Republic of the Philippines
Supreme Court
En Banc

ATTY. HOWARD M. CALLEJA, *et al*,
Petitioners,
-versus- **G.R. NO. 252578**[1]

EXECUTIVE SECRETARY, *et al.*,
Respondents.
x----------x

MEMORANDUM FOR THE PETITIONERS (RE: ISSUES ASSIGNED TO CLUSTER V)

TABLE OF CONTENTS

[1] Consolidated with G.R. No. 252579, G.R. No. 252580, G.R. No. 252585, G.R. No. 252613, G.R. No. 252623, G.R. No. 252624, G.R. No. 252646, G.R. No. 252702, G.R. No. 252726, G.R. No. 252733, G.R. No. 252736, G.R. No. 252741, G.R. No. 252747, G.R. No. 252755, G.R. No. 252759, G.R. No. 252765, G.R. No. 252767, G.R. No. 252768, G.R. No. 252802, G.R. No. 252809, G.R. No. 252903, G.R. No. 252904, G.R. No. 252905, G.R. No. 252916, G.R. No. 252921, G.R. No. 252984, G.R. No. 253018, G.R. No. 253100, G.R. No. 253118, G.R. No. 253124, G.R. No. 253242, G.R. No. 253252, G.R. No. 253254, G.R.No.253420, UDK 16663, and UDK 16714.

Republic of the Philippines
Supreme Court
En Banc

ATTY. HOWARD M. CALLEJA, *et al*,
Petitioners,

-versus- **G.R. NO. 252578[2]**

EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, *et al.*,
Respondents.
x----------x

MEMORANDUM FOR THE PETITIONERS
(RE: ISSUES ASSIGNED TO CLUSTER V)

UNDERSIGNED counsel in G.R. No. 252579 (Rep. Edcel C. Lagman vs. Executive Secretary Salvador C. Medialdea, et al.) which is consolidated with the 36 other kindred petitions, respectfully submits the instant Memorandum for all the petitioners under the following presentation:

1. Pursuant to the Honorable Court's *En Banc* Resolution dated May 17, 2021, an e-copy of which was received by the undersigned counsel on May 27, 2021, stating that the Honorable Court will "receive **only six (6) Memoranda** from the Petitioners **based on the six (6) clustered issues** that they agreed to present during the Oral Arguments", the instant Memorandum will principally discuss

[2] Consolidated with G.R. No. 252579, G.R. No. 252580, G.R. No. 252585, G.R. No. 252613, G.R. No. 252623, G.R. No. 252624, G.R. No. 252646, G.R. No. 252702, G.R. No. 252726, G.R. No. 252733, G.R. No. 252736, G.R. No. 252741, G.R. No. 252747, G.R. No. 252755, G.R. No. 252759, G.R. No. 252765, G.R. No. 252767, G.R. No. 252768, G.R. No. 252802, G.R. No. 252809, G.R. No. 252903, G.R. No. 252904, G.R. No. 252905, G.R. No. 252916, G.R. No. 252921, G.R. No. 252984, G.R. No. 253018, G.R. No. 253100, G.R. No. 253118, G.R. No. 253124, G.R. No. 253242, G.R. No. 253252, G.R. No. 253254, G.R.No.253420, UDK 16663, and UDK 16714.

the following issues assigned to Cluster V as listed in the Honorable Court's Advisory (Revised as of January 5, 2021):

a. Whether the following power of the Anti-Terrorism Council (ATC) is unconstitutional: "power to authorize arrest and detention without judicial warrant based on mere suspicion under Section 29 for violating separation of powers (Executive and Judicial), and constitutional rights to due process, against unreasonable searches and seizures, to bail, to be presumed innocent and speedy disposition of cases." [Advisory on substantial issues No. 6.d];

b. "Whether the detention period under Section 29 of R.A. No. 11479 contravenes the Constitution, the Revised Penal Code, the Rules of Court, and international obligations against arbitrary detention." [Advisory on substantial issues No. 8]; and

c. "Whether the House of Representatives gravely abused its discretion by passing House Bill No. 6875 (consolidated version of the House bills to amend the Human Security Act) in violation of the constitutionally-prescribed procedure." [Advisory No. 15].

2. In order to avoid repetitiveness, the herein Memorandum adopts the "Statement of the Case", "Statement of Facts" and "Statement of the Issues" as submitted in the pertinent Memoranda of the other Clusters.

I. PRELIMINARY STATEMENT

3. The maintenance and preservation of national security as well as the protection and promotion of civil liberties are mandatory dual obligations of the State.

4. These are not antagonistic governmental obligations because national security and fundamental freedoms are mutually reinforcing.

5. The effective defense of national security redounds to the benefit of civil liberties even as the protection of civil liberties makes for a vibrant democracy and empowers the people to defend the integrity and existence of a protective government.

6. It is therefore grossly errant, even malevolent, for the government to strengthen national security under Republic Act No. 11479 or the "Anti-Terrorism Act of 2020" (ATA), and in the process derogate civil liberties and fundamental freedoms.

7. It is in this context that the ATA should be assessed and adjudged unconstitutional for being a grave assault on the people's sacrosanct fundamental rights.

Terrorism started as a state instrument of violence and repression, and the ATA is a resurgence of state terrorism.

8. It is inaccurate to declare that terrorism is a novel phenomenon of recent vintage. The concept and practice of terrorism in the modern era antedate the 1987 Philippine Constitution by almost two centuries, while the first international covenant against terrorism in 1963 predates our Charter by more than two decades. Terrorism was practiced even before the birth of Christ.

9. Modern terrorism traces its ancestry to the "Reign of Terror" (September 5, 1793 – July 27, 1794) when the French revolutionary government employed various acts of terrorism – arrest without warrant, detention without bail, and execution without public trial – to consolidate the gains of the revolution and eliminate resistance from remnants and supporters of the monarchy and nobility.

10. The parliament of the revolutionary government enacted two terror laws: (1) the *Law of 22 Prairial* which "suspended a suspect's right to public trial and legal assistance and left the jury a choice only of acquittal or death"; and (2) the *Law of Suspects* which authorized the arrest of "those who by their conduct, relations or language spoken or written have shown themselves partisans of tyranny or federalism and enemies of liberty." Perforce, suspects were held culpable by the vague criminalization of their relationship or expression.

11. These laws "placed terror in the order of the day", a horrific agenda underscored by Maximillien Robespierre, the chief architect of the regime of terror, when he intoned that "virtue without terror is powerless". The Reign of Terror resulted in the arrest of 300,000 suspects in less than a year; the execution of about 17,000 persons; and the death in prison without trial of some 10,000 inmates. Among those guillotined was Robespierre himself.

12. **Verily, at its inception, terrorism was State-sponsored. Until the 20th century, terrorism was equated with "violence perpetrated by the government".** It was also at the advent of the 20th century when terrorism mutated to non-state terrorism, a conspiracy by enemies of the State using violence and fear "to achieve political ends or topple the existing government". It is now propelled by ideological, religious, and secessionist motives, and transcends national frontiers.

13. Non-state terrorists include the Ku Klux Klan; the Basque separatist group ETA; the Palestine Liberation Organization (PLO); Germany's Red Army Faction; Peru's Shining Path; Italy's Red Brigades; the Taliban; the Al Qaeda; the Islamic State in Iraq and Syria (ISIS); the Philippines' Abu Sayyaf Group (ASG); and the African National Congress (ANC) of South Africa which fought violently against apartheid, and subsequently succeeded in becoming the ruling party.

14. Some terrorist groups are movements for national liberation which led to the saying "one man's terrorist is another man's freedom fighter". But threat, violence, or

terror, either by the government or non-state actors, does not justify the pursuit of noble aspirations. This hardline position could be relaxed for revolutionary crusades against repressive and corrupt regimes.

