G.R. No. 252578 (Atty. Howard M. Calleja, *et al.*, v. Executive Secretary, et al.); G.R. No. 252579 (Rep. Edcel C. Lagman v. Executive Secretary Salvador C. Medialdea, et al.); G.R. No. 252580 (Melencio S. Sta. Maria, et al. v. Executive Secretary Salvador C. Medialdea, et al.); G.R. No. 252585 (Bayan Muna Party-List Representative 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 (Center Trade Union and Human Rights, et al. v. Hon. Rodrigo R. Duterte, et al.); G.R. No. 252624 (Christian S. Monsod, et al. v. Executive Secretary 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. Executive Secretary Salvador C. Medialdea, et al.); G.R. No. 252733 (Bagong Alyansang Makabayan Secretary General Renato Reyes, Jr., et al. v. H.E. 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. Executive Secretary 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 (The Alternative Law Groups, Inc. v. Executive Secretary Salvador C. Medialdea); G.R. No. 252767 (Bishop Broderick S. Pabillo, et al. v. President Rodrigo R. Duterte, et al.); G.R. No. 252768 (General Assembly of Women for Reforms, Integrity, Equality, Leadership and Action, Inc., et al. v. President Rodrigo Duterte, et al.); UDK 16663 (Lawrence A. Yerbo v. Senate President, et al.); G.R. No. 252802 (Henry Abendan, et al. v. Hon. Salvador C. Medialdea, et al.); G.R. No. 252809 (Concerned Online Citizens, et al. v. Executive Secretary Salvador C. Medialdea, et al.); G.R. No. 252903 (Concerned Lawyers for Civil Liberties, et al. v. President 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. Executive Secretary Salvador C. Medialdea); G.R. No. 252921 (Brgy. Maglaking, San Carlos City, Pangasinan Sangguniang Kabataan Chairperson Lemuel Gio Fernandez Cayabyab, et al. v. President Rodrigo R. Duterte); G.R. No. 252984 (Association of Major Religious Superiors in the Phils., et al. v. Executive Secretary Salvador C. Medialdea, et al.); G.R. No. 253018 (University of the Philippines System Faculty Regent Dr. Ramon Guillermo, et al. v. H.E. 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 Philippines, 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. Executive

Secretary 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, et al.); G.R. No. 254191 [formerly UDK-16714] (Anak Mindanao Party-List Representative Amihilda Sangcopan, et al. v. Executive Secretary Salvador C. Medialdea, et al.).

Promulgated:

December 7, 2021

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SEPARATE OPINION

ZALAMEDA, *J.*:

At the outset, I deem it necessary to state, lest there be doubt, that the Court *is* keenly aware of its limitations, especially in matters of national security in this fast-changing world. We nevertheless strive to be responsive to the needs of the times. The Court's decision in this case should in no way be read as to undermine the powers of either Executive or the Congress. Under our Constitution's separation of powers structure, the exercise by the Executive of powers granted to it by Congress is vindicated, not eroded, when confirmed by the Judicial Branch.[1] Ultimately, we take heart that "the law and the Constitution are designed to survive, and remain in force, even in extraordinary times x x x. Liberty and security can be reconciled" as it was in my view reconciled here, "within the framework of the law."[2]

This Separate Opinion not only serves as an exposition, but also identifies the necessary consequences of the *ponencia*'s conclusion. Discussion will include the effect on the Implementing Rules and Regulations (IRR) of the Anti-Terrorism Act (ATA), or Republic Act No. (RA) 11479, as well as matters which should be addressed by Congress, the Anti-Terrorism Council (ATC), and the Anti-Money Laundering Council (AMLC). As far as practicable, the order of discussion will follow the sequence of sections of the ATA.

I. *Current Situation*

1 *Boumedienne v. Bush*, 553 U.S. 723, 797 (2008) [Per J. Kennedy].
2 *Id.* at 798.

A. *Anti-terrorism Laws and Judicial Review in Other Jurisdictions*

Anti-terrorism laws or counterterrorism measures in general, notwithstanding the admitted public interest served, have always been heavily scrutinized in view of their inevitable effect on civil liberties and human rights. Ideally, effective counterterrorism measures and respect for the rule of law, human rights and fundamental freedoms are complementary and mutually reinforcing objectives.[3] While the Legislative and Executive departments are expected to undertake this balancing act when enacting and implementing counterterrorism legislations, the herculean task of ensuring such balance ultimately falls with the Judiciary.

The United States of America (USA) and the United Kingdom (UK), in enacting their anti-terror laws, have struggled to find balance in their desire for security and preservation of constitutional or human rights.[4]

In the USA, the indefinite detention of aliens under the Patriot Act was harshly criticized by the media.[5] Under the said law, the Attorney General has the power to take into custody foreign terrorist suspects and, if deportation is unlikely, to detain them for up to 6 months, with renewable 6-month terms,[6] subject to judicial review in the form of *habeas corpus* proceedings.[7] The 6-month time limit appeared to be their Congress' response to the court ruling[8] that an alien who is held for more than 6 months has presumptively had his or her due process violated.[9]

The Anti-Terrorism, Crime and Security Act 2001[10] of the UK provides for indefinite detention of non-citizens, who are identified as international terrorists by the Secretary of State and are unable to leave UK, without charge or trial.[11] After the House of Lords found this to be in violation of the European Convention on Human Rights for being disproportionate and discriminatory,[12] the UK enacted the Prevention of Terrorism Act 2005. This gave the Secretary of State the power to place an individual under house arrest or place such other restrictions on his or her movements (referred to as control order), instead of indefinite detention.[13] Notably, court decisions influenced the evolution of anti-terrorism

3 *Promoting and Protecting Human Rights and Fundamental Freedoms while Countering Terrorism* <https://www.unodc.org/unodc/en/terrorism/news-and-events/human-rights-while-countering-terrorism.html> (last accessed 07 December 2021).

4 JoAnne M. Sweeny, *Indefinite Detention and Antiterrorism Laws: Balancing Security and Human Rights*, 34 Pace L. Rev. 1190 (2014), p. 1191< https://digitalcommons.pace.edu/plr/vol34/iss3/6> (last accessed 07 December 2021).

5 *Id.* at 1202.

6 *Id.* citing U.S.C. §1226(a) (2012).

7 *Id.* citing 28 U.S.C. §2241.

8 *Zadvydas v. Davis*, 533 U.S. 678 (2001).

9 Sweeny, *supra* at note 4, at 1203.

10 This replaced the Terrorism Act 2000.

11 Sweeny, *supra* at note 4, at 1214, citing Anti-terrorism, Crime and Security Act, 2001, § 23(2) (U.K.).

12 *Id.* at 1219-1220; citing *A v. Sec'y of State for Home Dep't*, (2004) UKHL 56.

13 *Id.* at 1222, citing Prevention of Terrorism Act, 2005, § 1 (U.K.).

legislations in both jurisdictions.

In striking down anti-terrorism laws, judicial review allows the Legislature to engage in a dialogue with the Judiciary by enacting a reply legislation.[14] Interestingly, there are also cases when anti-terror laws upheld as constitutional are nevertheless repealed by the Legislature.

In Canada, their highest tribunal upheld the provision in the Anti-Terrorism Act, which allows an investigative hearing where the police may obtain a judicial order that would compel a person to answer questions and reveal documents that were relevant in a terrorism investigation, subject to certain restrictions on its use.[15] The Canadian Parliament, however, allowed said provision to expire despite the favorable ruling.[16]

In a facial challenge lodged against India's Prevention of Terrorism Act (POTA), the constitutionality of the law was upheld, including the process of listing terrorist groups since the availability of judicial review after listing was deemed sufficient.[17] This notwithstanding, the POTA was repealed by a subsequent legislation.[18]

B. *The Philippines' ATA and the Anti-Terrorism Laws of Other Countries*

In his sponsorship speech, Senator Panfilo M. Lacson stated that there was a need to amend the Human Security Act (HSA) to, among others, meet international and regional standards on anti-terrorism laws.[19] The Philippine Government, in response to the Office of the United Nations High Commissioner on Human Rights (OHCHR), highlighted the similarities of the ATA to that of the Australian Criminal Code, the Canadian Criminal Code, and the Terrorism Act 2000 of the U.K.[20]

To demonstrate that the Congress did not formulate the definition of terrorism arbitrarily, the *ponencia* points out that the language of Section 4 of the ATA is almost identical to the language used in the United Nation's (UN) proposed Comprehensive Convention on International Terrorism, the Directive (EU) 2017/541 of the European Union, the Terrorism Act 2000 of the U.K., and the 2002 Terrorism (Suppression of Financing) Act of

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[14] Kent Roach, *Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review*, p. 23 <https://www.researchgate.net/publication/228152832_Judicial_Review_of_the_State's_AntiTerrorism_Activities_The_Post-911_Experience_and_Normative_Justifications_for_Judicial_Review> (last accessed 07 December 2021).

[15] *Id.* at 10, citing *Re Vancouver Sun* (2004) 2 S.C.R. 332.

[16] *Id.* at 17.

[17] *Id.* at 15, citing *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

[18] Id. at 17.

[19] TSN, 02 October 2019 Senate Session, p. 27.

[20] *The Philippine Government's Response to JOL PHL 4/2020 dated 29 June 2020 on Comments on the Anti-Terror Act (2020)*, pp. 5. 7, <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35537 > (last accessed 07 December 2021).

Singapore.[21] The *ponencia* looks into the designation process of the USA and the proscription process of the UK and Singapore and notes that these processes are neither novel nor recent preventive and extraordinary counterterrorism measures.[22]

The ATA notably bears substantial likeness to anti-terrorism legislations in other jurisdictions.

The definition of terrorism under the Australian Criminal Code,[23] the Canadian Criminal Code,[24] and the Malaysian Penal Code[25] appear similar to

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21 *Ponencia*, pp. 98-101.

22 *Id.* at 145-151.

23 Part 5.3, Section 100.1 defines "terrorist act" to mean an an action or threat of action where: (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it: (a) causes serious harm that is physical harm to a person; (b) causes serious damage to property; (c) causes a person's death; (d) endangers a person's life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: (i) an information system; (ii) a telecommunications system; (iii) a financial system; (iv) a system used for the delivery of essential government services; (v) a system used for, or by, an essential public utility; (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public.

24 Section 83.01 (1) defines "terrorist activity" to mean: (a) an act or omission constituting offenses under various Conventions and Protocols; or (b) an act or omission, in or outside Canada, (i) that is committed: (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada; and (ii) that intentionally: (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C); and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

25 Chapter VIA, Section 130B defines "terrorist act" as an act or threat of action within or beyond Malaysia where (a) the act or threat falls within subsection (3) and does not fall within subsection (4); (b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the act or threat is intended or may reasonably be regarded as being intended to—(i) intimidate the public or a section of the public; or (ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act.

An act or threat of action falls within this subsection if it— (a) involves serious bodily injury to a person; (b) endangers a person's life; (c) causes a person's death; (d) creates a serious risk to the health or the safety of the public or a section of the public; (e) involves serious damage to property; (f) involves the use of firearms, explosives or other lethal devices; (g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the

Section 4 of the ATA. Said laws define the acts, and the required intent and purpose of said acts, to constitute terrorism, with the proviso that advocacy, protest, dissent or industrial action is not considered terrorist act if it is not intended to cause serious harm that is physical harm to a person, to cause a person's death, to endanger the life of a person, other than the person taking the action, or to create a serious risk to the health or safety of the public or a section of the public.

Section 6 of the ATA, which refers to knowingly providing or receiving training connected with terrorist acts,[26] possessing things connected therewith,[27] collecting or making documents likely to facilitate terrorist acts,[28] and other acts done in preparation for, or planning, terrorist acts,[29] are also offenses punishable in the Australian Criminal Code.

Further, while not entirely the same as designation and proscription under the ATA, the Australian Criminal Code provides for a listing mechanism done by the Australian Federal Police Minister (in practice the Minister of Home Affairs), upon satisfaction that there is reasonable ground that the organization is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or advocates the doing of a terrorist act,[30] which listing ceases to have effect after 3 years (referred to as sunset clause).[31] The Criminal Code of Canada also provides for a listing regime by the Governor in Council, upon recommendation of the Minister of Public Safety,[32] subject to a five-year sunset clause.[33]

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public to— (i) any dangerous, hazardous, radioactive or harmful substance; (ii) any toxic chemical; or (iii) any microbial or other biological agent or toxin; (h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure; (i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services; (j) involves prejudice to national security or public safety; (k) involves any combination of any of the acts specified in paragraphs (a) to (j), and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].

