

Anti-Terrorism Legislation in Comparative Perspective: Some Policy Concerns

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1. Introduction

Terrorist attacks are often met with urgent calls for new anti-terrorism legislation to deal with the situation. The assumption seems to be that the attacks signal a failure of law and that once new, improved legislation is in place, future attacks can better be prevented. The experience in a number of jurisdictions around the globe suggests, however, that this assumption might not always be valid.

When new anti-terrorism legislation is on the table, it is wise to subject its details to critical scrutiny to ensure that the proposed legislation is necessary, fair, and effective. This is eminently the task of those most familiar with the jurisdiction. I do in this presentation have something to say from a comparative perspective about the specific legal issues that typically arise in anti-terrorism legislation, but I want to focus ultimately on some broader themes that emerge from a comparative study of anti-terrorism policy.

Specifically, I want to step back from specific legal issues and consider instead three broad policy concerns that anti-terrorism measures raise: (a) the impact of these measures on the rule of law and executive power; (b) their effect on minority groups and community cohesion; and (c) their potential to inadvertently become part of the problem, triggering a cycle of political violence. Drawing on these concerns, I make specific observations concerning the limits of the law and venture some suggestions as to the appropriate, but modest, role that the law can play in anti-terrorism strategy.

One brief caveat before I begin. I am mindful of the danger of attempting to generalize about anti-terrorism law and policy, and so I offer these comments in the spirit of a dialogue. I look forward to your critical comments and your views as to whether the points I raise in this presentation resonate with the experience of the Philippines.

2. Anti-Terrorism Legislation: Specific Legal Problems

The plethora of anti-terrorism measures that have emerged around the world post-9/11 raise concerns about international and domestic law. From the perspective of international law, questions have arisen, for instance, relating to the use of military force

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(e.g. by the United States in Iraq) and the legality of both torture and the practice of rendition (by which terrorists suspects are sent for interrogation to jurisdictions in which the prohibition against torture is not as strict or as strictly enforced). There is also, at the international level, pressure on states to enact new anti-terrorism laws and to implement a range of international conventions relating to terrorism. I will not get into these issues here. Nor will I address specific issues or developments in international law relating to aviation and maritime security, or anti-terrorism financing. My focus is principally on the domestic response to terrorism (again, from a comparative perspective) and the legal problems that arise from such legislation. What, then, are the sorts of legal problems that arise? These problems, I suggest, cluster around the following issues.

(a) The Definition of Terrorism

There are some obvious problems with the definition of terrorism, and here international law is particularly significant. In international law, the difficulties in distinguishing acts of terrorism from an armed struggle are well known. This audience would be well aware that Nelson Mandela and the African National Congress were once considered terrorists by the United States and many other states. The difficulty here is that the physical acts committed by terrorists and freedom fighters may closely resemble one another. Excluding national liberation struggles (defined to include resistance to an occupying force) from the definition of terrorism would in today's geopolitical climate be highly politically charged. At least in the international sphere, focusing instead on the acts of violence themselves and on the specific *methods* of terrorism might be more fruitful than trying to formulate a definition acceptable to all.¹

Other difficulties concern the distinction in domestic law between terrorism and ordinary criminal acts. Most acts of terrorism could be regarded as particularly heinous crimes and prosecuted accordingly, yet there is a perceived need to treat terrorism as a *sui generis* offence. The danger here is that, following the *Terrorism Act 2000* in the United Kingdom,² the temptation might be to distinguish terrorism from ordinary criminal offences by reference to the political, religious, or ideological *motive* with which the act is committed. This is not only a departure from ordinary criminal law principles, but is also a prosecutorial and political minefield. Giving motive (rather than the intention) primary legal significance leaves prosecutors and governments vulnerable to charges of profiling and discrimination against religious groups or unpopular political groups, further politicizing anti-terrorism prosecutions.³

Notably, the approach in some Southeast Asian jurisdictions is markedly different from the U.K model. For instance, in Singapore, regulations made under its United Nations

¹ C.L. Lim, "The question of a generic definition of terrorism under general international law" in Victor V. Ramraj, Michael Hor, and Kent Roach, *Global Anti-Terrorism Law and Policy* (Cambridge University Press, forthcoming October 2005), 37-64 a 62.

² Section 1 of that act defines terrorism to include the use or threat of action "designed to influence the government or to intimidate the public or a section of the public ... [where] the use or threat is made for the purpose of advancing a political, religious or ideological cause."

