G.R. No. 252578 (*Atty. Howard M. Calleja, et al. v. Executive Secretary, et al.*); **G.R. No. 252579** (*Rep. Edcel C. Lagman v. Salvador C. Medialdea, et al.*); **G.R. No. 252580** (*Melencio S. Sta. Maria, et al. v. Salvador C. Medialdea, et al.*); **G.R. No. 252585** (*Isagani T. Zarate, et al. v. President Rodrigo Duterte, et al.*); **G.R. No. 252613** (*Rudolf Philip B. Jurado v. The Anti-Terrorism Council, et al.*); **G.R. No. 252623** (*CTUHR, et al. v. Hon. Rodrigo R. Duterte, et al.*); **G.R. No. 252624** (*Christian S. Monsod, et al. v. Salvador C. Medialdea, et al.*); **G.R. No. 252646** (*SANLAKAS v. Rodrigo R. Duterte, et al.*); **G.R. No. 252702** (*Federation of Free Workers, et al. v. Office of the President, et al.*); **G.R. No. 252726** (*Jose J. Ferrer, Jr. v. Salvador C. Medialdea, et al.*); **G.R. No. 252733** (*Bagong Alyansang Makabayan, et al. v. Rodrigo R. Duterte, et al.*); **G.R. No. 252736** (*Antonio T. Carpio, et al. v. Anti-Terrorism Council, et al.*); **G.R. No. 252741** (*Ma. Ceres P. Doyo, et al. v. Salvador Medialdea, et al.*); **G.R. No. 252747** (*National Union of Journalists of the Philippines, et al. v. Anti-Terrorism Council, et al.*); **G.R. No. 252755** (*Kabataang Tagapagtanggol ng Karapatan, et al. v. Executive Secretary*); **G.R. No. 252759** (*Algamar A. Latiph, et al. v. Senate, et al.*); **G.R. No. 252765** (*Alternative Law Groups, Inc. v. Salvador C. Medialdea*); **G.R. No. 252767** (*Bishop Broderick S. Pabillo, et al. v. Rodrigo R. Duterte, et al.*); **G.R. No. 252768** (*GABRIELA, et al. v. Rodrigo Duterte, et al.*); **UDK 16663** (*Lawrence A. Yerbo v. Senate President, et al.*); **G.R. No. 252802** (*Henry Abendan, et al. v. Salvador C. Medialdea, et al.*); **G.R. No. 252809** (*Concerned Online Citizens, et al. v. Salvador C. Medialdea, et al.*); **G.R. No. 252903** (*Concerned Lawyers for Civil Liberties, et al. v. Rodrigo Duterte, et al.*); **G.R. No. 252904** (*Beverly Longid, et al. v. Anti-Terrorism Council, et al.*); **G.R. No. 252905** (*Center for International Law, et al. v. Senate of the Philippines, et al.*); **G.R. No. 252916** (*Main T. Mohammad v. Salvador C. Medialdea*); **G.R. No. 252921** (*Brgy. Maglaking San Carlos City, Pangasinan Sangguniang Kabataan Chairperson Lemuel Gio Fernandez Cayabyab v. Rodrigo R. Duterte*); **G.R. No. 252984** (*Association of Major Religious Superiors in the Phils., et al. v. Exec. Secretary Salvador C. Medialdea, et al.*); **G.R. No. 253018** (*UP System Faculty Regent Dr. Ramon Guillermo, et al. v. Pres. Rodrigo R. Duterte, et al.*); **G.R. No. 253100** (*Philippine Bar Association v. Executive Secretary, et al.*); **G.R. No. 253118** (*Balay Rehabilitation Center, Inc., et al. v. Rodrigo R. Duterte, et al.*); **G.R. No. 253124** (*Integrated Bar of the Phils., et al. v. Senate of the Philippines, et al.*); **G.R. No. 253242** (*Coordinating Council for People's Development and Governance Inc., et al. v. Rodrigo R. Duterte, et al.*); **G.R. No. 253252** (*Philippine Misereor Partnership, Inc., et al. v. Salvador C. Medialdea, et al.*); **G.R. No. 253254** (*Pagkakaisa ng Kababaihan para sa Kalayaan, et al. v. Anti-Terrorism Council, et al.*); **G.R. No. 253420** (Haroun Alrashid Alonto Lucman, Jr., et al. v. Salvador C. Medialdea, in His Capacity as Executive Secretary, et al.); **G.R. No. 254191** [Formerly UDK 16714] (*Anak Mindanao [AMIN] Party-List Representative Amihilda Sangcopan, et al. v. Salvador C. Medialdea, et al.*); and **UDK 16663** (*Lawrence A. Yerbo v. Offices of the Honorable Senate President, et al.*).