15. The reemergence of totalitarian regimes revived State terrorism, like in the Soviet Union under Joseph Stalin; Nazi Germany under Adolf Hitler; China under Mao Zedong; Uganda under Idi Amin; Cambodia under Pol Pot; Iraq under Saddam Hussein; Brazil, Chile, Argentina, and Burma under military dictatorships; and the Philippines under Ferdinand Marcos' martial law regime.

16. The world today is confronted by two forms of terrorism: (a) establishment terrorism committed by the government against its own citizens; and (b) non-state terrorism perpetrated not only by enemies of the State but also by malefactors against the world order.

17. The Philippines faces these two forms of terrorism: from the criminal terrorists who must be neutralized, captured, prosecuted, and convicted once warranted by requisite evidence; and from State terrorism whose malevolence elevates national security to a pedestal and relegates people's fundamental freedoms to a footstool. Consequently, its dismantling is critically warranted.

18. The Anti-Terrorism Act of 2020 (ATA) in its major provisions is akin to State terrorism in its original usage during the French Revolution. Like the *Law of Suspects* of the Reign of Terror, the ATA: (a) authorizes arbitrary arrests of mere suspects and their prolonged detention without judicial warrant or intervention; and (b) infringes on the freedoms of expression, assembly, and association, among other constitutional rights. Thus, government terrorism is institutionalized by legislation like the terror laws of the French regime of terror.

19. As the final arbiter of justiciable issues and the judicious guardian of the Constitution, the Supreme Court has the solemn duty of resolving the 37 petitions' collective assertion that the ATA is unconstitutional for debasing fundamental rights, and the contrary position of the

government that the ATA is a valid and justified exercise of police power to preserve and maintain national security against terrorists.

20. The High Court may find relevant its own pronouncements in ***SWS v. COMELEC*** (G.R. No. 147571, May 5, 2001), ***Ople v. Torres*** (G.R. No. 127685, July 23, 1998), and ***Chavez v. Gonzales*** (G.R. No. 188338, February 15, 2008), among others. Following ***SWS***, the ATA suffers "a heavy presumption against its constitutional validity" since it is challenged as a prior restraint to protected speech. Thus, it is presumed to be unconstitutional. ***Ople*** categorically ruled that "[i]n case of doubt, the least we can do is to lean towards the stance that will not put in danger the rights protected by the said Constitution." ***Chavez*** succinctly and aptly held that "[a] blow too soon struck for freedom is preferred than a blow too late."

21. Resurgence of State terrorism must be nipped in the bud. Otherwise, it will grow into a predatory Venus flytrap in the sacrosanct garden of civil liberties.

II. STATEMENT OF ARGUMENTS

A. Section 29 of the ATA is unconstitutional for granting the Anti-Terrorism Council (ATC) the power to authorize arrest and detention without judicial warrant based on mere suspicion, thus violating the separation of powers between the Judiciary and the Executive.

B. Section 29 of the ATA is unconstitutional for violating the (1) right to due process; (2) right against unreasonable searches and seizures; (3) right to bail; (4) right to be presumed innocent; (5) right to speedy disposition of cases; (6) right to the writs of *habeas corpus* and *amparo*; and (7) right against torture.

C. The inordinately long detention period under Section 29 of the ATA violates the Constitution, the Revised Penal Code, the Rules of Court, and

international obligations against arbitrary detention.

D. The Implementing Rules and Regulations (IRR) on the ATA cannot cure the fatal infirmities of Section 29.

E. There is no need for an actual case to exist in order to declare Section 29 of the ATA unconstitutional.

F. The House of Representatives gravely abused its discretion in passing with inordinate alacrity House Bill No. 6875 entitled, "An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the Human Security Act of 2007", even as the constitutional infirmities originated from the Senate.

G. The ATA abandoned the safeguards in the Human Security Act (HSA) protective of the rights of the arrested and detained suspect.

H. The Solicitor General's defense of the constitutionality of Section 29 of the ATA is feeble and mistaken.

III. Discussion

A. Section 29 of the ATA is unconstitutional for granting the Anti-Terrorism Council (ATC) the power to authorize arrest and detention without judicial warrant based on mere suspicion, thus violating the separation of powers between the Judiciary and the Executive.

22. The controverted Section 29 of Republic Act No. 11479 or the ATA provides in full:

Section 29. *Detention Without Judicial Warrant of Arrest.* - The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, any law enforcement agent or military personnel, who, having been duly authorized in writing by the ATC has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act, shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (1) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (2) further detention of the person/s is necessary to prevent the commission of another terrorism; and (3) the investigation is being conducted properly and without delay.

Immediately after taking custody of a person suspected of committing terrorism or any member of a group of persons, organization or association proscribed under Section 26 hereof, the law enforcement agent or military personnel shall notify in writing the judge of the court nearest the place of apprehension or arrest of the following facts: (a) the time, date, and manner of arrest; (b) the location or locations of the detained suspect/s and (c) the physical and mental condition of the detained suspect/s. The law enforcement agent or military personnel shall likewise furnish the ATC and the Commission on Human Rights (CHR) of the written notice given to the judge.

> The head of the detaining facility shall ensure that the detained suspect is informed of his/her rights as a detainee and shall ensure access to the detainee by his/her counsel or agencies and entities authorized by law to exercise visitorial powers over detention facilities.
>
> The penalty of imprisonment of ten (10) years shall be imposed upon the police or law enforcement agent or military personnel who fails to notify any judge as provided in the preceding paragraph.

23. No matter how Section 29 of the ATA is viewed, it is indubitable that the grant of the power to the ATC to authorize in writing the detention of a person suspected of committing acts of terrorism includes the power to issue a warrant of arrest because there can be no detention without taking physical custody of the suspect to be detained. Verily, arrest precedes detention.

24. The power granted to the ATC to authorize the arrest of a terrorist suspect violates the constitutional provision that warrants of arrest can only be issued by a judge based on his personal determination of probable cause. Moreover, the inordinately long detention of a suspect without a judicial warrant of arrest is arbitrary because detention should be the legal consequence of a judicial warrant of arrest. **The very title of Section 29 – "*Detention Without Judicial Warrant of Arrest*" – is an admission of unconstitutionality**.

25. Section 2 of Article III of the Bill of Rights of the 1987 Constitution unequivocally provides that:

> **Section 2.** The right of the people to be secure in their persons, houses, papers, and effects against **unreasonable searches and seizures** of whatever nature and for any purpose **shall be inviolable**, and **no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the**

> **judge** after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized. (Emphasis supplied).

26. This is similar to Section 1(3) of Article III of the Bill of Rights of the 1935 Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects against **unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge** after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis supplied).

27. This provision traces its ancestry to the Bill of 1902, which provides that "The right to be secure against unreasonable searches and seizures shall not be violated" and "no warrant shall issue but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The foregoing guarantees were reiterated in the Jones Law of 1916.

28. Verily, throughout the constitutional history of the Philippines only a judge can issue a warrant of arrest based on probable cause. This was only broken during the repressive regime of martial law under the dictator Ferdinand Marcos where he and his alter egos issued executive warrants like Arrest, Search and Seizure Orders (ASSOs); Presidential Commitment Orders (PCOs); and Prevention Detention Actions (PDAs) without judicial authorization or intervention.

29. This authority to issue warrants of arrest by non-judicial authorities was improvidently incorporated in the 1973 Constitution which provided that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and whatever purpose shall not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, **or such other responsible officer as may be authorized by law**, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized. (Underscoring supplied).