³ Jeff Sallot, "Leave religion out of terror law, groups say", *Globe and Mail* on-line edition (21 September 2005).

Act avoid any reference to motive, looking only at whether the “use or threat is intended or reasonably regarded as intending to (i) influence the Government or any other government; or (ii) intimidate the public or a section of the public.”⁴ Similarly, Indonesia makes no reference to motive, defining terrorism generally as the intentional use of “violence or the threat of violence to create a widespread atmosphere of terror or fear in the general population or to create mass casualties, by forcibly taking the freedom, life or property of others or causes damage or destruction to vital strategic installations or the environment or public facilities or international facilities.”⁵ These definitions of terrorism show a sensitivity to the social-political context, by avoiding the impression that acts of terrorism are linked to particular religious or political views.

(b) Criminal Law Concerns – Substantive and Procedural

To the extent that anti-terrorism offences are incorporated into the criminal law system, substantive and procedural criminal law concerns arise. Substantively, these concerns relate, for example, to the ways in which anti-terrorism laws depart from traditional criminal law norms. They might do so by, for instance, relaxing the mental element required for a conviction or by expanding criminal liability to those who facilitate acts of terrorism⁶ or even to third parties with no direct knowledge of the activity in question (by creating secondary offences relating to, say, the failure to monitor or report financial or property transactions).⁷ This tendency to fight terrorism by criminalizing conduct that might otherwise be harmless (say, allowing a customer to open a bank account without collecting detailed personal information) gives rise to concerns about privacy and over-criminalization.

On the procedural side, criminal lawyers have also expressed concerns about the extent to which the usual procedural safeguards may be diluted or eliminated to facilitate anti-terrorism operations. The concern is not only the fairness of doing so in these cases, but the corrosive effect that these measures might have on the ordinary criminal justice system. A good example of how this might happen is the erosion of the right to silence in the United Kingdom, which began as a proposal to permit adverse inferences to be drawn from an arrestee’s silence in anti-terrorism cases in Northern Ireland, but soon became the norm in criminal prosecutions more widely in the United Kingdom.⁸

⁴ *United Nations (Anti-Terrorism) Regulations* [Singapore], Regulation 1, s. 4(1).

⁵ See Chapter III, section 6 of its Government Regulation in Lieu of Legislation of the Republic of Indonesia No. 1/2002 on Combating Criminal Acts of Terrorism, available in unofficial English translation online at: http://www.law.unimelb.edu.au/alc/indonesia/perpu_1.html.

⁶ See, for instance, Michael Hor, “Terrorism and the Criminal Law: Singapore’s Solution” [2002] *Sing. J.L.S.* 30 at 36-37.

⁷ On the use of this approach post-9/11, see Kent Roach, “The criminal law and terrorism” in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 129-151.

⁸ For details and commentary, see Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1011, at 1111-15 at 1086.

(c) *Expansion of Executive Power*

Another set of legal problems arises from the expansion of executive power and what, in the post-9/11 context, is referred to as the rise of the security state. The expansion of executive powers manifests itself in range of different ways in different jurisdictions. Again, I mention only a few examples here, as an indication of the expanding range of anti-terrorism tools that are available to the executive.

In the United States, for instance, the USA Patriot Act⁹ and subsequent legislation have expanded the investigative powers of the FBI to secretly obtain information from terrorist suspects as well as a wide range of third parties, both Americans and non-citizens, through the use of administrative subpoenas issued by the Attorney General with no judicial role.¹⁰

In Canada, investigative hearings allow law enforcement officials, with the consent of the Attorney General, to apply to the court for an order for the gathering of certain specified information in relation to a terrorist offence for which there are reasonable grounds to believe has been or will be committed.¹¹ The order may specify terms or conditions under which the investigation may be conducted, "including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation."¹² A person subject to such an order is required to answer questions put to him or her by the Attorney General.¹³ Although the legislation provides no specific guidance in the event that the person being questioned refuses to answer questions (unless protected by the law of privilege), options may include, for instance, options available to the court "include the use of contempt powers or subsequent prosecutions for disobeying a court order."¹⁴ The Supreme Court of Canada has ruled that these provisions violate neither the right to silence nor the independence of the judiciary.¹⁵ The Criminal Code also provides for the preventive detention of terrorist suspects for 24 hours after which the suspect must be brought before a judge, and for an additional 48 hours upon adjournment by a judge. If the judge finds that are reasonable grounds to suspect that a terrorist activity will be carried out, the judge may require that the arrestee to enter into a recognizance or peace bond and to refrain from possessing firearms, and various other weapons or explosives for up to 12 months.