Promulgated:

December 7, 2021

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SEPARATE CONCURRING AND DISSENTING OPINION

DIMAAMPAO, *J.:*

At the vortex of these consolidated petitions is a deceivingly simple query: Should Republic Act No. 11479, notoriously known as the Anti-Terrorism Act of 2020 (ATA), be declared unconstitutional for infringing upon most of our civil liberties?

Prefatorily, the *ponente's* efforts to address the intricate web of procedural and substantive issues presented by the petitioners is highly laudable. While I concur in most of the results, I respectfully dissent from the explication made in the *ponencia* concerning the validity of Section 29, chiefly because the provisions thereof are antithetical to the constitutional tenet of due process.

Simply put, I vote to strike down Section 29 of the ATA.

Section 29 encompasses the rule on detention without judicial warrant of arrest, framed in this wise:

> *Detention without Judicial Warrant of Arrest.* – The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, any law enforcement agent or military personnel, who, having been duly authorized in writing by the ATC has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act, shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (1) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (2) further detention of the person/s is necessary to prevent the commission of another terrorism; and (3) the investigation is being conducted properly and without delay.
>
> Immediately after taking custody of a person suspected of committing terrorism or any member of a group of persons, organization or association proscribed under Section 26 hereof, the law enforcement agent or military personnel shall notify in writing the judge of the court nearest the place of apprehension or arrest of the following facts: (a) the time, date, and manner of arrest; (b) the location or locations of the detained suspect/s and (c) the physical and mental condition of the detained suspect/s. The law enforcement agent or military personnel shall likewise furnish the ATC and

the Commission on Human Rights (CHR) of the written notice given to the judge.

The head of the detaining facility shall ensure that the detained suspect is informed of his/her rights as a detainee and shall ensure access to the detainee by his/her counsel or agencies and entities authorized by law to exercise visitorial powers over detention facilities.

The penalty of imprisonment of ten (10) years shall be imposed upon the police or law enforcement agent or military personnel who fails to notify any judge as provided in the preceding paragraph.

Concomitantly, its counterpart provisions in the Implementing Rules and Regulations (IRR) provide:

RULE 9.1. *Authority from ATC in Relation to Article 125 of the Revised Penal Code.* – Any law enforcement agent or military personnel who, having been duly authorized in writing by the ATC under the circumstances provided for under paragraphs (a) to (c) of Rule 9.2, has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act shall, without incurring any criminal liability for delay in the delivery of detained persons under Article 125 of the Revised Penal Code, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (a) further detention of the person/s is necessary to preserve the evidence related to terrorism or complete the investigation, (b) further detention of the person is necessary to prevent the commission of another terrorism, and (c) the investigation is being conducted properly and without delay.

The ATC shall issue a written authority in favor of the law enforcement officer or military personnel upon submission of a sworn statement stating the details of the person suspected of committing acts of terrorism, and the relevant circumstances as basis for taking custody of said person.