30. This aberration was junked by the 1987 Constitution which reverted to the issuance of warrants of arrest solely by a judge.

31. In ***Comerciante v. People*** (G.R. 205926, July 22, 2015) it was held that:

> Section 2, Article III of the Constitution mandates that a search and seizure must be carried out through or on the **strength of a judicial warrant predicated upon the existence of probable cause; in the absence of such warrant, such search and seizure becomes, as a general rule, "unreasonable" within the meaning of the said constitutional provision.** (Emphasis supplied).

32. In ***Pestilos v. Generoso and People*** (G.R. No. 182601, November 10, 2014) the Honorable Supreme Court traced the history of the right of persons from unreasonable searches and seizures, and held that "**Arrest falls under the term seizure**." (Emphasis supplied).

33. The following cases confirm that only a judge can issue a warrant of arrest:

(a) In ***Salazar v. Achacoso*** (G.R. No. 81510, March 14, 1990), it was ruled that: "**We reiterate that the**

Secretary of Labor, not being a judge, may no longer issue search or arrest warrants. Hence, the authorities must go through the judicial process. To that extent, we declare Article 38, paragraph (c) of the Labor Code, unconstitutional and of no force and effect." (Emphasis supplied).

(b) In ***Ponsica v. Ignalaga*** (G.R. No. 72301, July 31, 1987), the High Court ruled that:

> But it must be emphasized here and now that what has just been described is the state of the law as it was in September, 1985. The law has since been altered. No longer does the mayor have at this time the power to conduct preliminary investigations, much less issue orders of arrest. Section 143 of the Local Government Code, conferring this power on the mayor has been abrogated, rendered *functus officio* by the 1987 Constitution x x x **The constitutional proscription has thereby been manifested that thenceforth, the function of determining probable cause and issuing, on the basis thereof, warrants of arrest or search warrants, may be validly exercised only by judges**, this being evidenced by the elimination in the present Constitution of the phrase, "such other responsible officer as may be authorized by law" found in the counterpart provision of said 1973 Constitution, who, aside from judges, might conduct preliminary investigations and issue warrants of arrest or search warrants. (Emphasis supplied).

(c) In ***Presidential Anti-Dollar Salting Task Force v. Court of Appeals*** (G.R. No. 83578, March 16, 1989) the Supreme Court held that:

> We agree that the Presidential Anti-Dollar Salting Task Force exercises, or was meant to exercise, prosecutorial powers, and on that ground, it cannot be said to be a neutral and detached "judge" to determine the existence of probable

> cause for purposes of arrest or search. Unlike a magistrate, a prosecutor is naturally interested in the success of his case. Although his office "is to see that justice is done and not necessarily to secure the conviction of the person accused," he stands, invariably, as the accused's adversary and his accuser. **To permit him to issue search warrants and indeed, warrants of arrest, is to make him both judge and jury in his own right, when he is neither. That makes, to our mind and to that extent, Presidential Decree No. 1936 as amended by Presidential Decree No. 2002, unconstitutional.** (Emphasis supplied).

(d) In ***Lino v. Fugoso*** (G.R. No. L-1159, January 30, 1947), the Supreme Court pronounced that:

> **It is obvious in the instant case that the City Fiscal had no authority to issue warrants of arrest** x x x and was powerless to validate such illegal detention by merely filing informations or by any order of his own, either express or implied. (Emphasis supplied).

34. Verily, the ATC, like the Secretary of Labor, a Mayor, the Presidential Anti-Dollar Salting Task Force, and the City Fiscal, has no constitutional authority or cannot be authorized to issue a warrant of arrest and detain suspects without a judicial warrant of arrest. Section 29 of the ATA unconstitutionally revives the executive warrants of ASSOs, PCOs, and PDAs of the Martial Law vintage.

35. There are only three (3) instances when an arrest can be effected without a judicial warrant as provided for in Section 5 of Rule 113 of the Rules of Court, which provides:

> **Section 5.** *Arrest without warrant*; *when lawful*. — A peace officer or a private person may, without a warrant, arrest a person:

(a) When, **in his presence**, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has just been committed, and he has **probable cause to believe based on personal knowledge** of facts or circumstances that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraph (a) and (b) above, **the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail and shall be proceeded against in accordance with Section 7 of Rule 112**. (Emphasis supplied).

36. Except in the limited cases of valid warrantless arrest, the inflexible rule is that no arrest can be legally effected without a warrant of arrest issued solely by a judge.

37. In sum, warrantless arrest is legal only in the cases of *in flagrante delicto* (the person arrested has committed, is committing, or attempting to commit an offense in the presence of the arresting peace officer or private person); hot pursuit (the person sought to be arrested has just committed an offense and the arresting peace officer or private person has probable cause to believe, based on his own personal knowledge, that the person arrested has committed the offense); and an escaped prisoner.

38. The warrantless arrest is based not on mere suspicion but on probable cause or personal knowledge of the arresting peace officer or private person.

39. The arrest and detention by authority of the ATC under Section 29 does not qualify as a warrantless arrest for the following reasons:

a) Under Section 29, suspicion substitutes for personal knowledge or probable cause required under Section 5 of Rule 113.

b) The circumstance of instant arrest without warrant is absent because of the time lapse where the ATC still has to issue a written authority for such arrest and detention. In the valid instances of warrantless arrests, the Commission on Human Rights maintains that "the **element of immediacy is essential** as warrantless arrests are only possible when there is no time to secure a warrant and the person has committed or is about to commit a crime, with personal knowledge of the person arresting. The fact that Section 29 allows the ATC to process witnesses and documents for it to issue an authorization to conduct a warrantless arrest of 'a person suspected' means that law enforcers have all the time to secure a proper warrant of arrest. However, instead of prescribing them to secure a valid judicial warrant, the law gives the option to request authorization from the ATC, an executive body, in order to conduct arrests."

c) In warrantless arrests, the person arrested shall immediately be delivered to the nearest police station or jail and shall be proceeded against in accordance with Section 7 of Rule 112, which is not the procedure under Section 29 of the ATA where the suspect arrested is detained for 14 days, which is extendable by another 10 days or a maximum of 24 days.

40. If Section 29 of the ATA contemplates a fourth instance when a warrantless arrest can be made, this would constitute an amendment to Section 5 of Rule 113 which cannot be done by legislation because any such amendment can only be made by the Supreme Court pursuant to its

exclusive rule-making power under Section 5(5) of Article VIII of the Constitution on the "protection and enforcement of constitutional rights".

41. In ***Carpio Morales v. Court of Appeals*** (G.R. Nos. 217126-27, November 10, 2015) it was ruled that "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) of Article VIII of the 1987 Constitution).

42. ***Echegaray v. Secretary of Justice*** (G.R. No. 132601, January 19, 1999) pronounced that 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.**"

43. Former Chief Justice Reynato s. Puno in his position paper as *amicus curiae* questions the constitutionality of Section 29 of the ATA as follows:

> The question that confronts us is whether the ATA erodes the protection of existing rights of arrested persons. Consider the following:
>
> 1. **The warrant is issued by the ATC, an executive functionary. Under the present legal regime, a warrant of arrest is issued by a judge**. And it is issued by a judge, upon application by a prosecutor who had independently evaluated the evidence of guilt of the respondent in the exercise of quasi-judicial function. These two (2) levels of protection

appear to have been taken away and given to the ATC, a body that cannot exercise judicial power.