An act or threat of action falls within this subsection if it— (a) is advocacy, protest, dissent or industrial action; and (b) is not intended— (i) to cause serious bodily injury to a person; (ii) to endanger the life of a person; (iii) to cause a person's death; or (iv) to create a serious risk to the health or safety of the public or a section of the public.

26 Australian Criminal Code, Section 101.3; Canadian Criminal Code, RSC 1985, c C-46, Section 83.18; Act 574, Section 130F and 130FA.

27 Australian Criminal Code, Section 101.4; Malaysian Penal Code, Section 130JB.

28 *Id.* at Section 101.5.

29 *Id.* at Section 101.6.

30 *Id.* at Section 102.1 (2). Under the Australian listing regime, a listing can provide the basis for establishing the fact that an organization is a terrorist organization in a criminal proceeding. In this regime, the Minister of Home Affairs considers advice in the form of a Statement of Reasons, which is prepared based on unclassified, open-source information about an organization or a classified briefing may be provided by relevant agencies. The listing is subject to the review by the Parliamentary Joint Committee on Intelligence and Security, judicial review by the courts, and oversight by the Inspector-General of Intelligence and Security (an independent statutory office) < https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/protocol-for-listing > (last accessed 07 December 2021).

31 *Id.* at Section 102.1 (3). Currently, 26 organizations are listed as terrorist organizations under this listing regime <https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations> (last accessed 07 December 2021).

32 Criminal Code, RSC 1985, c C-46, Section 83.05 (1) and (8.1).

33 To be listed, the Minister of Public Safety and the Governor in Council must be satisfied that there are

The formulation of anti-terrorism legislation is indeed a challenging one. It is imperative that the prevention of terrorist incidents through effective law enforcement is performed within the constraints of the rule of law. At the same time, the differing legal traditions and levels of technological capacities of States preclude the formulation of a uniform definition and approach to terrorism.

II. *Approaches in Judicial Review*

A. *Modes of Challenging the Constitutionality of Statutes*

In dealing with constitutional questions presented before the Court, due consideration must be given to the type of challenge mounted, *i.e.*, whether the attack was made by way of a facial or an as-applied challenge. The mode employed determines justiciability and, if judicial review appears proper, delineates the boundaries of the Court's pronouncements.

A facial challenge scrutinizes an entire law or provision by identifying its flaws or defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that the very existence of the law or provision is repugnant to the Constitution.[34] Facial challenges depart from the case and controversy requirement of the Constitution.[35]

While facial challenges traditionally result in the invalidation of the entire law,[36] Philippine jurisprudence has adopted a delimited type of facial analysis, where scrutiny is confined to certain provisions vulnerable to facial

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reasonable grounds to believe that the has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or the entity has knowingly acted on behalf of, at the direction of or in association with, an entity involved in a terrorist activity. [Criminal Code, RSC 1985, c C-46, Section 83.05 (1)] <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrsm/lstd-ntts/bt-lstng-prcss-en.aspx> (last accessed 07 December 2021).
While being on the list does not constitute criminal offence, it can lead to criminal consequences since it prohibits, among others, the provision or collection of funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by a designated person. <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/terrorists-terroristes.aspx?lang=eng> (last accessed 07 December 2021).

As of 25 June 2021, there are 77 terrorist groups listed under this regime. <https://www.canada.ca/en/public-safety-canada/news/2021/06/government-of-canada-lists-four-new-terrorist-entities.html> (last accessed 07 December 2021).

[34] *David v. Macapagal-Arroyo*, 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez]; *See also* Separate Concurring Opinion of C.J. Sereno in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28 (2014) [Per J. Abad].

[35] *Concurring Opinion* of J. Mendoza in *Estrada v. Sandiganbayan*, 421 Phil. 290 (2001).

[36] *See David v. Macapagal-Arroyo*, *supra* at note 34: "In overbreadth analysis, those rules give way; challenges are permitted to raise the rights of third parties; and the court invalidates the entire statute 'on its face,' not merely 'as applied for' so that the overbroad law becomes unenforceable until a properly authorized court construes it more narrowly."

attack.[37] As a rule, only laws and provisions implicating freedom of expression and its cognate rights are susceptible to a facial challenge.[38]

In contrast, an as-applied challenge considers only extant facts affecting real litigants, and examines the flaws and defects of the law on the basis of its actual operation to the parties.[39]

The propriety of a facial challenge primarily turns on the law's character (whether it is penal or non-penal) and subject (whether it involves speech or conduct).

B. *Facial Review of Penal Laws*

Penal laws, such as the ATA, are not generally susceptible to facial attack. They are, by nature and design, meant to have an "*in terrorem* effect" to deter socially harmful conduct.[40]

Considering, however, the value and importance placed on speech – as the "lifeblood of democracy, x x x precondition for the discovery of truth, and vital to our self-development,"[41] a facial challenge against a penal law may be lodged **if the alleged violation relates to freedom of speech or any of its cognate rights.**[42] In other words, the Court allows a facial challenge to a penal law to counter possible chilling effects it may have on protected speech because said penal law is vague or overbroad.[43]

On this point, I concur with the delimited facial analysis adopted by the *ponencia*. I find the framework acceptable as this allowed for a review of the law in light of the serious issues raised against its provisions, especially in relation to speech, but one that was limited enough to be respectful of long-established principles, such as *locus standi*, actual case and controversy, and the hierarchy of courts, which are themselves rooted in considerations of justice and due process.[44]

I am, however, in favor of a facial analysis of **only that portion of the ATA which expressly implicates freedom of speech, expression, and their**

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37 *See Disini, Jr. v. Secretary of Justice*, *supra* at note 34, where the Court limited facial analysis to speech-related provisions of Republic Act No. 10175.

38 *Id.*

39 *David v. Macapagal-Arroyo*, *supra* at note 34; *Romualdez v. Commission on Elections*, 576 Phil. 357 (2008) [Per J. Chico-Nazario]; *Estrada v. Sandiganbayan*, *supra* at note 35.

40 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452-496 (2010) [Per J. Carpio-Morales].

41 L. Tribe and J. Matz, *Uncertain Justice: The Roberts Court and the Constitution*, (New York: Picador Press (2015), p. 122.

42 *See Disini, Jr. v. Secretary of Justice*, *supra* at note 34.

43 *Id.*

44 *See Gios-Samar, Inc. v. Department of Transportation and Communications*, G.R. No. 217158, 12 March 2019 [Per J. Jardeleza].

cognate rights, *i.e.*, the *proviso* in Section 4 of the ATA,[45] referred to in the *ponencia* as the "Not Intended Clause." This, to me, seems an acceptable compromise (at least for the moment) between numerous competing values – a balance between security and civil liberty – prior to a resolution in a probable as-applied case which could properly examine the law's penal provisions. This is also why I vote that the phrase "organized for the purpose of engaging in terrorism" in Section 10 and the modes of designation under Section 25 are not unconstitutional.

Moreover, restricting Our facial analysis to the Not Intended Clause is more in keeping with a long line of jurisprudence holding that laws governing conduct may not be facially assailed, as will be expounded below.

C. *Facial Review of Laws Proscribing or Regulating Conduct*

In assessing the availability of a facial challenge, We have consistently distinguished between laws regulating conduct *vis-à-vis* those pertaining to speech.

Our prevailing jurisprudence on the matter takes its bearings from the Separate Opinion of Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*[46] *(Estrada),* where he comprehensively discussed the inapplicability of facial challenges to ordinary statutes penalizing conduct.[47] Justice Mendoza opined that facial invalidation of a statute that does not regulate or prohibit speech may jeopardize the interest of society to suppress harmful conduct, *viz*:

> To recapitulate, had R.A. No. 7080 been a law regulating speech, I would have no hesitation examining it on its face on the chance that some of its provisions — even though not here before us — are void. For then the risk that some state interest might be jeopardized, i.e., the interest in the free flow of information or the prevention of "chill" on the freedom of expression, would trump any marginal interest in security.
>
> **But the Anti-Plunder Law is not a regulation of speech. It is a criminal statute designed to combat graft and corruption, especially**

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[45] *See* Rep. Act No. 11479, Sec. 4: "*SECTION 4. Terrorism.* — Subject to Section 49 of this Act, terrorism is committed by any person who, within or outside the Philippines, regardless of the stage of execution:

xxx

xxx *Provided,* That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, **which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety.**"

[46] *Supra* at note 35.

[47] *See* Separate Opinion of J. Mendoza in *Estrada v. Sandiganbayan*, *supra* at note 35, which was extensively quoted with approval in the main opinion.

> **those committed by highly-placed public officials. As conduct and not speech is its object, the Court cannot take chances by examining other provisions not before it without risking vital interests of society.** Accordingly, such statute must be examined only "as-applied" to the defendant and, if found valid as to him, the statute as a whole should not be declared unconstitutional for overbreadth or vagueness of its other provisions.[48]

The position of Justice Mendoza was then adopted in *Romualdez v. Sandiganbayan*,[49] where the Court ruled that Section 5 of the Anti-Graft Law involved conduct—not speech—and must be examined only as applied to petitioners therein. The same line of reasoning was adopted in *David v. Macapagal-Arroyo*[50] and *Spouses Romualdez v. Commission on Elections*.[51] In these cases, the Court maintained that facial adjudication is not intended to test the validity of a law that penalizes unprotected conduct.

Going to the case at bar, primarily instructive is the Court's ruling in *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council* (*Southern Hemisphere*),[52] which involved a provision of similar import as Section 4 of the ATA. In *Southern Hemisphere*, petitioners assailed the definition of terrorism in Section 3 of the HSA for being vague and overly broad. The Court ruled that the HSA, being a penal statute, may not be subjected to a facial challenge. A limited vagueness analysis of the definition of "terrorism" is legally impermissible absent an actual or imminent charge against the petitioners therein.[53]

Petitioners in *Southern Hemisphere* attempted to clothe the definition of terrorism with a speech component. However, the Court rebuffed this theory, finding that Section 3 of the HSA penalizes conduct, not speech.

Here, the other provisions of the ATA, except the Not Intended Clause, do not expressly implicate speech, expression, or any of their cognate rights. Going by precedent, it is my considered view that the delimited facial analysis should be confined to the Not Intended Clause. The other provisions of the ATA may be assailed through an appropriate as-applied challenge.

D. *Advocated Expansion of Facial Review to Laws Implicating Other Fundamental Rights*

Petitioners prompt the Court to expand the scope of facial challenges

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48 Emphasis supplied.
49 479 Phil. 265 (2004) [Per J. Panganiban].
50 *Supra* at note 36.
51 *Supra* at note 39.
52 *Supra* at note 40.
53 *Id.*

beyond speech–and expression–related provisions of the ATA.[54] They rely on *Imbong v. Ochoa, Jr.* (*Imbong*),[55] where the Court held that facial challenges cover statutes regulating free speech, religious freedom, and "other fundamental rights."

I acknowledge that the Court's use of facial challenge in *Imbong* was not confined to religion-related provisions of RA 10354 (RH Law). The Court also struck down certain provisions of the RH Law for violating the equal protection clause,[56] the mutual right of the spouses to found a family and their right to marital privacy,[57] and the right of parents to exercise parental control over their minor-child.[58] In fact, in his dissenting opinion in *Imbong*, Justice Marvic M.V.F. Leonen noted the Court's expansion of the scope of facial challenges.[59]

Since the deviation in *Imbong*, however, the Court redirected facial analysis to its limited application.

In *Falcis III v. Civil Registrar General*,[60] the Court restated the rule that a facial challenge requires a showing of curtailment of the right to freedom of expression, based on the principle that an overly broad statute may chill otherwise constitutional speech.[61] In *Madrilejos v. Gatdula*,[62] the Court noted that an anti-obscenity statute cannot be facially attacked because facial challenges are limited to cases involving protected speech. Thus, notwithstanding *Imbong*, the prevailing rule is that facial challenges are limited to laws directly implicating freedom of expression and its cognate rights.