If the law enforcement agent or military personnel is not duly authorized in writing by the ATC, he/she shall deliver the suspected person to the proper judicial authority within the periods specified under Article 125 of the Revised Penal Code, provided that if the law enforcement agent or military personnel is able to secure a written authority from the ATC prior to the lapse of the periods specified under Article 125 of the Revised Penal Code, the period provided under paragraph (1) of this Rule shall apply.

XXX XXX XXX

RULE 9.3. *Immediate Notification to the Nearest Court.* – Immediately after taking custody of the suspected person, the law enforcement agent or military personnel shall, through personal service, notify in writing the judge of the trial court nearest the place of apprehension or arrest of the following facts:

> a. the time, date, and manner of arrest;
> b. the exact location of the detained suspect; and
> c. the physical and mental condition of the detained suspect.
>
> For purposes of this rule, immediate notification shall mean a period not exceeding forty-eight (48) hours from the time of apprehension or arrest of the suspected person.
>
> **XXX XXX XXX**
>
> RULE 9.5. *Notification to the ATC and CHR.* – The law enforcement agent or military personnel shall furnish the ATC and the Commission on Human Rights (CHR) copies of the written notification given to the judge in such manner as shall ensure receipt thereof within forty-eight (48) hours from the time of apprehension or arrest of the suspected person.

In determining whether Section 29 should be nullified for restraining or chilling the exercise of freedom of expression and its cognate rights, the *ponencia* did not utilize the void-for-vagueness doctrine since "petitioners have not sufficiently presented any demonstrable claim that the wording or text of the assailed provision is ambiguous, or that it fails to specify what is prohibited or required to be done so that one may act accordingly."[1]

However, considering that petitioners have impugned Section 29 for transgressing the right to due process,[2] a right which is appurtenant to the void-for-vagueness doctrine, I humbly submit that this doctrine should have been applied in analyzing the constitutionality of Section 29 notwithstanding the paucity of averments regarding the ambiguity of its text.

Indeed, the scope of facial challenges in this jurisdiction remains narrow in construction and almost surgical in application; these are generally allowed only in cases where freedom of speech and its cognate rights are asserted before this Court. The dictum of this Court in *SPARK v. Quezon City*[3] is clear, that "the application of the overbreadth doctrine is limited to a facial kind of challenge and, owing to the given rationale of a facial challenge, applicable only to free speech cases."[4]

Nevertheless, in *Disini v. Secretary of Justice,*[5] this Court refined the admissible extent of facial challenges, such that "[w]hen a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."[6] The rationale for such an exception is patently discernible, which is to counter the "chilling effect" on protected speech that inevitably arises from statutes violating free speech. A

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1 See Majority Opinion, p. 193.

2 See Petitioners' Memorandum (Cluster V), pp. 19-20.

3 815 Phil. 1067 (2017).

4 *Id.* at 1104; citing *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* 646 Phil. 452 (2010).

5 727 Phil. 28 (2014).

6 *Id.* at 121.

person who does not know whether his speech constitutes a crime under an overbroad or vague law may simply restrain himself from speaking in order to avoid being charged with a crime. The overbroad or vague law thus chills him into silence.[7]

Taken altogether, a facial challenge on the basis of overbreadth may only proceed against a law or regulation specifically addressing the freedom of speech or its cognate rights. Upon the other hand, a facial challenge on the ground of void-for-vagueness is permissible against penal statutes that seemingly impinge upon the freedom of speech and its associated rights. At this juncture, a statute or act may be unconstitutionally vague when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application. It is repugnant to the Constitution in two respects: *first,* it violates due process for failing to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and *second,* it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.[8]

A fortiori, it is axiomatic that due process requires that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning.[9]

In the case at bench, to echo the sterling elucidation by our esteemed colleague Justice Caguioa, it is readily perceptible from the clear wording of Section 29 of the ATA the utter failure to provide the standards and restrictions for the issuance of a written authority to detain a person suspected of committing any of the punishable offenses under Sections 4 to 12 of the same statute for the initial fourteen (14) day period. On its face, Section 29 merely inaugurates a ministerial duty upon the Anti-Terrorism Council (ATC) to issue a written authority for detention based exclusively on the account of the law enforcement officer or military personnel that the detainee is suspected of committing terrorist acts. In this regard, it is ineludible that the application of the void-for-vagueness doctrine is warranted.