2. **Under the present law, an accused has a more effective way of assailing the validity of the warrant of arrest.** First, he can do so while under investigation by an arresting policeman. If he is able to convince the police investigator that there is no legal reason to arrest him, he goes scot free. If he fails, his next remedy is before an independent prosecutor. He can present proof before the independent prosecutor that he did not commit any crime and should not be detained. If he succeeds, again he is released. If he fails, he has a third chance. He can convince the judge with jurisdiction over the case not to issue a warrant of arrest against him for lack of probable cause that he committed the crime charged. His chance with the judge is better because the judge can look at the case with more impartiality. **Under the ATA the alleged terrorist appears to have lost all these three levels of protection.** The law enforcement agent or military personnel has no power to investigate for his executive order is to arrest the suspect. **Likewise, the prosecutor and the judge have no role to play in the arrest of the suspect. Indeed, how can a prosecutor have a role when the Secretary of Justice is a member of the ATC that ordered the arrest.**

3. Under existing law, the process of investigation by the police, as well as the proceedings before the prosecutor and the judge, are open and adversarial in character. **Under the ATA, the proceedings are *ex parte*, secret and**

inquisitorial in nature. A suspect will not know how the ATC arrived at the conclusion that he is a terrorist.

4. Under the existing law, an accused will be issued a warrant of arrest only upon finding of probable cause against him as established by evidence admissible under the Rules of Court. **Under the ATA, the ATC can order the arrest on mere suspicion that a person is committing terrorism. As a standard, suspicion is different from probable cause.**

5. **Under existing law, the period of detention is set under Section 125 of the Revised Penal Code (RPC)**: 36 hours when the penalty for the crime is afflictive, or capital penalties, or their equivalent; 18 hours when the penalty is correctional; and 12 hours when the penalty is light. The period of detention therefore varies and escalates according to the seriousness of the crime committed. **Under the ATA, the period of detention is longer – 14 days and extendible to a maximum of 10 more days. The length of detention is uniform regardless of the act committed as constituting terrorism.** The detention will most probably be extended considering the grounds that may be relied upon: i.e., to preserve the evidence, to complete the investigation, and to prevent the commission of another terrorism. The extension will also be decided by the same ATC that issued the warrant of arrest.

6. **Under the present law, an accused who has been charged in court and issued a warrant of arrest by a judge, can still prevent his detention during trial of his case by posting bail.** Under Art. III, Sec.

> 13 of the Constitution, this right to bail is denied only to persons charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong. The Constitution also provides that the right to bail shall not be impaired even when the writ of *habeas corpus* is suspended. **Under the ATA, there is no provision giving this remedy to a person detained by virtue of a warrant issued by the ATC.** (All emphases supplied).

44. In view of all the foregoing, Section 29 of the ATA patently violates the separation of powers between the Judiciary and the Executive. A purely executive agency like the ATC cannot be authorized by legislation to arrogate the sole power of a judge to issue judicial warrants of arrest. Neither can the ATC authorize the detention of a suspect for a maximum of 24 days without judicial warrant or intervention. Moreover, if Section 29 is intended to create another instance of warrantless arrests, this cannot be done by legislation because only the Supreme Court in its exclusive rule-making power to protect constitutional rights can amend Section 5 of Rule 113.

B. Section 29 of the ATA is unconstitutional for violating the (1) right to due process; (2) right against unreasonable searches and seizures; (3) right to bail; (4) right to be presumed innocent; (5) right to speedy disposition of cases; (6) right to writs of habeas corpus and amparo; and (7) right against torture.

i. <u>Infringement of due process.</u>

45. All constitutional rights, particularly those enshrined in the Bill of Rights, are of equal import. However, the right that "no person shall be deprived of life, liberty, or property without due process of law" appears to enjoy primacy since it is provided for under Section 1 of the Bill of

Rights. This is rightly so because once life or liberty is lost or curtailed, the other constitutional rights may be rendered nugatory or illusory.

46. The due process clause is a limitation on the exercise of the immense powers of the State. This is to protect the inherent fundamental freedoms of citizens and persons against the State's incursion or derogation.

47. Thus, due process is the crucial bedrock of every democratic society. When a government injures a person's liberty without following the rule of law, this constitutes a violation of due process.

48. It is under this stringent standard of protecting individual rights and liberties that the ATA offends due process and the rule of law. When the ATC is authorized by the ATA to cause the arrest and detention of a person on mere suspicion without the requisite judicial warrant of arrest, the liberty of the suspect is infringed and the due process clause is violated.

49. Similarly, when the suspect is detained for a maximum of 24 days without judicial intervention or without an information being filed in court or without the suspect being brought to the judicial authority, the suspect's liberty is derogated.

ii. <u>Violation of the right against unreasonable searches and seizures.</u>

50. As discussed above, the grant by the ATA to the ATC of the power to issue written authorization for the arrest and detention of terrorism suspects is a violation of the inflexible rule that warrants of arrest must be issued solely by a judge, except when warrantless arrest legally obtains.

51. As held in ***Comerciante v. People***, ***[supra],*** the seizure or arrest of a person becomes unreasonable in contemplation of the Constitution when the requisite warrant is not issued by a judge.

iii. Transgression of the right to bail.

52. As a general rule, all persons shall enjoy the right to bail. Section 13 of Article III provides that "All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the *writ of habeas corpus* is suspended. Excessive bail shall not be required.

53. Section 17 of Rule 114 provides:

> **Section 17.** *Bail*, *where filed*. — (a) Bail in the amount fixed may be filed with the court where the case is pending, or in the absence or unavailability of the judge thereof, with any regional trial judge, metropolitan trial judge, municipal trial judge, or municipal circuit trial judge in the province, city, or municipality. If the accused is arrested in a province, city, or municipality other than where the case is pending, bail may also be filed with any regional trial court of said place, or if no judge thereof is available, with any metropolitan trial judge, municipal trial judge, or municipal circuit trial judge therein.
>
> (b) Where the grant of bail is a matter of discretion, or the accused seeks to be released on recognizance, the application may only be filed in the court where the case is pending, whether on preliminary investigation, trial, or on appeal.
>
> (c) Any person in custody who is not yet charged in court may apply for bail with any court in the province, city, or municipality where he is held.

54. As ancillary to the right to bail, Article 125 of the Revised Penal Code provides:

> Article 125. *Delay in the delivery of detained persons to the proper judicial authorities.* – The penalties provided in the next preceding Article shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: twelve (12) hours, for crimes or offenses punishable by light penalties, or their equivalent; eighteen (18) hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and thirty-six (36) hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.

55. According to the late Supreme Court Chief Justice Ramon C. Aquino "Article 125 is intended to prevent any abuse resulting from confining a person without allowing him to go on bail" (Aquino, *The Revised Penal Code*, 1997 edition, Vol. Two, P, 70). In other words, Article 125 seeks to expedite the delivery to the judicial authorities of a detained person so that he could secure bail.

56. The inordinately long maximum period of detention of 24 days patently and effectively deprives a suspect of his right to post bail.

57. Since the right to bail becomes generally seasonable only after an information is filed in court against an accused because the court approves the bail bond, then the long period of detention of a suspect without the filing of an information against him or delivering him to the judicial authorities within the limited and strict periods under Article 125 effectively denies him the right to bail.

iv. <u>Impairment of presumption of innocence.</u>

58. One of the cardinal rights of an accused is to be presumed innocent. Section 14(2) of the Bill of Rights provides that "In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved".

59. In ***People v. Maraorao*** (G.R. No. 174369, June 20,2012) it was held that:

> The presumption of innocence of an accused in a criminal case is a basic constitutional principle, fleshed out by procedural rules which place on the prosecution the burden of proving that an accused is guilty of the offense charged by proof beyond reasonable doubt. Corollary thereto, conviction must rest on the strength of the prosecution's evidence and not on the weakness of the defense. x x x Indeed, suspicion no matter how strong must never sway judgment. x x x When guilt is not proven with moral certainty, it has been our policy of long standing that the presumption of innocence must be favored, and exoneration granted as a matter of right."

