security Act of 2007, §§ 56 & 59.

191. Roach, *Review and Oversight*, *supra* note 163, at 60 & 66–68.

192. *Id.* at 78.

193. Gershon Shafir et al., *Conclusion: Human Rights in Hard Times*, in NATIONAL INSECURITY AND HUMAN RIGHTS, DEMOCRACIES DEBATE COUNTERTERRORISM 182 (Alison Brysk & Gershon Shafir eds., 2007).

194. ABINALES & QUIMPO, *supra* note 26, at 18.

195. S. JOURNAL, Sess. No. 31, at 369.

It defined acts that would constitute the crime of terrorism in not a vague manner.¹⁹⁶ It involved the independent Judiciary, a known protector of human rights, in the process of countering terrorism.¹⁹⁷ It placed stringent procedures for authorizing extraordinary measures.¹⁹⁸ It established bodies that would check the propriety of the measures.¹⁹⁹

Wittingly or unwittingly, however, the HSA, in the final analysis, tilted the scales in favor of one side, disturbing the balance. By focusing too much on the propriety of the measure, the law sidestepped issues on its efficacy. A question thus remains unanswered: Does the law really safeguard human rights when it justifies some acts of terrorism,²⁰⁰ like the Valentine's Day bombing? It must be borne in mind that "terrorism not only disregards human life and human dignity but actually leads to the death and injury of innocent people."²⁰¹

The HSA, while commendable for extending due regard to human rights, needs to be reviewed as to its efficacy as a counter-terror measure.

196. Human Security Act of 2007, § 3.

197. *Id.* §§ 27-39.

198. *Id.* §§ 19 & 57.

199. *Id.* §§ 55 & 59.

200. SAUL, *supra* note 87, at 79.

201. See Peter Van Krieken, Terrorism and the International Legal Order: With Special Reference to the UN, the EU and Cross-Border Aspects 169 (2002) & Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Terrorism and Human Rights*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/1999/27 (June 7, 1999) (by Kalliopi K. Koufa).