Perhaps equally significant is the fact that the text of Section 29 decrees a standard of arrest lower than that of probable cause, *i.e.,* upon mere

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7 *Id.* at 122; citing Justice Antonio T. Carpio's dissent in *Romualdez v. Commission on Elections,* 576 Phil. 357 (2008).

8 See *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, supra* note 4 at 488; citing *People v. Nazario,* 247-A Phil. 276 (1988).

9 See *People v. Dela Piedra,* 403 Phil. 31, 47-48 (2001); citing *Connally v. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L Ed 322 (1926); *Colautti v. Franklin,* 439 U.S. 379, 99 S. Ct. 675, 58 L Ed 2d 596 (1979); and *American Communications Asso. v. Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L Ed 925 (1950).

suspicion that a person is committing speech-related terrorist crimes, such as but not limited to inciting to terrorism (Section 9), proposal to commit terrorism (Section 8), and threat to commit terrorism (Section 5).

The foregoing illuminations further underscore that the period of the warrantless detention contemplated by Section 29 is not only repugnant to the Constitution, but is also unconscionable, unnecessarily long, and incompatible with human dignity. Under this provision, the suspected individual has virtually no means of questioning the legality of his or her arrest and extended detention before the ATC or the courts. Elsewise stated, it expressly removed the processes that would allow the judiciary to review the validity and propriety of the detention. These intellections will be discussed hereinafter *in seriatim*.

Philippine case law is replete with decisions which acknowledge that prolonged detention without charge or trial severely undermines constitutional rights. For example, in *Mejoff v. The Director of Prisons,*[10] this Court opined:

> It was said or insinuated at the hearing of the petition at bar, but not alleged in the return, that the petitioner was engaged in subversive activities, and fear was expressed that he might join or aid the disloyal elements if allowed to be at large. Bearing in mind the Government's allegation in its answer that "the herein petitioner was brought to the Philippines by the Japanese forces," and the fact that Japan is no longer at war with the United States or the Philippines nor identified with the countries allied against these nations, the possibility of the petitioner's entertaining or committing acts prejudicial to the interest and security of this country seems remote.
>
> If we grant, for the sake of argument, that such a possibility exists, still the petitioner's **unduly prolonged detention would be unwarranted by law and the Constitution, if the only purpose of the detention is to eliminate a danger that is by no means actual, present, or uncontrollable. xxx**[11]

Accordingly, to curb the risks of arbitrary detention, Article 125 of the Revised Penal Code dictates that a public officer or employee shall deliver a detained person to the proper judicial authorities within the period of twelve (12) hours for crimes or offenses punishable by *light* penalties; eighteen (18) hours for crimes or offenses punishable by *correctional* penalties; and thirty-six (36) hours for crimes or offenses punishable by *afflictive or capital* penalties.

Au contraire, Section 29 of the ATA protracts such a period for eleven (11) days, and under the appropriate circumstances even extending the detention for a further ten (10) days without delivery of such detainee to the proper judicial authority, where the detainee is suspected of committing terrorism or other terror-related offenses.

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10 90 Phil. 70 (1951).

11 *Id.* at 76-77. Emphasis supplied.

Significantly, the IRR itself does not remedy the vagueness attending Section 29. While Rule 9.1 instructs law enforcement officers or military personnel to procure a written authority from the ATC by submitting a sworn statement declaring "the details of the person suspected of committing acts of terrorism, and the relevant circumstances as basis for taking custody of the said person," the fact remains that there is in the plain language of either Section 29 or Rule 9.1 no poignant reference to any clear standards and qualifications that must be applied by the said body to authorize the initial detention of fourteen (14) days.