60. Earlier, in ***People v. Asinas, et al.*** (G.R. No. 29832, March 25, 1929), it was ruled that:

> It is far better for the court to acquit the defendants of a serious crime upon the ground that the evidence is not sufficient to prove their guilt than to invoke the death penalty upon men who may be innocent.

61. William Blackstone, an English jurist, in 1769 said that "the law holds that it is better that 10 guilty persons escape than that one innocent suffer." The Blackstone principle instructs that in distributing errors in criminal punishment, "our justice system should strive to minimize false convictions, even at the expense of creating more false acquittals and more errors overall."

62. In *"The Brothers Karamazov"*, written in 1880, acclaimed Russian novelist Fyodor Dostoevsky intoned that "It is better to acquit 10 guilty than to punish one innocent!"

63. All of the foregoing truisms on the presumption of innocence are put to naught by the long detention of a suspect under police custodial investigation which effectively penalizes him with imprisonment despite his being presumed

innocent unless proved beyond reasonable doubt by competent evidence.

v. <u>Derailment of the right to speedy disposition of cases.</u>

64. Section 14(2) of the Bill of Rights also provides that the accused shall "have a speedy, impartial, and public trial" and Section 16 of the Bill of Rights provides that "All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."

65. The constitutional guarantee of a speedy disposition of one's case is an application of the maxim that "justice delayed is justice denied". As held in ***Licaros v. Sandiganbayan*** (G.R. No. 145851, November 22, 2001) "the aphorism 'justice delayed is justice denied' is by no means a trivial or meaningless concept that can be taken for granted by those who are tasked with the dispensation of justice." Likewise, in ***Tan v. People*** (G.R. No. 173637, April 21, 2009) it was held that "intimating historical perspective on the evolution of the right to speedy trial, we reiterate the old legal maxim 'justice delayed is justice denied'. This oft repeated adage requires the expeditious resolution of disputes, much more so in criminal cases where an accused is constitutionally guaranteed the right to a speedy trial."

66. The foregoing legal maxim and rulings find application in the long-winding custodial investigation under Section 29 of the ATA, which is compounded by the detention or incarceration of a suspect for a maximum of 24 days. This verily derails the detained suspect's constitutional right to a speedy disposition of his case.

vi. <u>Derogation of the right to the writs of *habeas corpus* and *amparo*.</u>

67. Section 15 of the Bill of Rights provides that the "privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion or rebellion when the public safety requires it." The writ of *habeas corpus* commands an individual or a government official who has restrained another

individual to produce the prisoner at a designated time and place so that the court can determine whether the prisoner's custody is legal or not. In other words, the writ is a safeguard against warrantless arrests and illegal detention. Section 1 of Rule 102 provides that "except as otherwise expressly provided by law, the writ of *habeas corpus* shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto."

68. On the other hand, Section 1 of the Rule on the Writ of Amparo (A.M. No. 07-9-12-SC) provides that the "petition for a writ of amparo is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity. The writ shall cover extralegal killings and enforced disappearances or threats thereof."

69. The rights to the writs of *habeas corpus* and *amparo* are defeated by a perfunctory invocation by agents of the state that the continuing detention of a suspect is legitimized by the controverted written authority of the ATA to arrest and detain a person suspected of committing acts of terrorism without a judicial warrant of arrest.

70. Unless Section 29 of the ATA is declared unconstitutional, the rights to the writs of *habeas corpus* and *amparo* are rendered nugatory. To reiterate, these rights are defeated by the police or military's invocation that the suspect is detained pursuant to a written authority from the ATC under Section 29 of the ATA.

71. Reproduced hereunder is the submission of Petitioners Center for International Law, Inc. (CenterLaw), et al. in G. R. No. 252905 in support of their argument that "Section 29 of the ATA is void because it violates the constitutional guarantee of the *writ of habeas corpus*":

- Article III, Section 15 of the Constitution provides that "[the] privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion or rebellion when the public safety requires it."

- It has been settled by this Honorable Court that the writ of *habeas corpus* extends to <u>all cases of illegal confinement or detention</u> by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto. It has also been held that if a person's liberty is restrained by some legal process, the writ of *habeas corpus* is unavailing.

- The key characterization to avail of the writ is, therefore, the illegality of the confinement or detention. If the detention is legal, the writ of *habeas corpus* will not issue.

- To answer the question propounded by the Justices during the Oral Arguments, while the remedy of the writ of *habeas corpus* is available in cases of detention under Section 29 of the ATA, it is only available in the sense that the detained individual may apply for the writ before a court of competent jurisdiction. Section 29 of the ATA gives one's detention the color of legality, thereby ensuring that the writ of habeas corpus will not issue.

- Through Section 29, **the privilege of the writ is effectively suspended** during the twenty-four (24) day maximum period of detention without the existence of invasion or rebellion and the demands of public safety as constitutional prerequisites for the suspension of the writ of *habeas corpus*. There is a virtual *de facto* suspension in the privilege of the writ of *habeas corpus*.

- Worse, the constitutional safeguards on the powers of the commander-in-chief in relation to the suspension of the privilege of the writ of habeas corpus have all been whimsically and unjustifiably set aside and disregarded, including the legislature's power of review and revocation thereof.

vii. <u>The right against torture is vitiated.</u>

72. Section 12(2) of the Bill of Rights provides that "No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him (any person under investigation for the commission of an offense)."

73. This executive authorization of prolonged detention is reminiscent of the Spanish Inquisition when persons suspected of heresy and witchcraft were incarcerated for long periods without being charged and tried. They were mercilessly tortured during lengthy custody.

74. Extended detention induces the commission of torture to coerce confession in violation of the Anti-Torture Act of 2009. Long detention without judicial intervention must be proscribed to foreclose the incidence of torture.

75. The World Organisations against Torture (OMCT)[3] in its discussion of "Lack of Safeguards Against Torture" underscored that:

> Anti-terrorism laws that **lack safeguards against torture such as long periods of detention without judicial review**, the lack of lodging a habeas corpus petition, and the lack of accessing a lawyer, have repeatedly been criticized by international mechanisms, including the CAT. The Convention Against Torture requires that in Article 2 that each "State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." The CAT has recurrently found that the lack of such measures in anti-terrorism laws increases the risk of torture in order to extract a confession as well as the risk of incommunicado detention in unofficial places of detention. **Arrest without warrant, detention for up to 24 days without judicial authorization as foreseen in Section 29 of the ATA are therefore problematic. The CAT has in the past criticized similar provisions containing unwarranted detention for an**

[3] The World Organisations against Torture (OMCT) works with 200 member organisations to end torture and ill-treatment, assist victims, and protect human rights defenders at risk wherever they are. Together, it makes up the largest global group actively standing up to torture in over 90 countries. It works to protect the most vulnerable members of our societies, including women, children, indigenous peoples, migrants and other marginalised communities. To achieve this, it advocates with governments to change or implement their laws and policies, we help victims seek justice and strive to hold perpetrators to account.

extended period of 25 days. (Emphasis supplied).

C. The inordinately long detention period under Section 29 of the ATA violates the Constitution, the Revised Penal Code, the Rules of Court, and international obligations against arbitrary detention

76. Section 29 of the Anti-Terrorism Act on a maximum of 24 days detention of alleged "suspected terrorists", without judicial warrant of arrest, odiously defies more than a century of libertarian tradition enjoyed by Filipinos against unreasonable seizures of their persons dating back to the Malolos Constitution of 1899, the Bill of 1902, the Jones Law of 1916 and the Constitutions of 1935, 1973 and 1987.