As of yet, there is no compelling reason to expand the scope of facial challenges to all other constitutional rights.

Relatedly, the general rule is that courts do not sit to adjudicate mere academic questions to satisfy scholarly interest, however intellectually challenging.[63] There ought to be an actual and substantial controversy admitting of specific relief through a decree conclusive in nature, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[64]

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54 *See* Petitioners' Memorandum for Cluster 1, p. 20.

55 732 Phil. 1 (2014) [Per J. Mendoza].

56 *See id.* at Section 5.24 of the RH Law's implementing rules and regulations.

57 *See id.* at Sec. 23(a)(2)(i) of the RH Law.

58 *See id.* at Secs. 7 and 23(a)(2)(ii) of the RH Law.

59 *See id., Separate Dissenting Opinion* of J. Leonen: "That we rule on these special civil actions for *certiorari* and prohibition — which amounts to a preenforcement freewheeling facial review of the statute and the implementing rules and regulations — is very bad precedent. The issues are far from justiciable."

60 G.R. No. 217910, 03 September 2019 [Per J. Leonen].

61 *Id.*

62 G.R. No. 184389, 24 September 2019 [Per J. Jardeleza].

63 *Republic v. Tan*, 470 Phil. 322 (2004) [Per J. Carpio-Morales].

64 *Southern Hemisphere, supra* at note 40.

The danger of an advisory opinion is that we are forced to substitute our own imagination of the facts that can or will happen.[65] In an actual case, there is judicial proof of the real facts that frame Our discretion.[66] Upending the doctrines requiring a justiciable controversy would flood the courts with cases framed within hypotheticals and speculations. In turn, ruling on these imagined scenarios would make courts tread into dangerous territory, in potential encroachment of the legislative prerogatives vested by the people upon Congress.

Hence, I submit that facial challenges must be used in the conservative and only to avert the chilling effect proscribed by the Constitution.[67] An on-its-face invalidation is a manifestly strong medicine to be used sparingly and only as a last resort.[68] Accordingly, the Court's facial analysis of the ATA should be limited to the Not Intended Clause.

E. *Outcomes in facial and as-applied challenges*

I emphasize that the *ponencia's* use of a delimited facial challenge does not foreclose, and is not determinative of, any possible outcome in an appropriate as-applied challenge. Litigants may still obtain relief through an as-applied challenge backed by concrete facts.

To illustrate the possible similar outcomes between facial and as-applied challenges, a summary of the rules is in order:

First. In a facial challenge, a litigant may invoke the doctrines of overbreadth and vagueness. The overbreadth doctrine provides that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.[69] Meanwhile, the vagueness doctrine holds that a law is facially invalid if men of common intelligence must necessarily guess at its meaning and differ as to its application.[70]

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,[71] whether involving penal or non-penal

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65 *Separate Dissenting Opinion* of J. Leonen, *Imbong v. Ochoa, Jr. supra* at note 55.

66 *Id.*

67 *See Nicolas-Lewis v. Commission on Elections*, G.R. No. 223705, 14 August 2019 [Per J. Reyes]: "The allowance of a review of a law or statute on its face in free speech cases is justified, however, by the aim to avert the 'chilling effect' on protected speech, the exercise of which should not at all times be abridged."

68 *David v. Macapagal-Arroyo*, *supra* at note 34.

69 *Adiong v. Commission on Elections*, G.R. No. 103956, 31 March 1992 [Per J. Gutierrez, Jr.].

70 *Spouses Romualdez v. Commission on Elections*, *supra* at note 39.

71 *Southern Hemisphere*, *supra* at note 40.

laws.[72] A statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.[73]

Unlike overbreadth, the vagueness doctrine may be invoked both in a facial and an as-applied challenge. The Court categorically affirmed this in *Southern Hemisphere*,[74] where We ruled that prevailing doctrines do not preclude the operation of the vagueness test as applied to litigants with an actual or imminent charge against them.

In an as-applied challenge, the vagueness doctrine is not confined to free speech cases; it may be invoked against a penal law under a claim of violation of due process.[75] In *Southern Hemisphere*, the Court noted several cases where the vagueness doctrine, asserted under the due process clause, was utilized to examine the constitutionality of criminal statutes.[76] In all these cases, accused were charged with violations of the assailed statute, and they raised vagueness as a defense.

Second. As to possible outcomes, a successful facial challenge would result in striking down the law or the offending provisions.[77] Meanwhile, an as-applied challenge has several possible results:

1. The court may rule that the statute is not vague. This finding may be premised on the fact that the law sets sufficient standards,[78] the provisions are intended to be understood in their plain and ordinary meaning,[79] or the alleged ambiguous terms would be addressed by the State's evidence as trial progresses.[80]

2. If the legislation is merely couched in imprecise language, but which nevertheless specifies a standard through defectively phrased, the law may be saved by proper construction.[81]

3. If the statute is apparently ambiguous but fairly applicable to certain types of activities, the statute may not be challenged whenever

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72 *See Disini, Jr. v. Secretary of Justice*, *supra* at note 34.

73 *Southern Hemisphere, supra* at note 40.

74 *Id.*

75 *Southern Hemisphere, supra* at note 40:

> American jurisprudence instructs that "vagueness challenges that do not involve the First Amendment must be examined in light of the specific facts of the case at hand and not with regard to the statute's facial validity."
>
> For more than 125 years, the US Supreme Court has evaluated defendants' claims that criminal statutes are unconstitutionally vague, developing a doctrine hailed as "among the most important guarantees of liberty under law."

76 *People v. Nazario*, G.R. No. L-44143, 31 August 1988 [Per J. Sarmiento]; *People v. Dela Piedra*, 403 Phil. 31 (2001) [Per J. Kapunan]; *People v. Siton*, 616 Phil. 449 (2009) [Per J. Ynares-Santiago]. *See also Romualdez v. Sandiganbayan, supra* at note 49; *Romualdez v. Commission on Elections*, supra at note 39; *Estrada v. Sandiganbayan, supra* at note 35.

77 *Estrada v. Sandiganbayan*, supra note 35.

78 *People v. Nazario, supra* at note 76, *citing Parker v. Levy*, 417 U.S. 733 (1974).

79 *Estrada*, supra note 35.

80 *Dans, Jr. v. People*, 349 Phil. 434 (1998) [Per J. Romero].

81 *People v. Nazario, supra* at note 76; *Romualdez v. Sandiganbayan supra* at note 49; *People v. Dela Piedra, supra* at note 76.

directed against such activities.[82]

4. If the court finds that the statute is unconstitutional as applied to the accused, the court may carve away the unconstitutional aspects of the law by invalidating its improper applications on a case to case basis.[83]

5. In highly exceptional circumstances, as when the statute is "perfectly vague" and it cannot be clarified by a saving clause or by construction, the statute may be struck down as unconstitutionally vague.[84] As mentioned in the *ponencia*, it is theoretically possible that a case which starts out as an as-applied change may eventually result in the total invalidation of the statute if, in the process, the court is satisfied that the law could never have any constitutional application.[85]

Otherwise put, a facial challenge and an as-applied challenge have similar issues and outcomes. The matters passed upon in this case may resurface again in an as-applied case.

For example, the accused may claim that his or her actions do not fall within the plain text of the law, and he or she could not have known that his or her acts would be covered by the law. If the defense is meritorious, courts may invalidate certain applications of the law for violating due process, without necessarily nullifying the law itself. Thus, an as-applied challenge may result in a ruling that the law, as applied to the accused, is ambiguous or vague. Until passed upon in a proper case, therefore, vagueness is a valid defense, whether meritorious or not.

Thus, the *ponencia's* disquisition passing upon provisions not subject to a facial challenge should not be decisive of future as-applied challenges. Judicial tenets must naturally arise from actual litigated facts.

III. *Section 4: Terrorism*

A. *The unavailability of facial challenge to assail the main part of Section 4, which penalizes conduct unrelated to speech*

Section 4, paragraphs (a) to (e) of the ATA (referred to in the *ponencia* as the "main part") may not be assailed through a facial challenge.[86] These

[82] *People v. Nazario*, *supra* at note 76.
[83] *David v. Macapagal-Arroyo*, supra note 34.
[84] *People v. Nazario*, *supra* at note 76, *citing Coates v. City of Cincinnati*, 402 U.S. 611 (1971).
[85] *Ponencia*, p. 70, *citing INS v. Chadha*, 462 U.S. 919 (1983).
[86] *See Ponencia*, p. 88.

clauses pertain to conduct, and not to speech.[87]

Similar to the definition of terrorism assailed in *Southern Hemisphere*, the main part of Section 4 covers acts of the same character as those proscribed by other penal laws. It has no speech component elemental to the crime.

Paragraphs (a) to (c) of Section 4 speak of acts intended to cause death, serious bodily injury, extensive damage or destruction, or extensive interference with critical infrastructure. Paragraph (d) pertains to overt acts involving weapons and explosives, while paragraph (e) refers to conduct relating to dangerous substances, fires, floods, or explosions. Thus, the crimes are defined through acts that cause a specific harm, injury, or damage.

It is only when the main part of Section 4 is read in relation to the Not Intended Clause that there appears basis for a vagueness and overbreadth challenge. The *ponencia* even pointed out that it is only the Not Intended Clause, by clear import of its language and legislative history, which innately affects the exercise of freedom of speech and expression.[88] I would thus limit this facial challenge only to this objectionable portion, rather than the entirety, of Section 4.

As also mentioned, the ATA, being a penal law, is **not** susceptible to a facial challenge on vagueness or overbreadth grounds.[89] In fact, if the law is to work precisely as it was intended, it *should* create a chilling effect as to deter any commission of acts of terrorism. No one disputes that terrorism is an evil which the State has the right to protect itself and the public from.

At any rate, even assuming that the main part of Section 4 may be facially attacked, I find the terms of the main part to be sufficiently clear as to remove it from the purview of a facial challenge on the grounds of vagueness and overbreadth.

A law will not be held invalid merely because it might have been more explicit in its wordings or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide all the details in advance as in all other statutes.[90] Due process only requires that the terms of a penal statute be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.[91] To reiterate, even a law that is couched in imprecise language may not be struck down for vagueness and may be saved by proper construction so long as it sets a standard.[92]

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87 *Id.*
88 *Id. at* 85.
89 *Madrilejos v. Gatdula, supra* at note 62.
90 *Estrada v. Sandiganbayan, supra* at note 35.
91 *People v. Dela Piedra, supra* at note 76.
92 *People v. Nazario, supra* at note 76; *Romualdez v. Sandiganbayan, supra* at note 49; *People v. Dela*

In this case, it is impossible to foresee any and all forms that terrorism may take. As was emphasized during my interpellation in the oral arguments, terrorism is continuously evolving.[93] By the very nature of terrorism, the law penalizing it must be agile enough to remain resilient and responsive to the changing times.

Notwithstanding the flexibility of the main part of Section 4, it provides sufficient guideposts to delineate permissible and criminal conduct. The Chief Justice correctly points out that the overt acts are circumscribed by specific criminal intents (*e.g.*, to cause death or serious bodily injury) and other specified results (*e.g.*, the development of weapons and release of dangerous substances).[94] The criminal acts are further delimited by the requirement for a terroristic purpose,[95] gleaned from the nature and context of the act.[96]

I agree that, at this point, the five elements of terrorism—overt act, intent to cause a particular harm, a link between the overt act and the particular harm intended, terroristic purpose, and standards of nature and context—appear to sufficiently apprise citizens and law enforcement of the range of prohibited conduct.[97]

B. *Invalidation of the Not Intended Clause*

1. *Reasons for Concurrence*

I agree with the *ponencia* that the Not Intended Clause is unconstitutional for being vague and overbroad, and hence, an undue restriction of freedom of speech and expression and its cognate rights. It is correct that the said clause indubitably pertains to speech and expression which qualifies it for the application of a facial challenge.

In *Estrada*,[98] the Court, citing Justice Mendoza, explained the void-for-vagueness and overbreadth doctrines in relation to a facial challenge which has special application only to free speech cases, thus:

> The **void-for-vagueness doctrine** states that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to

Piedra, *supra* at note 76.