In contrast with these developments in the United States and Canada, very little change was require legislatively in Singapore and Malaysia in light of those states' already

⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁰ See generally William C. Banks, "United States Responses to September 11" in *Global Anti-Terrorism Law and Policy*, *supra* note 1, 490-510 at 493.

¹¹ Criminal Code (R.S. 1985, c. C-46), s. 83.28(2)-(4).

¹² Section 83.28(5).

¹³ Section 83.28(8).

¹⁴ Kent Roach, "Canada's New Anti-Terrorism Law" [2002] *Singapore Journal of Legal Studies* 123 at 144.

¹⁵ *Re Application Under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, 2004 SCC 42, 184 C.C.C. (3d) 449, 240 D.L.R. (4th) 81.

awesome executive powers. The power to detain without trial persons suspected of being a threat to national security, in the form of the Internal Security Act in both jurisdictions, pre-existed the 9/11 attacks, so only some relatively minor legislative developments took place, mostly in direct response to UN Security Resolution 1373.¹⁶

Another source of expanding executive powers post-9/11, is the power conferred on the executive to designate groups or individuals as terrorists, typically without notice to them, and with the consequence that such listing is considered conclusive at a criminal trial.¹⁷ This listing procedure raises concerns about how to correct mistakes¹⁸ and about the separation of powers. Arguably, a determination at a criminal trial that a person or group is a terrorist should be made not by the executive, but by an independent judge.¹⁹ That a decision to list a group or individual as a terrorist is made by the executive by reference to the United Nations Security Council only complicates matter further since the Security Council acts without judicial oversight and there is no mechanism by which individuals can apply to the Security Council to be de-listed.²⁰

A final concern relates to the role of the military in domestic anti-terrorism operations. In the United States, for instance, the tradition of keeping the military out of domestic civilian affairs (reflected in the *Posse Comitatus Act* of 1878) has been challenged post-9/11, with the blurring of the line between internal and external and between civilian and military concerns. In the United Kingdom, the involvement of the military in anti-terrorism operations and the extent and ultimate source of its powers are matters of considerable controversy in light of the military's role in Northern Ireland at the height of the "Troubles" in the 1970s and 1980s. Indeed, it has been recently argued that the legal norms governing military intervention in the U.K. were (and remain) far from clear, with the result that the legal status of a curfew imposed in Belfast's Lower Falls district in July 1970 remains controversial.²¹ The involvement of the military in domestic anti-terrorism operations gives rise to concerns about the seepage of military procedures and tactics (which are not subject to the same democratic norms and legal safeguards) into the ordinary police conduct. I hasten to add, however, that an increasing role of the military does not always mean a stronger executive, particularly when greater discretion is given to military commanders. In such a case, greater military involvement may well be or become a threat to executive power.

¹⁶ For a full account and contextual explanation of developments in Singapore, see Hor, *supra*, note 6. For a commentary on developments in Malaysia, see Therese Lee, "Malaysia and the Internal Security Act: The Insecurity of Human Rights After September 11" [2002] *Sing. J.L.S.* 56.

¹⁷ Kent Roach, "Canada's Response to Terrorism" in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 511-33 at 516.

¹⁸ *Ibid.*

¹⁹ George Williams, "The rule of law and the regulation of terrorism in Australia and New Zealand" in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 534-52 at 540.

²⁰ C.H. Powell, "Terrorism and governance South Africa and Eastern Africa" in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 555-80 at 579.

²¹ See generally, Colm Campbell and Ita Conolly, "A Model for the 'War on Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew" (2003) 30 *Journal of Law and Society* 341; Steven Greer, "Military Intervention in Civil Disturbances: The Legal Basis Reconsidered" [1983] *Public Law* 573.