77. In stark contrast with the ATA, the Malolos Constitution, the first Constitution of the Philippines and the first Republican Charter in all of Asia, mandated that "All persons detained shall be discharged or delivered to the judicial authority within 24 hours following the act of detention." (Article 8). That was 122 years ago. Now, the ATA has ominously retrogressed to Draconian times by imposing a maximum of 24 days detention of a suspect under police custodial investigation without judicial intervention.

78. Detention upon the unilateral and unbridled authorization of the Anti-Terrorism Council, which is a purely executive agency, arrogates judicial jurisdiction, and resurrects the infamous ASSOs of Martial Law vintage.

79. It is relevant to reiterate that this executive authorization of prolonged detention is reminiscent of the Spanish Inquisition when persons suspected of heresy and witchcraft were incarcerated for long periods without being charged and tried. They were mercilessly tortured during lengthy custody.

80. It is critical to restate that extended detention induces the commission of torture to coerce confession in violation of the Anti-Torture Act of 2009. Long detention without judicial intervention must be proscribed to foreclose the incidence of torture.

i. <u>A 24-day maximum detention without judicial intervention or oversight violates the Constitution.</u>

81. Section 18 of Article VII of the 1987 Constitution provides that "During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released." Accordingly, even when the privilege of the writ of *habeas corpus* is suspended, the constitutional benchmark is that the arrested person must be judicially charged within three days, otherwise he shall be set free.

82. Verily, even during the exigency of an emergency like the suspension of the writ of *habeas corpus*, the maximum period of detention is only three days. This makes the 24-day maximum detention under Section 29 of the ATA during normal times a patent constitutional aberration.

83. Relevantly, Petitioners CenterLaw, et al. maintain that "Section 29 is unconstitutional for violating the maximum three-day detention period under Article VII, Section 18 of the Constitution." They strongly submit that:

- Picking up from the conclusion that Section 29 effectively suspends the privilege of the writ of *habeas corpus*, Petitioners argue that Section 29 is unconstitutional for violating the maximum three-day detention period under the Constitution.

- The Constitution demands that during any suspension of the privilege of the writ of *habeas corpus*, any person thus arrested and detained, is required to be judicially charged within three days, otherwise he must be released.

- This maximum three-day period for law enforcers to judicially charge an arrestee – during the most exigent circumstance that necessitates the suspension of the privilege of the writ of *habeas corpus* – is a limitation introduced in the 1987 Constitution to correct the abuses during the Marcos Regime. Constitutional Commissioner Ambrosio Padilla explained this period of limited detention as follows:

> The purpose … is to prevent a situation similar to the past regime when innocent persons were arrested, detained, and confined in prison sometimes for one month, one year, or even more, without any criminal charge filed against them who oftentimes did not even understand why they had been arrested or detained. (Joaquin G. Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, p.855 [2009 ed]).

- If a maximum three-day detention period is only allowed by the Constitution in seriously exigent circumstances, then the maximum twenty-four (24) days detention period under Section 29 is clearly repugnant to the Constitution.

- The inclusion of Section 29 in the ATA is imbued with grave abuse of discretion amounting to lack or excess of jurisdiction as this provision is repugnant to the Constitution for encroaching upon the Judicial Department's power.

- By effectively suspending the privilege of the writ of *habeas corpus* and violating the maximum three-day detention period enshrined in the Constitution, Section 29 of the ATA is unconstitutional and must be struck down.

84. Moreover, the contentions of petitioners Monsod, et al., in G.R. No. 252624 are incorporated hereunder:

- In the deliberations of the Constitutional Commission, the Commissioners emphasized the dangers of leaving detained persons in the custody of arresting officers for extended periods of time. The purpose of this provision is to require all those detained to immediately be turned over to judicial officers to prevent the possibility of abuse or any form of oppression.

> **Mr. Concepcion**: Before I express my views on the remarks by Commissioner Padilla, I wish to make it

clear that the purpose of this paragraph is to **require all those detained to be immediately turned over to the judicial authorities.** x x x

As a matter of fact, I would prefer that the detainee be turned over to the court as soon as possible. **The first important thing is to preserve his right and his life; the second is to avoid torture or other forms of oppression; and of course to place the detainee under the authority of the court** x x x

Mr. Sarmiento: x x x My submission, Madam President, is that five days is too long. **Our experience during Martial Law was that torture and other human rights violations happened immediately after the arrest, on the way to safe houses or to Camp Aguinaldo, Fort Bonifacio or Camp Crame** … **I suggest that we reduce the period of five days to three days** x x x.

The President: Is there any objection to this particular proposed amendment? *(Silence)* The Chair hears none; the amendment is approved. (II Record of the Constitutional Commission 510, July 31, 1986). [Emphasis supplied].

- **The purpose of Article VII Section 18 is subverted by Section 29 of the Anti-Terror Law. The protection granted by the constitution can easily be rendered nugatory as the law allows the government to detain persons for long periods of time without ever filing criminal charges against them**. This is exactly what the provision sought to prohibit. It is a well-established rule that what cannot be legally done directly cannot be done indirectly. (***Tawang Multi-Purpose Cooperative v. La Trinidad Water District***, G.R. No. 166471, March 22, 2011).

85. Moreover, it is respectfully submitted that the maximum of three-day detention mandated under Section 18 of Article VII covers any and all detentions for any and all crimes, not necessarily connected with rebellion or invasion. No less than the Constitution does not make any distinction

with respect to the offenses where the detainees are covered under this provision. This is an omnibus coverage of all detainees and offenses when the writ of *habeas corpus* is suspended

(a) From the deliberations of the Constitutional Commission of 1986, it is clear that the purpose of this limited detention is to cover any and all detainees of any and all crimes. As Constitutional Commissioner, the late Chief Justice Roberto Concepcion, categorically emphasized that the purpose of this paragraph is to "require **ALL** those detained to be immediately turned over to the judicial authorities." (Emphasis supplied).

(b) Constitutional Commissioner Abraham Sarmiento, a former Associate Justice of the Supreme Court, underscored that the overriding purpose is to obviate the occurrence of long detentions like what happened during martial law when detainees were tortured. He said that "our experience during martial law was that torture and other human rights violations happened immediately after the arrest, on the way to safehouses or to Camp Aguinaldo, Fort Bonifacio or Camp Crame."

(c) Arbitrary detention is equally sanctionable when the maximum period for detention is exceeded with respect to all detainees for varying suspected offenses.

(d) Even the then questionable and controversial erstwhile Human Security Act adopted the maximum of three-day detention provided for under the Constitution when a suspect is detained without judicial warrant of arrest.

ii. <u>A 24-day maximum detention without judicial intervention or oversight violates the short periods of detention under Article 125 of the Revised Penal Code.</u>

86. Article 125 of the Revised Penal Code provides:

> Article 125. *Delay in the delivery of detained persons to the proper judicial authorities.* – The penalties provided in the next preceding article shall be imposed upon the public officer or employee who shall detain any person for some

> legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: twelve (12) hours, for crimes or offenses punishable by light penalties, or their equivalent; eighteen (18) hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and thirty-six (36) hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.
>
> In every case, the person detained shall be informed of the cause of his detention and shall be allowed, upon his request, to communicate and confer at any time with his attorney or counsel. (As amended by EO No. 272, July 25, 1987).

87. The short duration of the periods of detention of an arrestee, the maximum of which is 36 hours for crimes punishable by afflictive or capital penalties, is an apt implementation of the constitutional rights of a person where time is of the essence like the rights to be presumed innocent, to seasonably post bail, to expeditious disposition of one's case and against torture.