Withal, law enforcement officers or military personnel are not commanded to furnish the detainee a copy of the sworn statement under Rule 9.1. Worse, the detainee is neither notified of the basis for the evaluation made by the ATC, nor given any opportunity to answer or refute its findings. These infirmities unquestionably embody a gross violation of due process and pose a threat to the liberty of all persons in light of the scope of the punishable acts under the ATA.

Appositely, the following exchanges between the Office of the Solicitor General (OSG) and members of this Court during the oral arguments are enlightening:

> **ASSOCIATE JUSTICE GAERLAN:**
>
> Okay, let us move on to judicial writs. Now, if a person is detained on the basis of the ATC's authority, will an application for a writ of *habeas corpus* prosper, or will it be held with the same standard as applications for writ of *habeas corpus* for people restrained by legal process?
>
> **ASSISTANT SOLICITOR GENERAL RIGODON:**
>
> If there is an ATA authorization for extended detention, Your Honor, *habeas corpus* will not lie because a *habeas corpus* proceeding inquires into the validity of the detention and **since such extended definition is authorized by Congress itself through the mechanism of the ATC, Your Honor, then the detention would be valid and therefore the writ will not issue.**[12]
>
> **xxx xxx xxx**
>
> **ASSOCIATE JUSTICE DELOS SANTOS:**
>
> My next question: Can Congress, through the Anti-Terror Act, impose an additional function on judges without the authority or consent of the Supreme Court? Moreover, this case, did the Anti-Terror effectively reduce the function of a judge to receiving clerk? As nothing in the Anti-Terror Act states that a judge concerned who would be determining whether there is probable cause to detain a suspected terrorist or to overrule the ATC's written authority ordering his arrest?
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> **ASSISTANT SOLICITOR GENERAL GALANDINES:**
>
> **Your Honor, we submit that the judge was not given the role of determining whether the continuous detention is warranted.** The judge,

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[12] TSN, 4 May 2021, pp. 64-65. Emphasis supplied.

as mentioned in Rule 9.3 and as mentioned in Section 29, was to be notified of the fact that there is a person held for questioning by the law enforcement agents and this person could probably be charged for terrorism. But there is no additional function imposed upon the judge, Your Honor.[13]

xxx xxx xxx

ASSOCIATE JUSTICE LAZARO-JAVIER:
The ATC is just an administrative body, can it validly pass upon the validity or invalidity of a warrantless arrest?

ASSISTANT SOLICITOR GENERAL GALANDINES:
We submit that it can validly pass upon the validity of a warrantless arrest as law because the ATC is with the, the ATC would have to evaluate if the detention was by virtue of any of the circumstances provided for under Rule 113 for purposes of extension, Your Honor.[14]

xxx xxx xxx

ASSOCIATE JUSTICE LAZARO-JAVIER:
Alright. I'll go to the next question. Will the suspected terrorist be informed of the application for extension of his/her detention?

ASSISTANT SOLICITOR GENERAL GALANDINES:
Yes, Your Honor.

ASSOCIATE JUSTICE LAZARO-JAVIER:
Yes? Or if so, will the suspected terrorist be allowed to present countervailing evidence before the ATC for purposes of proving that the requirements or the requisites for extension have not been satisfied?

ASSISTANT SOLICITOR GENERAL GALANDINES:
Your Honor, he has remedies to question his continued detention, but **he cannot question his continued detention before the ATC.**[15]

Ineluctably, Section 29 is tainted with ambiguity, considering that the State itself, through the OSG, appears at a loss as to how a detainee may judiciously question his detention under this provision. This is a clear derogation of the constitutional mandate to protect each person's right against arbitrary detention and right to due process as enshrined in the Bill of Rights;[16] because the detainee is effectively deprived of any meaningful opportunity to be heard.