(d) *Scope of Judicial Review*

The role of the courts in an emergency is also a serious legal issue. There is a tendency, in times of crisis, for the executive to attempt to limit judicial review. It is sometimes said that the courts do not have the relevant institutional expertise in such matters.²² The use of military tribunals at the U.S. naval base at Guantanamo Bay shows the extent to which the executive will go to insulate its decisions in national security cases from scrutiny by the courts. The use of these tribunals recalls the Internal Security Act in Singapore and Malaysia, which allows the government to detain without trial for renewable two-year periods individuals deemed a threat to national security. One attempt by the Singapore Court of Appeal in 1989 to assert an “objective” standard of review, which would have permitted it to scrutinize the substantive basis for the detention, were rebuffed by the government through a series of legislative and constitutional amendments the effect of which appears to have been to limit judicial review in national security cases to ensuring procedural compliance.²³

Despite the oft-articulated concerns about institutional expertise in matters of national security, the courts may well have a role to play in forcing the executive to articulate the basis of its conclusion that national security is involved (even if these needs to be done *in camera*) and in reminding the executive and the public of the importance of constitutional rights.²⁴ When it comes to judgments about rights – even in times of crisis – the courts may yet have a greater expertise than the other branches, and may be better positioned to resist the politics of fear that acts of terrorism can ignite. The Indonesian Constitutional Court demonstrated in July 2004 that the judiciary can yet provide a check on legislating violating human rights norms, when it struck down as unconstitutional the retroactive application of the death penalty in terrorism cases.²⁵ At the very least, a judicial ruling against the executive (as in the ruling of the House of Lords in the “Belmarsh case”²⁶ in the U.K.) may lead to a democratic dialogue between the judicial and the other branches of government, ideally paving the way for a tailored legislative response that trenches no more than is strictly necessary (if it is necessary at all) on individual rights.

²² *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), *per* Lord Wright at 267. Compare the dissenting opinion of Thomas J. in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) at 2678.

²³ See *Chng Suan Tze* [1989] 1 MLJ 69 (Sing. C.A.) and subsequent amendments to Article 149 of the Constitution (see Constitution of the Republic of Singapore (Amendment) Act 1989, No 1 of 1989) and s. 8B of the Internal Security Act (see Internal Security (Amendment) Act, No 2 of 1989). For more details on this episode, see Michael Hor, “Law and terror: Singapore stories and Malaysia dilemmas” in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 273-94.

²⁴ Victor V. Ramraj, “Terrorism, risk perception, and judicial review” in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 107-26.

²⁵ See Hikmahanto Juwana, “Indonesia’s Anti-Terrorism Law” in *Global Anti-Terrorism Law and Policy*, *supra*, note 1, 295-306 at 304. As Sidney Jones of the International Crisis Group reportedly explained in response to the allegedly lenient sentence given to Abu Bakar Bashir for the crime of conspiracy that led to the Bali bombings, “in the post-Soeharto era, people demand evidence. You can’t simply arrest people on suspicion or hearsay” (as cited in Tim Lindsay, “Jakarta’s Bashir Dilemma” *The Age*, 8 March 2005, p. 13).

²⁶ *A. v. Secretary of State for the Home Department* [2004] UKHL 56. The House of Lords ruled that the fact that British citizens suspected of involvement in international terrorism were not similarly subject to indefinite detention, detention measures aimed at non-nationals were not ‘strictly required’ and disproportionate, and so did not constitute a valid derogation from the United Kingdom’s obligations under Article 15 of the European Convention on Human Rights.

3. Anti-Terrorism Legislation: Some Policy Concerns

Concerns about the breadth of the definition of terrorism, the distortion of criminal law norms, the unchecked expansion of executive powers, and limitations on judicial review are among the commonly expressed concerns about the direction of anti-terrorism law in other jurisdictions. Some of these concerns may well resonate with the experience of the Philippines, and I am interested in learning more about this from you. Obviously, specific anti-terrorism provisions and proposals differ from one jurisdiction to another, and it is crucial to examine the details before drawing any conclusions about particular laws. What I want to do now, however, is to take a step back and consider some of the overarching concerns raised by anti-terrorism legislation, and the broader impact that this legislation can have on fundamental values.

(a) Rule of Law Concerns

Rule of law concerns take two forms. The first is a concern about the concentration of power in the executive and the increasing scope for executive discretion. The rule of law is a contested concept with thicker and thinner versions,²⁷ but at a minimum it stands for the principle that any exercise of power by the state must be openly authorized by law. The trend that we have seen toward greater executive power and discretion, with fewer checks and limited judicial review, challenges even this minimal understanding of the rule of law and the values of democracy and legality that underlie it.