93 *See Ponencia*, p. 102, *citing* TSN, 02 March 2021, pp. 41-44.

94 Concurring and Dissenting Opinion of C.J. Gesmundo, p. 152.

95 *See* Sec. 4 of the ATA: "xxx to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety xxx"

96 Concurring and Dissenting Opinion of C.J. Gesmundo, p. 153.

97 *See id.* at 151-152.

98 Supra at note 35.

> its application, violates the first essential of due process of law." The **overbreadth doctrine**, on the other hand, decrees that "a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."
>
> A facial challenge is allowed to be made to a vague statute and to one which is overbroad because of possible "chilling effect" upon protected speech. The theory is that "[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity." The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes.[99] (Emphasis supplied)

A reading of the *proviso* which includes the Not Intended Clause shows that the inclusion of the latter serves as a limitation to the exercise of the enumerated acts related to free speech, expression, and assembly, thus:

> SEC. 4. *Terrorism.* – x x x *Provided*, That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, **which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or create serious risk to public safety.** (Emphasis supplied)

The inclusion of the Not Intended Clause was meant to safeguard freedom of speech and expression. However, I likewise find that its inclusion, while appearing to be a carve-out clause, produced the opposite effect. It criminalizes advocacy, protest, and other exercises of civil and political rights subject to proof of a specific intent. This is made more evident in Rules 4.1 to 4.4 of the ATA's IRR, which treats advocacy, protest, etc., as overt acts similar to the *actus reus* enumerated in the main part of Section 4. Its inclusion begs the question – would the exercise of the enumerated actions be considered as terrorism if found to have been intended to cause death or serious physical harm to a person, to endanger a person's life, or create serious risk to public safety? If it was the intention of the Congress to criminalize such acts, this should have been clearly stated rather than hidden behind the supposed protection of the said rights. Indeed, despite the similar wording of Section 4 of the ATA and its corresponding provisions in the IRR with the definitions provided in other jurisdictions, the ATA and its IRR should be scrutinized under the lens of the 1987 Philippine Constitution and prevailing jurisprudence.

We are aware of the view that what is actually being criminalized in

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[99] Citations omitted.

the Not Intended Clause is not speech *per se*, but the accompanying or ensuing overt act of terrorism defined in the main part of Section 4. The enumerated acts would fall within the ambit of terrorism only when they are intended "to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."

However, this construction brings to light the overbreadth of the Not Intended Clause. If the accompanying or ensuing overt act is already covered and penalized under paragraphs (a) to (e) of Section 4, then there is no legal and practical necessity for the Not Intended Clause. As it stands, the *proviso,* as qualified by the Not Intended Clause, only serves as a cautionary warning against dissent; it does not and will not further the State's counter-terrorism efforts.

Even though the governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[100] Incidental restriction on freedom of speech and expression must be no greater than is essential to the furtherance of such governmental interest.[101] The requirement of a narrowly-tailored restriction applies even if the level of scrutiny is merely intermediate.[102]

Section 4 of the ATA was distributed among Rules 4.1 to 4.4 of its IRR. Before the *ponencia's* invalidation of the Not Intended Clause, Rule 4.4 of the ATA's IRR read:

> **Rule 4.4. Acts not considered terrorism**
> When not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety, the following activities shall not be considered acts of terrorism:
>
> a. advocacy;
> b. protest;
> c. dissent;
> d. stoppage of work;
> e. industrial or mass action;
> f. creative, artistic, and cultural expressions; or
> g. other similar exercises of civil and political rights.
>
> **If any of the acts enumerated in paragraph (a) to (g) of Rule 4.4, however, are intended to cause death or serious physical harm to a person, to endanger a person's life, or to create serious risk to public safety, and any of the purposes enumerated in paragraph (b) under Rule 4.3 is proven in the engagement in the said act, the actor/s may be held liable for the crime of terrorism as defined and penalized under Section 4 of the Act.** The burden of proving such intent lies with the prosecution arm of the government. (Emphasis supplied)

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[100] *Adiong v. Commission on Elections*, *supra* at note 69.
[101] *Chavez v. Gonzales*, 569 Phil. 155 (2008) [Per C.J. Puno], *citing Osmeña v. Commission on Elections*, 351 Phil. 692 (1998) [Per J. Mendoza].
[102] *See id.*

In this regard, the ATA's IRR is clear in categorically penalizing as acts of terrorism – advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights – supposedly intended to cause death or serious physical harm to a person, to endanger a person's life, or to create serious risk to public safety, and any of the purposes enumerated in paragraph (b) under Rule 4.3.

Expanding the purposes to include those mentioned in paragraph (b) of Rule 4.3 or the *mens rea* in Section 4 of the ATA, advocacy and similar acts are penalized if they are done for the following purposes: (a) to intimidate the general public or a segment thereof; (b) to create an atmosphere or spread message of fear; (c) to provoke or influence by intimidation the government or any international organization; (d) to seriously destabilize or destroy the fundamental political, economic, or social structures of the country; or (e) to create a public emergency or seriously undermine public safety.

The foregoing purposes, as laid out in paragraph (b) of Rule 4.3, show the broad extent of possible bases to claim as terrorism the exercise of advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights. Moreover, the catch-all phrase "other similar exercises of civil and political rights" may include any and all conceivable exercises of free speech, expression, and assembly such as, but not limited to, the press, print, and media.

It bears stressing that freedom of speech and expression are accorded primacy and high esteem in our jurisdiction. As eloquently explained in *Chavez v. Gonzales,*[103] our history shows that the struggle to protect the freedom of speech, expression and the press was, at bottom, the struggle for the indispensable preconditions for the exercise of other freedoms.

> Freedom of speech and of the press means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, and to take refuge in the existing climate of opinion on any matter of public consequence. When atrophied, the right becomes meaningless. The right belongs as well — if not more — to those who question, who do not conform, who differ. The ideas that may be expressed under this freedom are confined not only to those that are conventional or acceptable to the majority. To be truly meaningful, freedom of speech and of the press should allow and even encourage the articulation of the unorthodox view, though it be hostile to or derided by others; or though such view "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.

As such, this Court cannot give judicial imprimatur to a patently wrongful characterization under the ATA and its IRR of the exercise of the fundamental rights to free speech, expression, and assembly. The Not

[103] *Supra* at note 101.

Intended Clause relegates advocacy, protest, dissent, stoppage of work, industrial or mass action, and other exercises of civil and political rights similar to the *actus reus* enumerated in Section 4(a) to (e) of the ATA.

Further, the Not Intended Clause under the ATA is vague as there are no sufficient standards within which to objectively determine the supposed criminal intentions in the exercise of advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights. Such exercise will be highly subjective since the enumerated acts are normally intended to check and criticize governmental actions as well as establishments. It is also overbroad insofar as it invades protected areas of freedom, and sanctions criminalization of acts committed pursuant to such freedom. A 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 of a crime. The overbroad or vague law thus chills him into silence.[104]

In addition, I agree with the *ponencia* that the Not Intended Clause likewise fails the strict scrutiny test. In *Disini vs. Secretary of Justice*,[105] the Court stated that "under the strict scrutiny standard, a legislative classification that impermissibly interferes with the exercise of fundamental right or operates to the peculiar class disadvantage of a suspect class is presumed unconstitutional. The burden is on the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest." Here, while addressing the threats of terrorism is a valid objective, the Not Intended Clause unduly expands restrictions to fundamental rights which are not *per se* related to such objective.

If not declared unconstitutional, the Not Intended Clause makes anyone who exercises acts which relate to free speech, expression, and assembly vulnerable to terrorism charges. The facial invalidation of the Not Intended Clause is warranted by the "chilling effect" it has on protected speech, and an inhibitory effect on protesters, dissenters, and individuals exercising similar acts. While it is recognized that criminal acts may possibly be committed on the occasion of the exercise of such rights, such criminal acts should be differentiated from acts in the exercise of freedom of speech, expression, and assembly. Criminal acts should be punished under applicable penal laws. This recognition, however, does not detract from the fundamental precept of our democracy that the fundamental rights to advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, are central to our national life.

The foregoing considered, I agree that the Not Intended Clause should be declared unconstitutional. As a necessary consequence, portions of Rule

[104] *Disini, Jr. v. Secretary of Justice*, *supra* at note 34.
[105] *Id.*

4.4 of the ATA's IRR should be expressly declared as unconstitutional.

2. *Necessary Consequence of Invalidation of the Not Intended Clause: Effect in the ATA's IRR*

The *ponencia* declared unconstitutional the Not Intended Clause under Section 4 of the ATA. As ruled, Section 4 reads:

> SEC. 4. *Terrorism.* – Subject to Section 49 of this Act, terrorism is committed by any person who, within or outside the Philippines, regardless of the stage of execution:
>
> (a) Engages in acts intended to cause death or serious bodily injury to any person, or endangers a person's life;
>
> (b) Engages in acts intended to cause extensive damage or destruction to a government or public facility, public place or private property;
>
> (c) Engages in acts intended to cause extensive interference with, damage or destruction to critical infrastructure;
>
> (d) Develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives or of biological, nuclear, radiological or chemical weapons; and
>
> (e) Release or dangerous substances, or causing fire, floods or explosions
>
> when the purpose of such act, by its nature and context, is to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety, shall be guilty of committing terrorism and shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592, otherwise known as "An Act Amending Articles 29, 94, 97, 98 and 99 of Act No. 3815, as amended, otherwise known as the Revised Penal Code": Provided, That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights.

Deletion of references made to the Not Intended Clause in the ATA's IRR thus follows as a necessary consequence of this declaration. To my mind, this entails the deletion of the first clause in the first paragraph and the entire second paragraph of Rule 4.4, thus:

> **RULE IV: TERRORISM AND TERRORISM-RELATED CRIMES**
>
> **RULE 4.4. Acts not considered terrorism.**

The following activities shall not be considered acts of terrorism:

a. advocacy;
b. protest;
c. dissent;
d. stoppage of work;
e. industrial or mass action;
f. creative, artistic, and cultural expressions; or
g. other similar exercises of civil and political rights.

IV. *Section 25: Designation of Terrorist Individual, Groups of Persons, Organizations or Associations*

A. *Section 25 cannot be subject to a facial challenge*

Section 25, by its terms, does not explicitly implicate the freedom of speech or its cognate rights; as part of a penal law, it cannot be subject to a facial challenge.

The following petitions, however, purport to present as-applied challenges:

In **G.R. No. 252585**, petitioners Bayan Muna, *et al.*, claim that Section 25 is a "unilateral" and "purely executive act of designation without judicial intervention" that may be too sweepingly applied to "just any speaker and their speeches."[106] In particular, they argue that the power of designation could be used to disqualify them from participating under the party-list system by simply tagging them as "communist fronts and/or terrorists and/or NPA."[107] They went on to cite a recent Resolution issued by the Commission on Elections (COMELEC) dismissing one such petition filed against it and several other groups.[108]

In **G.R. No. 252767**, petitioners Pabillo, *et al.*, maintain that the grant of designation powers to the ATC not only "arrogat[es] the public prosecutor's function to determine probable cause in a preliminary investigation,"[109] it transgresses due process rights in that it designates an individual as a terrorist "based only on suspicion, sans evidence, and without any proceeding where a respondent is given an opportunity to refute the accusations against him/her xxx."[110] Petitioners in G.R. No. 252767 thereafter list instances when they have allegedly been "labelled and accused

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[106] Petition (G.R. No. 252585), p. 53.
[107] *Id.* at 56-63.
[108] It is noted, however, that the disqualification case was filed by one Angela Aguilar, a **private** party. According to the cited COMELEC Resolution, Aguilar is the current Secretary General of Kababaihang Maralita, a non-government organization; Annex E of Petition (G.R. No. 252767).
[109] Petition (G.R. No. 252767), p. 91.
[110] *Id.* at 91-92.

as front organizers of the CPP-NPA even prior to the enactment of RA No. 11479."[111]

In **G.R. No. 252768**, petitioners GABRIELA, *et al.*, assert that Section 25 is a "very broad, in fact, undefined power, to suspect individuals x x x of being terrorists or committing terrorism x x x [with] no known parameters for [its] exercise x x x."[112] Claiming that officers, members, and supporters of GABRIELA have been targets of human rights violations[113] and red-tagging[114] by state forces, petitioners warn that "given the worsening climate of oppression and disregard of basic rights, x x x the law is wont to be implemented 'with an evil eye and an unequal hand.'"[115]

In **G.R. No. 253242**, petitioners Coordinating Council for People's Development, *et al.*, argue that the ATC's designation power clearly and blatantly violates the due process clause of the Constitution[116] as it relies on a vague and overbroad definition of terrorism and lacks sufficient standards for its exercise. They also aver that they have been "openly branded as terrorist groups"[117] and, as such, targets of human rights violations perpetrated by State forces.[118]

I have examined the foregoing petitions and submit that the records before the Court are insufficient to justify a ruling on Section 25 at this time.