88. Consequently, while Article 125 of the Revised Penal Code is a statute which can be amended or modified by the Congress, no amendment or modification should make a period of detention inordinately long like a maximum of 24 days detention. This cannot be valid because it is an infringement of the basic constitutional rights of persons, particularly those who are deprived of liberty in a police custodial investigation.

iii. <u>A maximum of 24 days detention without judicial warrant of arrest violates Section 5 of Rule 113 of the Rules of Court.</u>

89. Section 5 of Rule 113 provides:

> **Section 5.** *Arrest without warrant*; *when lawful*. — A peace officer or a private person may, without a warrant, arrest a person:

(a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has just been committed, and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraph (a) and (b) above, the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail and shall be proceeded against in accordance with section 7 of Rule 112. (5a).

90. As extensively discussed above, there are only three instances where warrantless arrests are legal, namely: (a) *in flagrante delicto*; (b) hot pursuit; and (c) escaped prisoner. If the intention of Section 29 of the ATA is to make a fourth instance on warrantless arrests, this cannot be effected by legislation without infringing on the exclusive rule-making power of the Supreme Court in the protection and enforcement of constitutional rights pursuant to Section 5(5) of Article VIII of the Constitution and as elucidated in ***Carpio Morales v. Court of Appeals*** (*supra*).

91. Petitioners CenterLaw, et al. similarly contend that "Section 29 encroaches upon the rule making power of the Supreme Court by legislating another instance of a warrantless arrest." They articulate their contention in this wise:

- Under Article VIII, Section 5(5) of the Constitution gives the Supreme Court the power to "**Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts xxx**" As such, the Rules of Criminal Procedure provide for the specific instances when a warrantless arrest can be made.

- By legislating another instance of a warrantless arrest, therefore, Congress brazenly encroached upon the Supreme Court's rule-making power, contrary to the Constitution. Congress committed grave abuse of discretion in encroaching upon the judiciary's powers and jurisdiction.

iv. A maximum 24 days detention violates international conventions to which the Philippines is a State party prohibiting arbitrary detention.

92. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (Article 9) prohibit arbitrary arrest and arbitrary detention. The Philippines is a State party to both conventions.

93. The submission of the Commission on Human Rights that "Section 29 violates the rights against arbitrary arrest and arbitrary detention guaranteed in the ICCPR" (International Convention on Civil and Political Rights) is incorporated herein as follows:

- The rights against arbitrary arrest and arbitrary detention are firmly established in international law. The rights are enshrined under Article 9 of the ICCPR:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> x x x

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

Emphatically, Article 9(3) of the ICCPR mandates that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge x x x and shall be entitled to trial within a reasonable time or to release." Philippine law has explicitly adopted and referred to the rights against arbitrary arrest and arbitrary detention in the ICCPR.

- The U.N. Human Rights Committee in General Comment No. 35 explains the rights against arbitrary arrest and detention:

The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits unlawful deprivation of liberty, i.e., deprivation of liberty that is not imposed on such grounds and in accordance with such

procedure as established by law. The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. **Arrest or detention that lacks any legal basis is also arbitrary. Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well unlawful; the same is true for unauthorized extension of other forms of detention.** Continued confinement of detainees in defiance of judicial order for their release is arbitrary as well as unlawful. (Emphasis supplied).

- Articles 9(3) and 9(4) of the ICCPR, as quoted, provide the clear obligation under international law to provide explicit remedies for arbitrary detention. **In exempting law enforcement officers from obligation under Article 125 of the Revised Penal Code to deliver detained persons to judicial authorities, Section 29 runs counter to our obligation to uphold applicable international human rights law**.

- **The jurisprudence of the European Court of Human Rights provides guidance on the proper length of detention under a counter-terrorism law.**

a. ***Aksoy v. Turkey*** explicitly said that **fourteen (14) days without judicial intervention is unlawful**. The Court rationalized that this period is exceptionally long and left the person detained vulnerable not only to arbitrary interference with his right to liberty, but also to torture. Moreover, Turkey has not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable. (*Aksoy v. Turkey*, Application No. 21987/93, ECHR 1996-VI [December 18, 1996]).

b. ***Brogan and Others v. United Kingdom*** ruled that **a period longer than four (4) days and six (6) hours is too long to be held without judicial review**. The degree of flexibility attaching to the notion of 'promptness' is limited and that consideration of the particular features of each case can never be taken to

the point of impairing the very essence of the right guaranteed, that is, to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority. (*Brogan and Others v. United Kingdom*, Application Nos. 11209/84, 11234/84, 11266/84, 11386/85, 11 EHRR 117, at 6-7 [November 29, 1988]).

c. ***Beghal v. United Kingdom*** **warned against an unlawful examination of up to nine (9) hours**. The Court also endorsed the standard of proof of "reasonable suspicion" when confronted with issues of arrest in the context of terrorism. (*Beghal v. United Kingdom*, Application No. 4755/816, ECHR [February 28, 2019]).

- By allowing arrest without a warrant on mere suspicion, not on reasonable suspicion, and allowing detention following warrantless arrest for an initial period of fourteen (14) days without judicial intervention, which is extendible for an additional 10 days or a maximum of 24 days detention, the ATA gravely goes against the prescriptions of international law.

94. Also incorporated hereunder are the comments of the UN Special Rapporteur on Human Rights:

- Further, Section 29 of the Act and Rule 9 of the Implementing Rules allow the arrest of individuals suspected of terrorist acts with only the authorization of the ATC, contradicting the constitutional requirement that arrest warrants may only be issued by a competent judicial court.

- Article 9(3) of the ICCPR holds that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." The Human Rights Committee (CCPR) elaborated in its General Comment No. 35 that the meaning of "promptly" in Article 9(3) means that "delays should not exceed a few days from the time of arrest" and that "48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay

longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. (Human Rights Committee, General Comment No. 35, para. 33).

- In particular, General Comment No. 35 notes that this requirement "applies specifically to periods of pretrial detention" and that such detention itself "shall be the exception rather than the rule." (*Id.* para 37-38).

- Section 29 of the Act appears to be in direct contravention of Article 9(3) of the ICCPR. Under Section 29, law enforcement agents and military personnel may take into custody any person suspected of committing terrorist acts – as defined in Sections 4-12 of the Act – per authorization from the ATC, and without a judicial warrant. Apprehended individuals may then be held for a period of fourteen (14) calendar days in law enforcement or military custody, and this detention may be extended for a further period of ten (10) calendar days. This provision categorically permitting unwarranted arrest and detention for a period of up to twenty-four (24) days appears to directly contravene the requirements of Article 9 of the ICCPR. Twenty-four days of arrest without judicial scrutiny appears to violate the first requirement of Article 9(3) of the Covenant – prompt appearance before a judicial authority. Moreover, such unwarranted arrest may impinge upon the detainee's right under Article 9(3) of the ICCPR "to trial within a reasonable time or to release."

- Section 29 may also implicate other rights protected in the ICCPR. Article 7 prohibits torture or other cruel, inhuman or degrading treatment or punishment. Article 14 protects the right "to be presumed innocent until proven guilty." Lengthy pretrial detention can often lead to violations of both Article 7 and Article 14. Torture, inhuman or degrading treatment or punishment are often used in pretrial detention to extract information or confessions, as a means of punishment or intimidation, or as extortion. (UN Special Rapporteur on Torture, Manfred Nowak, A/64/215, August 3, 2009; Open Society Justice Initiative, "Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risks" [2011]).

- Additionally, Section 29's endorsement of long periods of pretrial detention, which treats suspects as though they are guilty, can in some instances violate Article 14's protections. Finally, Article 4 of the Covenant affirms the right to take proceedings before a court to enable the court to decide, without delay, on the lawfulness of detention. This right should not be diminished by a State party's decision to derogate from the Covenant, as the Human Rights Committee has articulated that because "certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict," there is no justification in derogating from this and other guarantees even during emergency situations." (Human Rights Committee, General Comment No. 29, para. 3).