Even in the realm of international law, the right to due process is encapsulated in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the Philippines is a State-Party. The prolonged detention under Section 29 of the ATA transgresses such right, and in the same vein, violates the right against arbitrary detention codified under Article 9 of the same covenant, *viz.*:

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13 *Id.* at 77-78. Emphasis supplied.
14 TSN, 11 May 2021, pp. 50-51.
15 *Id.* at 55-56. Emphasis supplied.
16 Article III, 1987 Constitution

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Undisputedly, a detainee possesses the right to question the legality of his or her arrest before the ATC or the courts during the prolonged detention. Likewise, in the event of unlawful arrest or detention, the detainee has the right to compensation which shall be enforceable upon action filed with judicial authority. As presently worded, Section 29 is found wanting such invaluable safeguards.

Furthermore, the United Nations (UN) Human Rights Committee highlighted that the ICCPR "is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."[17] Evidently, Article 9(1) of the ICCPR also envisages administrative or preventive detention, such as the one set out under Section 29 of the ATA. Perforce, the fail-safes embodied in Article 9 of the ICCPR should be extended to detainees under Section 29, such as court control of the detention, as well as compensation in the case of a breach.[18]

To be sure, Section 29 is tellingly violative of the universal right against arbitrary detention under Article 9 of the ICCPR, thus:

> The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits unlawful deprivation of liberty,

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17 See UN Human Rights Committee, 16th Sess., UN Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), No. 8, 30 June 1982, par. 1. Available at: <http://ccprcentre.org/page/view/general_comments/27851>.

18 *Id.* at par. 4.

> i.e., deprivation of liberty that is not imposed on such grounds and in accordance with such procedure as established by law. The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. **Arrest or detention that lacks any legal basis is also arbitrary. Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful; the same is true for unauthorized extension of other forms of detention.**[19]

In delivering its opinion on human rights, terrorism, and counter-terrorism, the Office of the UN High Commissioner for Human Rights accentuated that detained persons must have the ability "to have the lawfulness of their detention determined by a judicial authority."[20] So too, civilian courts must have jurisdiction to supervise the application of counter-terrorist measures without any pressure or interference, particularly from the other branches of government."[21]

To drive home the point, illustrative cases from other systems serve as our jurisprudential polestar on the right against arbitrary and prolonged detention in the context of an anti-terrorism campaign, as follows:

In *Öcalan v. Turkey*,[22] the European Court of Human Rights (ECHR) decreed that the bare invocation of terrorism does not automatically grant sweeping authority to arrest suspects for questioning without limits, *viz.*:

> The Court has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems **xxx This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved xxx.**[23]

Likewise, in *Al-Nashif v. Bulgaria,*[24] the ECHR expounded the delicate balance between national security and deference to human rights, thus:

> **Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body** competent to review the reasons for the decision and relevant evidence, if need be[,]

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19 See UN Human Rights Committee, 112th Sess., CCPR General Comment No. 35: Article 9 (Right to Liberty and Security of Persons), CCPR/C/GC/35, 16 December 2014, par. 11. Available at: <https://digitallibrary.un.org/record/786613?ln=en>. Emphasis supplied; original citations omitted.

20 See Office of the UN High Commissioner for Human Rights, Human Rights, Terrorism, and Counter-terrorism: Fact Sheet No. 32, 2007, pp. 36-37. Available at: <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. Original citations omitted.

21 *Id.* at 44. Original citation omitted.

22 Application No. 46221/99 (Eur. Ct. H.R. 12 May 2005). Available at: <http://hudoc.echr.coe.int/eng?i=001-69022>.

23 *Id.* at par. 104. Emphasis supplied; original citations omitted.