First, apart from petitioner Rey Claro Cera Casambre (Casambre), one of the petitioners in G.R. No. 252767, no other petitioner from the aforementioned petitions claims to have been the subject of the ATC's designation powers as to lodge a proper as-applied case against Section 25.

Second, while it is noted that Casambre was among those designated as terrorists under ATC Resolution No. 17, there is nothing by way of allegation, much less proof, in the petition in G.R. No. 252767, as to whether (and how) Section 25 operated to violate his constitutional rights. It also appears that specific references to government action against Casambre were solely in relation to his inclusion (as an alleged leader of the CPP-NPA) in the list of individuals in the **proscription** case filed by the DOJ before the Manila RTC Branch 19.[119] Nevertheless, and as the petition itself noted, his name was stricken off of this list upon his motion, "with the trial court declaring that [Casambre] cannot be considered 'a party respondent in the petition.'"[120]

Third, the lack of allegations as to the issue of designation may well

[111] *Id.* at 92-93.
[112] Petition (G.R. No. 252768), p. 43.
[113] *Id.* at 2-18.
[114] *Id.* at 18-25.
[115] *Id.* at 50.
[116] Petition (G.R. No. 253242), pp. 82-85.
[117] *Id.* at 14.
[118] *Id.* at 15-39.
[119] Petition (G.R. No. 252767), p. 33.
[120] *Id.* at 17.

be due to the date of issuance of ATC Resolution No. 17 (designating a number of individuals, including petitioner Casambre, as terrorists under the third mode of designation). The resolution was issued only on 21 April 2021, or nearly a year after the petition was filed before the Court. To my mind, however, this only further underscores the prematurity of any ruling with respect to Section 25.

Fourth, even granting the presence of an actual as-applied case in Casambre's favor, there is *still* an absolute dearth of allegation supported by evidence on the record which can provide the necessary factual bases to strike down Section 25 (or portions thereof).

The allegations against Section 25 are essentially facial challenges against its reasonableness as a state-sponsored counterterrorism measure. A ruling on reasonableness in this case, however, is hinged on proof that the regulation is necessary to achieve a compelling State interest, and that it is the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest.[121] Such finding is, in turn, inextricably linked to the resolution of underlying questions of fact.[122] In this case, there are no factual bases, at least ones established by testimony and evidence of opposing parties in the crucible of trial, by which to weigh and ascertain the balance between the promotion of the government's compelling interest (to prevent the commission of terrorism) and the alleged intrusion/s into petitioners' constitutional rights.[123]

In *Alfonso v. Land Bank of the Philippines*,[124] this Court resisted proposals to declare the unconstitutionality of Section 17 of RA 6657, or the Comprehensive Agrarian Reform Law, and the rules issued by the Department of Agrarian Reform (DAR) to implement the same. It considered that while petitioner Alfonso was "a direct injury party who could have initiated a direct attack" on the law and its implementing rules, he did not do so. As the petition concerned itself merely with the non-binding nature of Section 17 of RA 6657 and the resulting DAR formula in relation to the judicial determination of the just compensation for properties covered by the agrarian reform program, the Court ruled that the case did **not** meet the "case and controversy" requirement of *Angara* as to warrant a ruling on the law's constitutionality:

> Petitioner is a direct-injury party who could have initiated a direct attack on Section 17 and DAR AO No. 5 (1998). His failure to do so prevents this case from meeting the "case and controversy" requirement of *Angara*. It also **deprives the Court of the benefit of the "concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional**

[121] *Samahan ng mga Progresibong Kabataan v. Quezon City*, 815 Phil. 1067 (2017) [Per J. Perlas-Bernabe].

[122] *See* Concurring and Dissenting Opinion of J. Jardeleza in *Zabal v. Duterte*, G.R. No. 238467, 12 February 2019 [Per J. Del Castillo].

[123] *See Social Justice Society v. Dangerous Drugs Board*, 591 Phil. 393 (2008) [Per J. Velasco].

[124] 801 Phil. 217 (2016) [Per J. Jardeleza].

> **questions."**
>
> The dissents are, at their core, indirect attacks on the constitutionality of a provision of law and of an administrative rule or regulation. This is not allowed under our regime of judicial review. x x x
>
> Our views as individual justices cannot make up for the deficiency created by the petitioner's failure to question the validity and constitutionality of Section 17 and the DAR formulas. To insist otherwise will be to deprive the government (through respondents DAR and LBP) of their due process right to a judicial review made only "after full opportunity of argument by the parties."
>
> Most important, since petitioner did not initiate a direct attack on constitutionality, **there is no factual foundation of record to prove the invalidity or unreasonableness of Section 17 and DAR AO No. 5 (1998).** This complete paucity of evidence cannot be cured by the arguments raised by, and debated among, members of the Court.[125]

Finally, and again granting the presence of evidence on record, this Court, since its creation in 1901, does not, as a rule, try questions of facts:

> x x x the Court, whether in the exercise of its original or appellate jurisdiction, is not equipped to receive and evaluate evidence in the first instance. Our sole role is to apply the law based on the findings of facts brought before us. x x x Accordingly, when litigants seek relief directly from the Court, they bypass the judicial structure and open themselves to the risk of presenting incomplete or disputed facts. This consequently hampers the resolution of controversies before the Court. **Without the necessary facts, the Court cannot authoritatively determine the rights and obligations of the parties. xxx**[126]

It must be stressed that petitioner Casambre *can* file the proper case before the appropriate trial courts. To my mind, this would allow for a *better* means of ascertaining truth and minimizing the risk of error,[127] instead of a ruling based on "factual findings" made by this Court *ex cathedra*. As Justice Antonin Scalia, in his dissent in *Sykes v. United States*, warned:

> Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery.[128]

A commentator likewise wrote that a resort to "in-house fact gathering creates serious risks, not least of which include the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data.[129]

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[125] Citations omitted. Emphasis supplied.

[126] *Gios-Samar, Inc. v Department of Transportation and Communications*, *supra* at note 44. Emphasis supplied.

[127] Allison Orr Larsen, "Confronting Supreme Court Fact Finding," (2012). Faculty Publications. Virginia Law Review, Vol. 98, p. 1294. <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2328&context=facpubs> (last accessed 07 December 2021).

[128] 564 U.S. __ (2011).

[129] Allison Orr Larsen, "Confronting Supreme Court Fact Finding," (2012). Faculty Publications. Virginia

Given the nature of the interests and the seriousness of the repercussions (both on the side of government as well as the individuals to be affected) involved in this case, I submit that the Court should refrain from striking down Section 25 (or portions thereof) at this time and without the benefit of "contextualization of petitioners' arguments using factual and evidentiary bases."[130] Instead, the Court should reserve its views on this particular provision until such time that the issue is properly elevated before Us.

B. *Effect on RA 10168 and on AMLC Sanctions Guidelines and Resolutions*

The enactment of the ATA prompted the revision of the Targeted Financial Sanctions by the AMLC. In this regard, the AMLC issued its 2021 Sanctions Guidelines.[131] Under paragraph 1.2.b of the AMLC's 2021 Sanctions Guidelines, designated persons were defined as:

> (a) Any person or entity designated as a terrorist, one who finances terrorism, or a terrorist organization or group under the applicable United Nations Security Council Resolution or by another jurisdiction or supra-national jurisdiction; or
>
> (b) Any person, organization, association, or group of persons designated under paragraph 3, Section 25 of the Anti-Terrorism Act of 2020 (ATA); and
>
> (c) Any person or entity designated under UNSC Resolutions Nos. 1718 (2006) and 2231 (2015).

Based on the foregoing definition of designated persons, the AMLC issued several resolutions to freeze the properties or funds, including related accounts, of those designated persons. These resolutions, which are enumerated below, were based on the designation by the ATC, and were directed not only to financial institutions and those covered institutions under the RA 9160, as amended, or the Anti-Money Laundering Act of 2001, but also to relevant government agencies, such as the Land Transportation Office, Land Registration Authority, Register of Deeds, Maritime Industry Authority, and the Civil Aviation Authority of the Philippines. The purpose of the freeze order is to deny listed individuals, groups, undertakings, and entities the means to support terrorism. AMLC seeks to ensure that no funds, financial assets, or economic resources of any kind are available to the

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Law Review, Vol. 98, p. 1263. <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2328&context=facpubs> (last accessed 07 December 2021).

[130] *Falcis III v. Civil Registrar General, supra* at note 60.

[131] <http://www.amlc.gov.ph/images/PDFs/2021%20SANCTIONS%20GUIDELINES.pdf> (last accessed 07 December 2021).

designated persons for so long as they remain subject to the sanctions measures.

We are aware of the following designations made by the ATC pursuant to the ATA:

1. *Authorizing ATC Resolution*: ATC Resolution No. 12, Series of 2020
See Also: Proclamation No. 374 issued on 05 December 2017 declaring the Communist Party of the Philippines - New People's Army (CPP-NPA) a Designated/Identified Terrorist Organization under R.A. No. 10168
Consequent AMLC Resolution: AMLC Resolution No. TF-33, Series of 2020
Persons designated: Communist Party of the Philippines and the New People's Army also known as Bagong Hukbong Bayan (CPP/NPA).

2. *Authorizing ATC Resolution*: ATC Resolution No. 13, Series of 2020
Consequent AMLC Resolution: AMLC Resolution No. TF-34, Series of 2020
Persons designated: (1) Islamic State in Iraq and Syria in SouthEast Asia; (2) Dawlatul Islamiyah Waliyatul Masrik; (3) Dawlatul Islamiyyah Waliyatul Mashriq; (4) IS East Asia Division; (5) Maute Group; (6) Islamic State East Asia; (7) Maute ISIS; (8) Grupong ISIS; (9) Grupo ISIS; (10) Khilafah Islamiyah; (11) KIM; (12) Ansharul Khilafah; (13) Bangsamoro Islamic Freedom Fighters-Bungo; (14) Bangsamoro Islamic Freedom Fighters-Abubakar; (15) Jama'atu al-Muhajirin wal Ansar fil Filibin; (16) Daulah Islamiyah (DI); and (17) other Daesh-affiliated groups in the Philippines.

3. *Authorizing ATC Resolution*: ATC Resolution No. 16, Series of 2021
Consequent AMLC Resolution: AMLC Resolution No. TF-39, Series of 2021
Persons designated: (1) Esmael Abdulmalik a.k.a. Cmdr Turaifie/Abu Turaifie/Abu Toraype of the Jama'atu al-Muhajirin wal Ansar fil Filibin and affiliated with the DI; (2) Raden Abu of the ASG and affiliated with the DI; (3) Esmael Abubakar a.k.a. Cmdr Bungos/Bungos of the Bangsamoro Islamic Freedom Fighters (BIFF)-Bungso faction; (4) Muhiddin Animbang a.k.a. Kagui Karialan/Karialan affiliated with the BIFF; (5) Salahuddin Hassan a.k.a. Orak/Salah/Tulea/Abu Salman affiliated with the DI; (6) Radzmil Jannatul a.k.a. Khubayb/Kubayb/Kubaib/Kubaeb/Baeb of the ASG and affiliated with the DI; (7) Majan Sahidjuan a.k.a. Apo Mike/Apoh Mike of the ASG and affiliated with the DI; (8) Faharudin Benito Hadji Satar a.k.a. Jer Mimbantas/Abu Zacaria/Zacharia/Abu Bakar/Omar of the Maute Group and affiliated with the DI; (9) Mudsrimar Sawadjaan a.k.a. Mundi Sawadjaan/Puruh Sawadjaan/Puroh of the ASG and affiliated with the DI; and (10) Almujer Yadah a.k.a. Mujer/Mujir of the ASG and affiliated with the

DI.