A second rule of law concern relates to the seepage of exceptional legal norms from the anti-terrorism regime into ordinary law, including ordinary criminal law; and from military strategies and tactics into civilian policing. The concern here is sometimes expressed as a concern about the normalization of the exception; as was the case with the erosion of the right to silence in the United Kingdom, extraordinary measures aimed at the prevention of terrorism can easily seep into the ordinary legal system. The rule of law concern here is not so much with discretion and lack of clear legal authority, but rather with the extent to which rule of law becomes synonymous with rule *by* law; the state rules through law, but its exercise of power is no longer subject to challenge. Without a strategy for resisting this tendency, either through legislative restraint or a stringent system of checks and balances, the rise of the security state may well be inevitable.

(b) Impact on Minority Groups and Community Cohesion

With a greater scope for executive discretion and a concentration of executive power, and particularly where the terrorist activities are associated with a particular group, the state may be tempted to engage in profiling of suspects on the basis of ethnic or religious affiliations, with potentially divisive consequences. But even if the state were extra-vigilant in avoiding such discriminatory practices, the mere perception of victimization

²⁷ Randall Peerenboom, "Varieties of rule of law: an introduction and provisional conclusion" in Randall Peerenboom, ed., *Asian Discourses of the Rule of Law* (London and New York: Routledge, 2004), 1-55.

itself could lead to alienation.²⁸ This is perhaps the greatest threat that terrorism poses to pluralist democracies; its ability to destroy societies from the inside by fueling ethnic tensions, collapsing bonds of trust, and further isolating minority communities that might already have felt marginalized. In its report entitled *Terrorism and Community Relations* published in April 2005 (thus, before the July bombings in London), the U.K. Parliament's Home Affairs Committee observed of community relations post-9/11:

We conclude that community relations have deteriorated, although the picture is by no means uniform, and there are many positive examples to set against our overall assessment. International terrorism and the response to it have contributed to this deterioration, particularly in relations between the majority community and the Muslim community.²⁹

The Report equally criticizes the government for not having a clear community cohesion policy as part of its broad anti-terrorism strategy.

The contemporary experience of community alienation in the United Kingdom is not unique.³⁰ Indeed, the alienation of the Republic/Nationalist community in Northern Ireland in the mid-twentieth century is cited as one of the causes of the rise of political violence, culminating in the period known euphemistically as "the Troubles." I would venture to suggest that around the globe post-9/11, concerns about discrimination, alienation, and social cohesion are all too common.

However, at least some states in Southeast Asia seem to be aware of the importance of addressing community cohesion as part of an overall anti-terrorism policy. For instance, following the 9/11 attacks, Singapore quickly established inter-racial confidence circles (known as "IRCC")³¹ in an effort to increase dialogue and mutual understanding across ethnic and religious communities. The then Deputy Prime Minister of Singapore explained:

[T]hrough the IRCCs, we have widened the channels for dialogue. In the past, our approach was to avoid subjects that we feared might be too

²⁸ In the United Kingdom, the public reaction after the 7 July 2005 London bombings to the revelation that the bombers were British nationals, along with the police shooting of an innocent Brazilian man, Jean Charles de Menezes, on 22 July 2005 after a second failed attack on the subway, shows just how strained ethnic tensions can be following a terrorist attack.

²⁹ House of Commons (U.K.), Home Affairs Committee, *Terrorism and Community Relations* (Sixth Report of Session 2004-05) (London: The Stationery Office, 2005). This report is available online at: <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/165/165.pdf>.

³⁰ *Ibid.* at 33.

³¹ Keynote Address by Deputy Prime Minister Lee Hsien Loong at the IRCC Forum 2004, Sunday, 4 April 2004, 11.00am, The Grassroots Club, Singapore (text released as a Press Release by the Media Relations Division, Ministry of Information, Communications and the Arts). For a critique of other aspects of Singapore approach to multiculturalism post-9/11, as well as a reply and rejoinder, see Victor V. Ramraj, "The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accommodative Liberalism" [2003] *Sing. J.L.S.* 459; C.L. Lim, Lim Chin Leng, "Race, Multi-cultural Accommodation and the Constitutions of Singapore and Malaysia" [2004] *Sing. J.L.S.* 117; and Victor V. Ramraj, "Multiculturalism and Accommodative Liberalism Revised" [2005] *Sing. J.S.* 159.

sensitive, out of respect for each other's race and religion. But with the stronger network of relationships, we have been more able to discuss sensitive issues. This is an important mechanism for us to cope with new issues post September 11 and the JI arrests. When something happens, we need to discuss it honestly and maturely ... to clear the air and prevent misunderstandings between different racial groups.³²

Whatever specific concerns might arise concerning other aspects of Singapore's anti-terrorism policy, the inter-racial confidence circles do suggest an appreciation of the complex nature of the problem.