24 Application No. 50963/99 (Eur. Ct. H.R. 20 September 2002). Available at: <http://hudoc.echr.coe.int/eng?i=001-60522>.

with appropriate procedural limitations on the use of classified information **xxx.**

> **The individual must be able to challenge the executive's assertion that national security is at stake.** While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary.
>
> Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[25]

Moreover, in *Aksoy v. Turkey*[26] and *Brogan and Others v. United Kingdom,*[27] the ECHR reckoned that detention without judicial intervention for fourteen (14) days, and four (4) days and six (6) hours, respectively, is unlawful. It ratiocinated that a fourteen (14) day period is exceptionally long and left the detainee vulnerable not only to arbitrary interference with his right to liberty, but also to torture.[28] "The undoubted fact that arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3)."[29]

Meanwhile, in *Boumediene v. Bush*[30] the petitioners therein were able to establish before the United States Supreme Court the constitutional infirmities from which the Detainee Treatment Act of 2005 suffered, such as the absence of provisions allowing them to challenge the President's authority to detain them for a longer period under the Authorization for Use of Military Force (AUMF), to contest the Combatant Status Review Tribunal's (CSRT)[31] findings of fact, and to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings. The Court pertinently held:

> In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. **xxx** The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

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25 *Id.* at pars. 123-124. Emphases supplied; original citation omitted.

26 Application No. 21987/93 (Eur. Ct. H.R. 18 December 1996). Available at: <http://hudoc.echr.coe.int/eng?i=001-58003>.

27 Application Nos. 11209/84, 11234/84, 11266/84, 11386/85 (Eur. Ct. H.R. 29 November 1988). Available at: <https://www.asylumlawdatabase.eu/en/content/ecthr-brogan-ors-v-united-kingdom-application-nos-1120984-1123484-1126684-1138685>.

28 *Supra* note 26 at par. 78. Original citation omitted.

29 *Supra* note 27 at par. 62. Art. 5-3 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

30 553 U.S. 723, 128 S. Ct. 2229, 171 L Ed. 2d 41 (2008). Available at: <https://www.law.cornell.edu/supct/pdf/06-1195P.ZO>.

31 Combatant Status Review Tribunals were established by the United States Defense Department to determine whether individuals detained at the U.S. Naval Station at Guantanamo Bay, Cuba, were "enemy combatants."

> Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. **There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.** It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.[32]

In obeisance to the foregoing concatenate of jurisprudence, there must also be a robust system of challenging unreasonable prolonged detentions in our jurisdiction to ensure fidelity and adherence to the primacy of protecting the right to due process. Detainees under the ATA should be afforded a prompt and meaningful opportunity to challenge the facts giving rise to detention and to offer evidence in rebuttal thereof before a neutral arbiter.[33] "Meaningful" in this context entails, *inter alia,* the participation of legal counsel or independent representation, as well as a genuine opportunity for the detainee to respond to the factual basis of his or her detention.[34] Anent the promptness requisite, "detainees must have at least a preliminary opportunity to contest their detention within a matter of days, not months."[35]

On that score, the process delineated in Section 29 and the assertions made by the OSG during the oral arguments, when juxtaposed with the aforecited pronouncements, despondently fall short of according detainees a tangible opportunity to contest the legality of their protracted detention before the ATC as well as the courts.

Given the foregoing disquisition, the polemics against Section 29 carry sufficient weight and conviction. While there is an undeniable need to strengthen the State's efforts to combat terrorism, promote the nation's security, and ensure the safety of all, counter-terrorism measures should still be formulated within constitutional bounds and in reverence of our human rights obligations.

In epitome, I accede that the law in question was crafted out of the necessity to mitigate the legitimate threats of terrorism both from within and outside our borders. Still and all, the peace and security of the nation's people should not come at the expense of their constitutionally-guaranteed freedoms. Hence, in fealty to this Court's mandate as the final beacon of justice and civil liberties, I join Justices Caguioa and Gaerlan in voting to declare Section 29 of the ATA as unconstitutional.

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32 *Supra* note 30. Emphasis supplied; original citation omitted.

33 See Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,* CASE W. RES. J. INT'L L. 40, NO. 3 (2009), p. 642. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=articles>

34 *Id.* at 642-643. Original citation omitted.

35 *Id.* at 642. Original citations omitted.

JAPAR B. DIMAAMPAO
Associate Justice