4. *Authorizing ATC Resolution*: ATC Resolution No. 17, Series of 2021
Consequent AMLC Resolution: AMLC Resolution No. TF-40, Series of 2021
Persons designated: (1) Jose Maria Canlas Sison a.k.a. Joma/Armando Liwanag/Amado Guerrero/Lodi/Pete/Al of the CPP; (2) Vicente Portades Ladlad a.k.a. Vic/Terry/Edgar/Ed/Gilbert/Fidel/Isagani/Emilio/Vlady/ Dong/Nonong/Dino/Ramon/Billy/ Bern of the CPP; (3) Rafael De Guzman Baylosis a.k.a. Raul/Rap/Raffy/Lando of the CPP; (4) Jorge Madlos a.k.a. Ka Oris/Mal Fuerza/JS/Jose/Oloy/ Caloy/Ando/ Tatay/Cdr Karyo/Raul Castro/Kasky of the CPP; (5) Julieta De Lima Sison a.k.a. Juliet/Julia/Julie/Socorro/Rojo/ Mayette/ Leah/Maria C De Guzman/Cdr Lita/Jules/Manet/Marie/ Sendang/ Yelena/Ylna of the CPP; (6) Rey Claro Cera Casambre a.k.a. Bong of the CPP; (7) Abdias Gaudiana a.k.a. Abadias Guadiana/July/Badul/Abdul/ Mario/Omar/Ramon/Dome of the CPP; (8) Alan Valera Jazmines a.k.a. Alfonso Jazmines, Jr./Tomas/Arthur/Tex/ Dex/Ogie/Andy Perez/Juan Tivaldo/Teroy/ Archie of the CPP; (9) Benito Enriquez Tiamzon a.k.a. Celo/Iyo/Lot/Crising Banaag/Jing of the CPP; (10) Wilma Austria-Tiamzon a.k.a. Ka Wing/Didith/Jana/Pinay/Sering/ Ria/Azon/Isabel/ Suarez/Edith/Jana of the CPP; (11) Adelberto Albayalde Silva a.k.a. Oca/Rigor/Perry/Percival Rojo of the CPP; (12) Ma. Concepcion Araneta-Bocala a.k.a. Kata/Concha/Clara/Remi/Estrella/Etang/ Ling/Diwa/Martha of the CPP; (13) Dionesio Micabalo a.k.a. Dionisio Micabalo/Muling/Moling/ Cardo/Kardo/Carpo/ Bawang/Abu/Jeff of the CPP; (14) Myrna Sularte a.k.a. Myrna Solarte/Iyay/Imang/Emang/ Bingbing/Maria Malaya/Josie of the CPP; (15) Tirso Lagora Alcantara a.k.a. Bart Sot/Flavio/Panginoon/Dave/ Shane Sangria of the CPP; (16) Pedro Heyrona Codaste a.k.a. Gonyong/Koyoy/Inggo/Senyong/ Beryong/Resurrecion Osorio of the CPP; (17) Tomas Dominado a.k.a. Pendong/Asyong/Greg/Tom/Noynoy of the CPP; (18) Ma. Loida Tuzo Magpatoc a.k.a. Eva/Ka Norsen/Bebyang/Byang/ Elay/Madam/Gwen/Adelaida Burias Tozo of the CPP; and (19) Menandro Villanueva a.k.a. Nelson/Boss/Dennis/Titing/Bok/Ka Luis/Book/Willy/Jude of the CPP.

5. *Authorizing ATC Resolution*: ATC Resolution No. 41, Series of 2021
Consequent AMLC Resolution: AMLC Resolution No. TF-20, Series of 2021
Persons designated: (1) Radulan/Radullan Sahiron a.k.a. Commander Putol/ Gagandilan/Magang of the ASG; (2) Hajan Sawadjaan/Hatib Hajan Sawadjaan a.k.a. Pah Hajan; Abdulhajan; Abduhajan of the ASG and affiliated with the Daulah Islamiyah (DI); (3) Furuji Amirin Indama/Furuji Indama a.k.a. Abu Sopek; Abu Dujana; Ustadz Faidz;

Ben Dudjanan; Juljama Indama of the ASG and affiliated with the DI; (4) Sansibar Saliddin Bensio/Sansibar Saliddin Bencio a.k.a. Sibar/Sansi of the ASG; (5) Pasil Bayali a.k.a. Kera/Kerah of the ASG and affiliated with the DI; (6) Abdullah Jovel Indanan a.k.a. Guro/Guroh of the ASG and affiliated with the DI; (7) Ibni Acosta/Acosta Ibni Y Ibrahim a.k.a. Abu Tini/Alkaser Albani/Moin/Win of the ASG and affiliated with the DI; (8) Bensito Quirino Yadah/Bensito Quirino Bakun/Ben Quirino Yadah a.k.a. Ben Tattoo/Ben Yadah of the ASG and affiliated with the DI; (9) Suhud Gaviola Salasim a.k.a. Ben Wagas of the ASG and affiliated with the DI; (10) Hassan Solaiman Indal/Hassal Indal a.k.a. Abu Azam/ Abu Hassan/Assam/Abu Ali of the Turaifie Group and affiliated with the DI; (11) Hassan Kulaw/Mustapha Kassan Kulaw/Kassan Kulaw a.k.a. Abu Saiden/Abu Zaiden of the Turaifie Group and affiliated with the DI; (12) Norodin Hassan/Nur Hassan a.k.a. Andot Hassan/Andot/Dots/Dot of the Hassan Group and affiliated with the DI; (13) Emarudin Kulaw/Emaruddin Kulaw/Samaruddin Kulaw/Emarudin Kasan/Emarudin Hassan a.k.a. Alpha King/Alpha King Hassan of the Maute Group and affiliated with the DI; also of the Hassan Group and affiliated with the DI; (14) Jaybee Mastura/Jayvee Mastura a.k.a. Abu Naim/Abu Naem of the Hassan Group and affiliated with the DI; (15) Yusoph Hadji Nassif/Osoph Hadji Nassif/Osop Hadji Nasir a.k.a. Abu Asraf/Abu Arap/Osoph/Osop of the Maute Group and affiliated with the DI; (16) Mahir Sandab a.k.a. Abu Jihad/Jihad/Lumen/Telmijie of the Maute Group and affiliated with the DI; (17) Solaiman Tudon/Sulaiman Tudon a.k.a. Abu Jihad of the Bangsamoro Islamic Freedom Fighters -Karialan faction; (18) Sukarno Sapal a.k.a. Abubakar Sapal/Zulkarnain Sapal/Sukarno Abubakar Joke/Diok/"CS 52"/Zuk of the Bangsamoro Islamic Freedom Fighters-Karialan faction; (19) Khadafi Abdulatif/Khadaffy Abdulatif/Kadaffy Abdullatip a.k.a. Yusa/"CS 01"/Zero One/Mukayam of the Bangsamoro Islamic Freedom Fighters -Bungos faction; and (20) Kupang Sahak/Kopang Sahak a.k.a. Commander Tarzan/Tarzan/Tarsan/Bapa Sahak of the Maguid Group and affiliated with the DI.

6. *Authorizing ATC Resolution*: ATC Resolution No. 42, Series of 2021
Consequent AMLC Resolution: AMLC Resolution No. TF-21, Series of 2021
Persons designated: National Democratic Front (NDF), also known as the National Democratic Front of the Philippines (NDFP)

Consistent with the thrust of ATA, freeze orders were immediately implemented on the properties and funds of the accounts in the AMLC resolutions, as well as related accounts. As it is my view that Section 25 is not unconstitutional under the present petitions, its effects and consequences, *i.e.*, the above-enumerated ATC and AMLC issuances on designation under

the ATA, are valid until they are successfully challenged in the appropriate forum.

V. *Section 29: Detention Without Judicial Warrant of Arrest*

A. Validation of Section 29

1. *Reasons for Concurrence*

I agree with the *ponencia* that Section 29 of the ATA does not contemplate the issuance of a warrant of arrest by the Executive department.[132] To be sure, the IRR salvaged the vague wording of the law. As clarified by the IRR, the written authorization issued by the ATC becomes relevant **only after** the valid warrantless arrest and particularly for the extension of the period of detention. Because the IRR ultimately fixed Section 29 of the ATA and the *ponencia* has elegantly constructed the provision consistent with the relevant rules, Section 29 ultimately passes strict scrutiny and is not overly broad.[133]

The *ponencia* harmonized the relevant provisions of law and clarified that a person may be arrested without a warrant by law enforcement officers or military personnel for acts defined or penalized under Sections 4 to 12 of the ATA but only under any of the instances contemplated in Rule 9.2 of the IRR, *i.e.*, arrest *in flagrante delicto*, arrest in hot pursuit, and arrest of escapees – which emulates Section 5, Rule 113 of the Rules of Court.[134] Once arrested without a warrant under said instances, a person may be detained for 14 days, provided that the ATC issues a written authority in favor of the arresting officer pursuant to Rule 9.1 of the IRR. This is 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 ATC does not issue the written authority, then the arresting officer shall deliver the detainee to the proper judicial authority within the periods specified under Article 125 of the Revised Penal Code (RPC). As such, Article 125 of the RPC is effectively the general rule as to the period of detention **and** it also applies to ATA-related offenses when the conditions under Section 29 are not met. Accordingly, the periods under Section 29 of the ATA will only become operative once the arresting officer has secured a written authorization from the ATC, upon compliance with the requirements provided in said section. Given the exclusive application of Section 29 to persons validly arrested without warrant for terrorism and its related crimes under the ATA, the 14-day detention provided therein simply supplements the periods provided

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[132] *Ponencia*, pp. 186-215.
[133] *Id.*
[134] *Id.*

under Article 125 of the RPC.

Prescinding from this, there is also no undue delegation or usurpation of authority since no warrant of arrest is issued by the ATC.

2. *Remedies for Section 29 Detainees*

I underline, however, the effect of this construction on the remedy of the writ of *habeas corpus*. The availability of the writ is derogated as to the detainee since the prolonged detention, even when lacking the written authority for the extension, may be rendered lawful, or seemingly lawful, by the valid warrantless arrest. For instance, when a person is detained following a valid warrantless arrest, come the second day of detention, can he already file for a petition for the writ of *habeas corpus*? The propriety of the remedy becomes dependent on the timely issuance of the written authority by the ATC.

In this regard, I submit that while it is within the ATC's function to issue the authorization, the process of how the written authority is issued should be streamlined and disclosed for regularity and uniformity and should be more transparent to preserve the availability of the detainee's remedies.

As currently worded, the ATA only provides for the extension and the circumstances under which an extension can be granted without, however, stating how said extension will be applied for, if at all, and who approves it. The following questions remain to be addressed: Who will apply for the authorization? Who will appreciate the facts to justify extension? Is it the whole ATC or does one member suffice? Is a quorum needed? What are the safeguards for the detainee and the process of deliberation?

The transparency of the process would ensure the earliest availability of the writ of *habeas corpus* to the detainee. The written authority should be issued and shown to the detainee within the 36 hours so that it is clear to the detainee when he can file for the writ of *habeas corpus*.

On this note, I also stress that the detainee may apply for bail even before an Information is filed against him. To be sure, the person seeking provisional release need not wait for a formal complaint or information to be filed against him as it is available to all persons where the offense is bailable, so long as the applicant is in the custody of the law. A person is considered to be in the custody of the law when (1) he is arrested either (a) by virtue of a warrant of arrest issued pursuant to Section 6, Rule 112, or (b) by warrantless arrest under Section 5, Rule 113 in relation to Section 7, Rule 112 of the revised Rules on Criminal Procedure, or (2) when he has voluntarily submitted himself to the jurisdiction of the court by surrendering

to the proper authorities.[135]

This notwithstanding, although the wisdom and propriety of legislation is not for this Court to pass upon,[136] and considering other countries' anti-terrorism laws, it is still worthy to note that the reason for the 14 + 10 day-period is not precisely clear or identified. According to the Senate deliberations, Congress simply thought that the 3-day maximum period under the HSA was insufficient for purposes of: (1) gathering admissible evidence for a prospective criminal action against the detainee; (2) disrupting the transnational nature of terrorist operations; (3) preventing the Philippines from becoming an "experiment lab" or "safe haven" for terrorists; and (4) putting Philippine anti-terrorism legislation at par with those of neighboring countries whose laws allow for pre-charge detention between 14 to 730 days, extendible, in some cases, for an indefinite period of time.[137] It was not discussed, however, why the 14 + 10 day-period, specifically, should be adopted. This is inconsistent with the Constitutional intent to minimize the period of detention without charge.[138] The same remains true even if I am constrained to agree that the Constitutionally mandated 3-day period for delivery to judicial authorities pertains specifically to instances when the writ of habeas corpus is suspended.