The alienation of minorities is a serious problem in its own right, and one that deserves to be addressed squarely. But even greater problems arise for the state when that alienation feeds into a cycle of political violence.

(c) The Cycle of Political Violence

Broad, discretionary powers intended to respond to political violence have an unfortunate tendency to exacerbate the problem,³³ leading to an escalation of the crisis and creating sympathy and even outright support for those engaging in the violence in the first place. This cycle of political violence can be seen in once again in Northern Ireland in the early 1970s, when anti-terrorism strategies involving mass "screening" and regular house searches by the military

so alienated the Catholic community in the areas of insensitive army activity that *a continuing flow of new recruits was ensured*. The fact that the principal impact of these military security techniques was in Catholic areas, while the RUC continued to operate the 'reformed' criminal justice system in most Protestant areas exacerbated the feeling of discrimination and alienation among most Nationalists.³⁴

Greater concentration of power in the executive, coupled with an alienated minority community that has lost faith in the partiality of institutions entrusted with emergency powers, has thus proved to be a recipe for disaster – or, more precisely, for a prolonged and violent conflict. Whatever short-term gains may be won by stringent emergency powers tend to be lost over the long-term, as abuses surface, concerns about legitimacy arise, and terrorists attract more sympathy within the community they purport to represent.

³² Ibid.

³³ See Araceli B. Habaradas, "Issues and Discussion Points on the Anti-Terrorism Draft Bills" (Mindanao Consultation-Workshop on Anti-Terrorism Legislation, 27-28 January 2005), at 9 (the state may be aggravating the problem, not solving it); see also Campbell and Connolly, *supra*, note 21 at 373.

³⁴ Tom Hadden, Kevin Boyle, and Colm Campbell, "Emergency Law in Northern Ireland: The Context" in Anthony Jennings, ed., *Justice Under Fire* (Pluto Press, 1990), 1-26 at 8 (emphasis added).

4. Conclusion: The Scope and Limits of the Law

In this final part of the presentation, I offer two sets of suggestions – the first relating to the limits of the law; the second relating to the limited role that the law might play when anti-terrorism measures are adopted.

(a) The Limits of the Law

It has been observed that the “natural reaction of governments throughout the world when faced with disorders and insurrection is to introduce a battery of emergency powers.”³⁵ Evidence of this “natural reaction” can be seen in the rush to legislate around the world post-9/11, which was inspired at least in part by UN Security Council resolution 1373.³⁶ It is understandable that a well-meaning democratic government would want to show a frightened and impatient public that it is doing all it can to ensure their safety. The observations in this paper suggest, however, that the “natural reaction” is one that should give us pause for thought; the long-term costs of emergency legislation need to be carefully examined. The observations in this paper suggest three plausible conclusions about the legal, social, and political response to an emergency.

First, the experience of other jurisdictions suggests a need to recognize the limits of the law generally, and of emergency legislation specifically, in dealing with political violence. New legislation confers even more power to the executive branch and to security forces, creating more potential for abuse and perhaps even perpetuating the very problem it is trying to address:

The most significant feature of the successive phases and failures in security policy is perhaps the apparent belief among many senior commanders that if only the right security policy could be identified and carried out without external interference, terrorists ... could be defeated. Yet ... new policies have been implemented with little or no concern to foresee and control potential abuses, with the invariable result of their accompaniment by a new set of abuses. This has in turn confirmed the deeply-felt view among those from whom the terrorists are recruited and supported that the security forces are incapable of acting fairly and that the administration of justice is inherently corrupt.³⁷

To the extent that emergency legislation is deemed necessary, it is crucial that potential abuses be anticipated and that adequate safeguards be provided.

³⁵ *Supra* note 34 at 17.

³⁶ See, for instance, the accounts of legislative developments post-9/11 in the Special Feature in the July 2002 issue of the *Singapore Journal of Legal Studies*; Philip A. Thomas, ‘9/11: USA and UK’ (2003) 26 *Fordham International Law Journal* 1193; and the collection of essays on Canada’s response to 9/11, in R. Daniels, P. Macklem, and K. Roach, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

³⁷ *Supra* note 34 at 12.