3. *Matters for Consideration*

I concede that, based on the foregoing and given the legislative history of Article 125 of the RPC, Congress can theoretically provide for a longer period for detention. However, it must be underscored that the period for detention is not just a matter of policy. The Judiciary, through its expanded power, can review the same to guard against grave abuse of discretion.

At this juncture, it is well to point out that other States have the means and resources at their disposal to sanction a longer period of pre-charge detention, while maintaining safeguards to avoid violation of human rights.

In this wise, Congress and eventually the ATC will do well to publish an issuance clarifying the application and implications of Section 29 of the ATA in accordance with the *ponencia*. That Section 29 of the ATA merely supplements Section 125 of the RPC triggers repercussions that must be addressed through a more transparent and streamlined process as regards pre-charge detention in terrorism cases. Laypersons will surely find it difficult and confusing to properly interpret and understand said section of

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[135] *Paderanga v. Court of Appeals*, 317 Phil. 862 (1995) [Per J. Regalado].

[136] *Silverio v. Republic*, 562 Phil. 953 (2007) [Per J. Corona]; *People v. Genosa*, 464 Phil. 680 (2004) [Per J, Panganiban]; *Santos v. Bedia-Santos*, 310 Phil. 21 (1995) [Per J. Vitug]; *Pascual v. Pascual-Bautista*, G.R. No. 84240, 25 March 1992 [Per J. Paras]; *People v. Lava*, 138 Phil. 77 (1969) [Per J. Zaldivar]; and *People v. Hernandez*, 99 Phil. 515(1956) [Per J. Concepcion].

[137] Senate Deliberations, TSN, 22 January 2020, pp. 28-31.

[138] II Record of the Constitutional Commission, 31 July 1986, pp. 510-513.

the ATA as it is. Certainly, the careless wording of the ATA runs counter to the truth that the law should be accessible to the public because it is, ultimately, for the public. The proper interpretation outlined by this Court should thus be adopted and further embodied in an executive or legislative issuance in order to assist and guide the persons to be affected by said legal provision.

VI. *Remedies for Gaps in the ATA: Lack of Sanctions for Violators of Extraordinary Rendition (Section 48) and Protection of Most Valuable Groups (Section 51)*

For most of the provisions in the ATA, the language used in imposing penalties for violations of the ATA are specific and definite: 4 years, 6 years, 10 years, 12 years, and life imprisonment. The violators are certain and identifiable: any person; an employee, official, or a member of the board of directors of a bank or financial institution; law enforcement agent or military personnel or any custodian; or any public officer who has direct custody of a detained person.

Section number	*Provision*	*Who*
Penalty: Imprisonment of 4 years		
37	Malicious Examination of a Bank or a Financial Institution	Any person
39	Bank Officials and Employees Defying a Court Order	An employee, official, or a member of the board of directors of a bank or financial institution
Penalty: Imprisonment of 6 years		
43	Furnishing False Evidence, Forged Document, or Spurious Evidence	Any person
Penalty: Imprisonment of 10 years		
20	Custody of Intercepted and Recorded Communications	Any person, law enforcement agent or military personnel or any custodian
21	Contents of Joint Affidavit	Any person, law enforcement agent or military personnel
22	Disposition of Deposited Materials	Violator
24	Unauthorized or Malicious Interceptions and/or Recordings	Any law enforcement agent or military personnel

29	Detention without Judicial Warrant of Arrest	Police, law enforcement agent or military personnel
31	Violation of the Rights of a Detainee	Law enforcement agent or military personnel
32	Official Logbook and Its Contents	Law enforcement custodial unit
41	Unauthorized Revelation of Classified Materials	Any person, law enforcement agent or military personnel, judicial officer or civil servant
42	Infidelity in the Custody of Detained Persons	Any public officer who has direct custody of a detained person
Penalty: Imprisonment of 12 years		
5	Threat to Commit Terrorism	Any person
8	Proposal to Commit Terrorism	Any person
9	Inciting to Commit Terrorism	Any person
10	Recruitment to and Membership in a Terrorist Organization	Any person
14	Accessory	Any person
Penalty: Life imprisonment without the benefit of parole and the benefits of RA 10592		
4	Terrorism	Any person within or outside the Philippines
6	Planning, Training, Preparing, and Facilitating the Commission of Terrorism	Any person
7	Conspiracy to Commit Terrorism	Any person
11	Foreign Terrorist	Any person
Liable as principal		
12	Providing material support	Any person

During the Senate deliberations, our lawmakers agreed to impose a uniform penalty for violators of the ATA who are public officials. After Senator Franklin M. Drilon proposed a lower penalty of 6 years for violation of Disposition of Deposited Materials during the period of amendments, Senator Panfilo M. Lacson reminded him about the agreement with Senator Francis Pangilinan that the penalty for violations of law enforcement officers should be imprisonment for 10 years.

> **Senator Lacson. And we agreed on 10 years to make it consistent with the other violations of law enforcement officers, Mr. President.**
>
> **Senator Drilon.** So, what is the proposed penalty?
>
> **Senator Lacson.** Ten years, Mr. President.
>
> **The President.** So we can remove "eight (8) years and one day to" on lines 23 and 24. So, it shall read: penalized by imprisonment of TEN (10) YEARS.

> **Senator Drilon.** Whenever a violation of law enforcement officer is involved, we should want to retain 10 years, Mr. President, as an added safeguard as proposed by Senator Pangilinan.[139]

This exchange highlights the legislative intent to impose a penalty of imprisonment for 10 years for erring law enforcement officers. The penalty of imprisonment should be imposed in addition to administrative liabilities under the ATA:

> SEC. 15. *Penalty for Public Official.* – If the offender found guilty of any of the acts defined and penalized under any of the provisions of this Act is a public official or employee, he/she shall be charged with the administrative offense of grave misconduct and/or disloyalty to the Republic of the Philippines and the Filipino people, and be meted with the penalty of dismissal from the service, with the accessory penalties of cancellation of civil service eligibility, forfeiture of retirement benefits and perpetual absolute disqualification from running for any elective office or holding any public office.

The specificity of the penalties for the violations in the table above stands in stark contrast to the lack of penalties for unauthorized or prohibited acts under extraordinary rendition in Section 48 and protection of most valuable groups in Section 51. Even though our legislators did not see fit to address the penalties for violations of these provisions in the ATA, it is submitted that remedies found in other laws, although considerably less than those imposed for the violations above, should remain as remedies to address these gaps within the ATA.

Extraordinary Rendition is mentioned twice in the ATA. It is defined in Section 3(c) and banned in Section 48. The counterpart provisions in the ATA's IRR, Rule 1.2(j), and Rule 11.12, reproduce the ATA's provisions verbatim.

> SEC. 3. *Definition of Terms.* – as used in this Act:
>
> x x x
>
> (c) *Extraordinary Rendition* shall refer to the transfer of a person, suspected of being a terrorist or supporter of a terrorist organization, association, or group of persons to a foreign nation for imprisonment and interrogation on behalf of the transferring nation. The extraordinary rendition may be done without framing any formal charges, trial, or approval of the court.
>
> SEC. 48. *Ban on Extraordinary Rendition.* – No person suspected or convicted of any of the crimes defined and penalized under the provisions of Sections 4, 5, 6, 7, 8, 9, 10, 11 or 12 of this Act shall be subjected to extraordinary rendition in any country.

There is no law which addresses extraordinary rendition. Violators of

[139] TSN, 19 February 2020, p. 50. Emphasis added.

the ban inevitably involve public officials as the persons who have custody of suspected or convicted individuals and can authorize such transfers.

Section 51 of the ATA recognizes the concerns for the welfare of suspects who are elderly, pregnant, or suffering from a disability, as well as women and children:

> SEC. 51. *Protection of Most Vulnerable Groups.* – There shall be due regard for the welfare of any suspects who are elderly, pregnant, persons with disability, women and children while they are under investigation, interrogation or detention.

Rule 11.11 of the ATA's IRR added that the ATC will conduct training and capacity-building:

> **Rule 11.11. Protection of most vulnerable groups.**
> While under investigation, interrogation or detention, there shall be due regard for the welfare of any suspects who are elderly, pregnant, persons with disability, women and children.
>
> In the State's endeavor to build its capacity to prevent and combat terrorism, the ATC shall conduct training and capacity-building on gender-sensitive approaches to investigations and prosecutions as well as to rehabilitation and integration of families, particularly of women.

In the RPC, Article 231 penalizes open disobedience while Article 235 recognizes the maltreatment of prisoners as a crime.

> Article 231. *Open disobedience.*- Any judicial or executive officer who shall openly refuse to execute the judgment, decision or order of any superior authority made within the scope of the jurisdiction of the latter and issued with all the legal formalities, shall suffer the penalties of *arresto mayor* in its medium period to *prision correccional* in its minimum period, temporary special disqualification in its maximum period and a fine not exceeding 1,000 pesos.
>
> Article 235. *Maltreatment of prisoners.* - The penalty of *arresto mayor* in its medium period to *prision correccional* in its minimum period, in addition to his liability for the physical injuries or damage caused, shall be imposed upon any public officer or employee who shall overdo himself in the correction or handling of a prisoner or detention prisoner under his charge, by the imposition of punishment not authorized by the regulations, or by inflicting such punishment in a cruel and humiliating manner.
>
> If the purpose of the maltreatment is to extort a confession, or to obtain some information from the prisoner, the offender shall be punished by *prision correccional* in its minimum period, temporary special disqualification and a fine not exceeding 500 pesos, in addition to his liability for the physical injuries or damage caused.

Arresto mayor in its medium period lasts from 2 months and 1 day to 4 months while *prision correccional* in its minimum period lasts from 6

months and 1 days to 2 years and 4 months. These periods are shorter than the imprisonment of 10 years imposed under the ATA.

Article 32 of the Civil Code of the Philippines also allows for civil liability. It does not impede any of the possible offended parties from filing a separate civil action for damages. Thus:

> Article 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:
>
> (1) Freedom of religion;
> (2) Freedom of speech;
> (3) Freedom to write for the press or to maintain a periodical publication;
> (4) Freedom from arbitrary or illegal detention;
> (5) Freedom of suffrage;
> (6) The right against deprivation of property without due process of law;
> (7) The right to a just compensation when private property is taken for public use;
> (8) The right to the equal protection of the laws;
> (9) The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
> (10) The liberty of abode and of changing the same;
> (11) The privacy of communication and correspondence;
> (12) The right to become a member of associations or societies for purposes not contrary to law;
> (13) The right to take part in a peaceable assembly to petition the Government for redress of grievances;
> (14) The right to be a free from involuntary servitude in any form;
> (15) The right of the accused against excessive bail;
> (16) The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf;
> (17) Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;
> (18) Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and
> (19) Freedom of access to the courts.
>
> In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil

> action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.
>
> The indemnity shall include moral damages. Exemplary damages may also be adjudicated.
>
> The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

Indeed, the ATA's silence as to the imposition of the penalty of imprisonment or liability for civil damages for erring public officials should not be seen as a failure to hold these officials accountable. Even though the duration of the penalties in these laws are much shorter than those in the ATA, I would like to emphasize that remedies exist for aggrieved persons outside of the provisions of the ATA. It would do well for Congress to explicitly address these gaps to be consistent with its legislative intent.

VII. *Unconstitutionality of Continuous Trial (Section 44) and of Trial of Persons Charged Under ATA (Section 53): Usurpation of the SC's Rule-Making Power*

Section 5(5), Article VIII of the 1987 Constitution reads:

> SECTION 5. The Supreme Court shall have the following powers:
>
> x x x
>
> (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.
>
> x x x.