Second, the experience elsewhere suggests a political, rather than strictly legal, need to affirm the rights of minorities, to consult them on the emergency measures, and to devise a "community cohesion policy" as part of its overall anti-terrorism strategy. If the long-term social costs of emergency powers can be avoided at all, the concerns of minority groups that they might be targeted by the new laws need to be squarely addressed.

Third, since the legitimacy of institutions may be called into question by those who feel victimized by emergency powers, serious attention must be paid to strengthening the integrity of and building public confidence in key institutions, from police and security forces to the courts and the executive. Ultimately, law enforcement agencies must be and be seen to be fair and impartial, and public institutions (the legislature and the courts, for instance) must remain the preferred venues in which to air grievances. At best, emergency powers might contain the violence, but the ultimate solution lies elsewhere: "Security measures alone cannot resolve the ... problem and ... one of the most important standards by which security policies and emergency laws must be judged is the contribution which they make to facilitating the development of a generally acceptable political solution."³⁸

(b) Appropriate Role for Law

I certainly don't mean to suggest that the law does not or should not play a role in an emergency, and to the extent that emergency powers are deemed essential, the judiciary may well be called on to resolve some of the problems caused by such powers. As to the role that law might play in this situation, I offer three suggestions.

First, it is important to remember that emergencies can take a variety of forms, from acts of terrorism to natural disasters. Focusing too narrowly on the former may detract from the ability of the state to deal with the latter. Moreover, a focus on natural disasters may well lead (though not necessarily, I concede) to more focused and limited powers that are more tailored to the specific problems that might arise. The outbreak of SARS in 2003 and the most recent aftermath of hurricane Katrina in New Orleans are timely reminders that disasters take many forms and that emergency preparedness is crucial. For this reason, legal academics, such as Kent Roach, have called for an "all-risks" approach to emergency legislation and for what he calls a "broader security agenda."³⁹

Second, and here I confess that I remain skeptical of the capacity of the law to solve our problems, we need to be able to draw clear legal lines to prevent seepage (e.g. we need to be clear role of the military forces in an emergency; and to ensure that ordinary criminal process does not become tainted by the extraordinary norms of an emergency). Again, from my research on states of emergency, I have serious doubts about whether this is possible. The lines between the norm and the exception and between civilian and military control in an emergency are much too fine, and history is replete with examples of

³⁸ *Supra* note 34 at 23 (emphasis added).

³⁹ Kent Roach, *September 11: Consequences for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2004).

“temporary” emergency powers colonizing ordinary law and gradually becoming permanent.

Finally, a comparative study of anti-terrorism laws suggests that to the extent that emergency legislation is invoked, it is essential that the courts remain active participants within the structure of government. There is a well-documented tendency for courts, in an emergency, to defer to the will of the executive. To the extent that this tendency can be resisted, there is greater hope for avoiding a cycle of political violence. Some have suggested that the law might, in the context of an emergency, provide a “self-correcting mechanism”⁴⁰ and serve, ultimately as a check on the worst abuses. There may be something to this suggestion, though I would add that the ability of the courts to do so depends on the overall strength and integrity of the judiciary as a whole. So we need to be cautious about expecting too much of the courts, which will rarely be able to affect changes in the *overall* direction of anti-terrorism policy on their own.

I want to end this presentation with an important footnote. When I wrote the first draft of this paper, I did so with very little appreciation of the debate here in the Philippines over the proposed anti-terrorism legislation. I have since had the opportunity to read some local news reports, and I have come to appreciate even more the extent to which the themes, arguments, and issues that arise in an emergency context resonate from one jurisdiction to the next. Perhaps, then, there are some lessons to be learned from a comparative study of anti-terrorism laws. But I should stress once again that social, political, and legal contexts can vary immensely, so the suggestions I have made should still be taken with a large pinch of salt.

Finally, I should add the caveat that I have no intention of endorsing any particular side of the debate over the proposed legislation. I offer my views as an outsider to the situation in the Philippines, and to the extent that my views might be similar to those expressed in the current debate, this is by accident, not design. I will follow the debate here with great interest and I hope that the rest of us might be able to learn from the Philippine experience and the anti-terrorism strategy that you choose to implement.

⁴⁰ Campbell and Connolly, *supra* note 21 at 374.