It is submitted that the seemingly innocuous phrase "set the case for continuous trial on a daily basis from Monday to Thursday or other short-term trial calendar to" be *motu proprio* deleted from Section 44 of the ATA for usurpation of this Court's rule-making power. Section 44 should now read:

> SEC. 44. *Continuous Trial.* – In cases involving crimes defined

> and penalized under the provisions of this Act, the judge concerned shall ensure compliance with the accused's right to speedy trial.

For the same reason, it is also submitted that second sentence in the first paragraph and the second paragraph of Section 53 be invalidated. Section 53 should now be worded as follows:

> SEC. 53. *Trial of Persons Charged Under this Act.* – Any person charged for violations of Sections 4, 5, 6, 7, 8, 9, 10, 11 or 12 of this Act shall be tried in special courts created for this purpose.

Accordingly, the counterpart of these ATA provisions in the ATA's IRR should read:

> **RULE 11.14. Trial of Persons Charged under the Act.**
> Any person charged for violations of Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act shall be tried in special courts created for this purpose.
>
> In cases involving crimes defined and penalized under the provisions of the Act, the judge concerned shall ensure compliance with the accused's right to speedy trial.

In the case of *Estipona v. Lobrigo,*[140] We had the occasion to explain the evolution of this Court's rule-making power under the 1935, 1973, and 1987 Constitutions and to summarize our previous rulings on this matter:

> The power to promulgate rules of pleading, practice and procedure is now Our exclusive domain and no longer shared with the Executive and Legislative departments. In *Echegaray v. Secretary of Justice*, then Associate Justice (later Chief Justice) Reynato S. Puno traced the history of the Court's rule-making power and highlighted its evolution and development:
>
> > x x x *It should be stressed that the power to promulgate rules of pleading, practice and procedure was granted by our Constitutions to this Court to enhance its independence,* for in the words of Justice Isagani Cruz "without independence and integrity, courts will lose that popular trust so essential to the maintenance of their vigor as champions of justice." Hence, our Constitutions continuously vested this power to this Court for it enhances its independence. Under the *1935 Constitution*, the power of this Court to promulgate rules concerning pleading, practice and procedure was granted *but it appeared to be co-existent with legislative power for it was subject to the power of Congress to repeal, alter or supplement.* Thus, its Section 13, Article VIII provides:
> >
> > > "Sec. 13. The Supreme Court shall have the power to promulgate rules concerning pleading, practice and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not

[140] 816 Phil. 798-820 (2017) [Per J. Peralta]. Formatting in the original. Citations omitted.

> diminish, increase, or modify substantive rights. The existing laws on pleading, practice and procedure are hereby repealed as statutes, and are declared Rules of Court, subject to the power of the Supreme Court to alter and modify the same. *The Congress shall have the power to repeal, alter or supplement the rules concerning pleading, practice and procedure, and the admission to the practice of law in the Philippines.*"

The said power of Congress, however, is not as absolute as it may appear on its surface. In *In re: Cunanan* Congress in the exercise of its power to amend rules of the Supreme Court regarding admission to the practice of law, enacted the Bar Flunkers Act of 1953 which considered as a passing grade, the average of 70% in the bar examinations after July 4, 1946 up to August 1951 and 71% in the 1952 bar examinations. *This Court struck down the law as unconstitutional.* In his *ponencia*, Mr. Justice Diokno held that "x x x the disputed law is not a legislation; it is a judgment — a judgment promulgated by this Court during the aforecited years affecting the bar candidates concerned; and although this Court certainly can revoke these judgments even now, for justifiable reasons, it is no less certain that *only this* Court, and not the legislative nor executive department, that may do so. Any attempt on the part of these departments would be a clear usurpation of its function, as is the case with the law in question." The venerable jurist further ruled: "It is obvious, therefore, that the ultimate power to grant license for the practice of law belongs exclusively to this Court, and the law passed by Congress on the matter is of permissive character, or as other authorities say, merely to fix the minimum conditions for the license." *By its ruling, this Court qualified the absolutist tone of the power of Congress* to "repeal, alter or supplement the rules concerning pleading, practice and procedure, and the admission to the practice of law in the Philippines."

The ruling of this Court in *In re Cunanan* was not changed by *the 1973 Constitution.* For the *1973 Constitution* reiterated the power of this Court "to promulgate rules concerning pleading, practice and procedure in all courts, x x x which, however, may be repealed, altered or supplemented by the Batasang Pambansa x x x." More completely, Section 5(2)5 of its Article X provided:

> xxx xxx xxx
>
> "Sec. 5. The Supreme Court shall have the following powers.
>
> xxx xxx xxx
>
> (5) Promulgate rules concerning pleading, practice, and procedure in all courts, the admission to the practice of law, and the integration of the Bar, which, however, may be repealed, altered, or

> supplemented by the Batasang Pambansa. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights."

Well worth noting is that the *1973 Constitution further strengthened* the independence of the judiciary by giving to it the additional power to promulgate rules governing the integration of the Bar.

The *1987 Constitution* molded an even *stronger and more independent judiciary.* Among others, *it enhanced the rule making power of this Court.* Its Section 5(5), Article VIII provides:

> xxx xxx xxx
>
> "Section 5. The Supreme Court shall have the following powers:
>
> xxx xxx xxx
>
> (5) *Promulgate rules concerning the protection and enforcement of constitutional rights,* pleading, practice and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. *Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.*"

The rule making power of this Court was expanded. This Court for the *first time* was given the power to promulgate rules concerning the protection and enforcement of constitutional rights. The Court was also granted for the *first time* the power to disapprove rules of procedure of special courts and quasi-judicial bodies. *But most importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure.* In fine, the power to promulgate rules of pleading, practice and procedure is no longer shared by this Court with Congress, more so with the Executive. x x x.

Just recently, *Carpio-Morales v. Court of Appeals (Sixth Division)* further elucidated:

> While the power to define, prescribe, and apportion the jurisdiction of the various courts is, by constitutional design, vested unto Congress, **the power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts belongs exclusively to this Court**. Section 5 (5), Article VIII of the 1987 Constitution reads:

xxx xxx xxx

In *Echegaray v. Secretary of Justice (Echegaray)*, the Court traced the evolution of its rule-making authority, which, under the 1935 and 1973 Constitutions, had been priorly subjected to a power-sharing scheme with Congress. As it now stands, the 1987 Constitution **textually altered the old provisions by deleting the concurrent power of Congress to amend the rules, thus solidifying in one body the Court's rule-making powers**, in line with the Framers' vision of institutionalizing a "[s]tronger and more independent judiciary."

The records of the deliberations of the Constitutional Commission would show that the Framers debated on whether or not the Court's rule-making powers should be shared with Congress. There was an initial suggestion to insert the sentence "The National Assembly may repeal, alter, or supplement the said rules with the advice and concurrence of the Supreme Court," right after the phrase "Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the underprivileged[.]" in the enumeration of powers of the Supreme Court. Later, Commissioner Felicitas S. Aquino proposed to delete the former sentence and, instead, after the word "[under]privileged," place a comma (,) to be followed by "the phrase with the concurrence of the National Assembly." Eventually, a compromise formulation was reached wherein (**a**) the Committee members agreed to Commissioner Aquino's proposal **to delete** the phrase "the National Assembly may repeal, alter, or supplement the said rules with the advice and concurrence of the Supreme Court" and (**b**) in turn, Commissioner Aquino agreed to withdraw his proposal to add "the phrase with the concurrence of the National Assembly." **The changes were approved, thereby leading to the present lack of textual reference to any form of Congressional participation in Section 5 (5), Article VIII, supra. The prevailing consideration was that "both bodies, the Supreme Court and the Legislature, have their inherent powers."**

Thus, as it now stands, Congress has no authority to repeal, alter, or supplement rules concerning pleading, practice, and procedure. x x x.

The separation of powers among the three co-equal branches of our government has erected an impregnable wall that keeps the power to promulgate rules of pleading, practice and procedure within the sole province of this Court. The other branches trespass upon this prerogative if they enact laws or issue orders that effectively repeal, alter or modify any of the procedural rules promulgated by the Court. Viewed from this perspective, We have rejected previous attempts on the part of the Congress, in the exercise of its legislative power, to amend the Rules of

Court (Rules), to wit:

> 1. *Fabian v. Desierto* — Appeal from the decision of the Office of the Ombudsman in an administrative disciplinary case should be taken to the Court of Appeals under the provisions of Rule 43 of the Rules instead of appeal by certiorari under Rule 45 as provided in Section 27 of R.A. No. 6770.
>
> 2. *Cathay Metal Corporation v. Laguna West Multi-Purpose Cooperative, Inc.* — The Cooperative Code provisions on notices cannot replace the rules on summons under Rule 14 of the Rules.
>
> 3. *RE: Petition for Recognition of the Exemption of the GSIS from Payment of Legal Fees; Baguio Market Vendors Multi-Purpose Cooperative (BAMARVEMPCO) v. Hon. Judge Cabato-Cortes; In Re: Exemption of the National Power Corporation from Payment of Filing/Docket Fees; and Rep. of the Phils. v. Hon. Mangotara, et al.* — Despite statutory provisions, the GSIS, BAMARVEMPCO, and NPC are not exempt from the payment of legal fees imposed by Rule 141 of the Rules.
>
> 4. *Carpio-Morales v. Court of Appeals (Sixth Division)* — The first paragraph of Section 14 of R.A. No. 6770, which prohibits courts except the Supreme Court from issuing temporary restraining order and/or writ of preliminary injunction to enjoin an investigation conducted by the Ombudsman, is unconstitutional as it contravenes Rule 58 of the Rules.
>
> Considering that the aforesaid laws effectively modified the Rules, this Court asserted its discretion to amend, repeal or even establish new rules of procedure, to the exclusion of the legislative and executive branches of government. To reiterate, the Court's authority to promulgate rules on pleading, practice, and procedure is exclusive and one of the safeguards of Our institutional independence.

We laud Congress' efforts in upholding the fundamental liberties as enshrined in the Constitution and in balancing it with protecting our national security and the welfare of our people. However, We emphasize that the determination of the manner of compliance with law, including the accused's right to speedy trial, as part of our authority to protect and enforce constitutional rights, pleading, practice, and procedure exclusively lies within the power of this Court.

VIII. *Conclusion*

In sum, I maintain that the petitions should be ruled upon through a

delimited facial challenge. I vote to strike down the phrase in the *proviso* of Section 4 which states "which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create serious risk to public safety."

There are insufficient facts for the successful pursuit of an as-applied challenge. Moreover, the alleged injuries and imminent prosecution have not been passed upon by lower courts. The absence of concrete facts renders the Court unable to examine with precision the operation of specific provisions of the ATA in relation to the concerned parties.

In addition, for usurpation of this Court's rule-making power, I submit the invalidation of the phrase "set the case for continuous trial on a daily basis from Monday to Thursday or other short-term trial calendar to" in Section 44 and of the second sentence in the first paragraph and the second paragraph of Section 54. I have also included the corresponding text in the ATA's IRR that are affected by this submitted invalidation.

The matters for concern raised in various portions of this Separate Opinion should in no way be viewed as exhaustive. Instead, it is envisioned that they serve as guideposts for amendment of the ATA or enactment of a subsequent related law.

The birthing and validation of a nuanced anti-terrorism law for the Philippines has been arduous. Both petitioners and respondents have undergone lengthy and laborious periods of researching, writing, and presenting their arguments before this Court. We see the need for legislation to keep up with evolving times and to comply with our international commitments, yet We are also mindful of our duty to uphold the Constitution.

The existence of a law is but one factor in addressing terrorism. Terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and there is a need to address the conditions conducive to the spread of terrorism.[141] It is important that UN Member States, such as the Philippines, continue to exert efforts to develop non-violent alternative avenues to decrease the risk of radicalization to terrorism and to promote peaceful alternatives to violent narratives espoused by terrorist fighters.[142]

RODIL V. ZALAMEDA
Associate Justice

[141] Preamble, United Nations Security Resolution No. 2178 (2014).
[142] *See* paragraph 19, United Nations Security Resolution No. 2178 (2014).