95. Section 29 of the ATA does not only impose an initial 14-day detention, but aggravates the arbitrariness of the detention by providing an extension of 10 days, or a total detention of 24 days. Section 29 provides the following grounds for extension: "The period of detention may be extended for a maximum period of ten (10) calendar days if it is established that (1) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (2) further detention of the person/s is necessary to prevent the commission of another terrorism; and (3) the investigation is being conducted properly and without delay."

96. The foregoing grounds for an additional 10-day extension defy reason and logic for the following reasons because:

(a) Firstly, an additional 10 days is not necessary to "preserve evidence" since the police or the military should have established procedures and policies on preserving evidence without unduly infringing on a suspect's liberty. Moreover, an extension is not necessary to "complete the investigation" because the police or military should have the efficiency to complete its investigation within the initial 14-day period, which is even inordinately long.

(b) Secondly, considering that the suspect has been detained for 14 days already under strict custodial

investigation, his possible involvement in the commission of "another terrorism" is remote. Moreover, if the apprehension is that once the suspect is released, he may commit "another terrorism", this apprehension is a mere conjecture. Furthermore, after the suspect's release, the police or military has all of the means to monitor and conduct surveillance in order to prevent his committing "another terrorism".

(c) Thirdly, it is utterly self-serving to proffer that an extension is in order because the "investigation is being conducted properly and without delay" considering that the arbitrarily long-drawn out custodial investigation has already lasted for 14 days. It must be underscored that a long arbitrary detention is neither proper nor expeditious.

D. The Implementing Rules and Regulations (IRR) on the ATA cannot cure the fatal infirmities of Section 29.

97. **The precise phraseology and express intent of Section 29 of the ATA do not envision a warrantless arrest**. This is so because the plain language of Section 29 provides for the situation where the ATC's written authority **precedes** any law enforcement agent or military personnel taking custody of a suspect. The pertinent provision unequivocally reads: "**Any law enforcement agent or military personnel, who, having been duly authorized in writing by the ATC had taken custody of a person suspected** of committing any of the acts defined and penalized under Section 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act". (Emphasis supplied).

98. **In other words, the arrest or taking into custody of a suspect comes after the written authorization of the ATC**.

99. In direct contravention of the language and intent of Section 29, the Implementing Rules and Regulations (IRR) on the ATA made it appear that the arrest and taking into custody of a suspect under Section 29 falls under warrantless arrest provided for in Section 5 of Rule 113 of the Rules of

Court, particularly so when the IRR restated in Rule 9.2 the three circumstances under which a warrantless arrest is valid in connection with the "detention of a suspected person without warrant of arrest" pursuant to Section 29.

100. The mischievous, or even malevolent, purpose of Rule 9.2 in relation to Rule 9.1 of the IRR is to legitimize the arrest and detention of a terrorist suspect under Section 29 of the ATA without a judicial warrant of arrest. As discussed above, Section 29 violates several constitutional rights, among which is infringing on the guarantee against unreasonable seizures or arbitrary arrest by arrogating the sole power of a judge to issue a warrant of arrest to legalize the detention of the person arrested.

101. Settled is the rule that the IRR cannot cure a fatal constitutional infirmity in the law. Neither can the IRR amend, modify or repeal the law which it seeks to implement (***Lokin v. COMELEC***, G.R. No. 179431-32, June 22, 2010; ***Purisima v. Lazatin***, G.R. No. 210558, November 29, 2016; ***CIR v. Philippine Aluminum Wheels, Inc.***, G.R. No. 216161, August 9, 2017). By its very nomenclature, the Implementing Rules and Regulations are promulgated to enforce or implement a law, never to introduce perfecting amendments or remedy its constitutional deficiencies.

102. Verily, the spring, which is the IRR, cannot rise higher than its source, the substantive law, even if the IRR's pretended ascendancy is supposedly to adhere to the Constitution or the Rules of Court. Only the Congress can cure or remedy the constitutional transgressions of its enactment, unless sooner repudiated by the Supreme Court.

E. There is no need for an actual case to exist in order to declare Section 29 of the ATA unconstitutional.

103. When a law like the ATA is challenged to have subverted the Constitution by empowering a purely executive agency like the ATC to authorize in writing the arrest and detention of a terrorist suspect, the justiciable controversy is between the repugnant statute and the sanctity of the

Constitution. This transcendental issue should be adjudicated by the Honorable Supreme Court without regard to the procedural requirement of the existence of an actual case.

104. The solemn duty of the Supreme Court to resolve the issue is highlighted by its extended power of judicial review to check any grave abuse of discretion committed by a branch or instrumentality of government, like the Congress, for enacting an unconstitutional statute or legislating a provision which violates the Constitution.

105. Section 1 of Article VIII provides:

> SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice **to settle actual controversies involving rights which are legally demandable and enforceable, AND to determine whether or not there has been a grave abuse of discretion** amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. (Emphasis supplied).

106. The foregoing defines two **separate** components of judicial power. First, is "the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable". Second, is to "determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government."

107. The requirement of an actual case or controversy pertains to the first component of judicial power wherein demandable and enforceable rights are in issue between two or more private citizens or between a private citizen and the government or a government functionary.

108. With respect to the second aspect of judicial power involving the extended power of judicial review, the

requirement of an actual controversy in the context of the first component of judicial power is not absolutely necessary because the very act of the respondent government agency or official is the gravamen determinative of the existence of grave abuse of discretion committed by any branch or instrumentality of the government.

109. With respect to Section 29 of the ATA, it is the very textual provision of the statute which grossly violates the Constitution which is the justiciable issue on whether or not the Congress committed grave abuse of discretion by defying the Constitution in authorizing the ATC to arrest and detain a terrorist suspect without judicial warrant, intervention or oversight.

110. The requirement of "ripeness" is satisfied when the petitioners and the respondent government agencies and functionaries assert differing or opposite legal claims which are susceptible to adjudication.

111. Verily, there is no need to wait for an actual case to happen in order to strike down Section 29 of the ATA because its constitutional infirmity is patent on its very face. The rulings in the following cases are particularly relevant:

(a) In ***Southern Hemisphere v. Anti-Terrorism Council*** (G.R. No. 178552, October 5, 2010), the ponencia quoted with favor the case of ***Holder v. Humanitarian Law Project*** which pronounced that **people "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.**" (Emphasis supplied).

(b) In ***Inmates of New Bilibid Prison v. De Lima*** (G.R. No. 212719, June 25, 2019) and ***Pimentel, Jr. v. Aguirre*** (G.R. No. 132988, July 19, 2000), it was ruled that **people "should not wait for the implementing evil to befall on them because they could question acts that are illegal or unconstitutional wherein the mere enactment of questioned law, the dispute is said to have ripened into a judicial controversy without any other overt act.**" (Emphasis supplied).

(c) In ***Tañada v. Angara*** (G.R. No. 118295, May 2, 1997), it was held that **when "an action of the legislative department is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute** x x x Once a controversy as to the application or interpretation of a constitutional provision is raised before this Court (as it is in the instant case), it becomes a legal issue which the Court is bound by constitutional mandate to decide." (Emphasis supplied).

(d) In ***Chavez v. Gonzales*** (supra), it was held that "**In cases where the challenged acts are patent invasions of a constitutionally protected right, we should be swift in striking them down as nullities *per se*. A blow too soon struck for freedom is preferred than a blow too late**." (Emphasis supplied).

112. The inordinately long detention of a maximum of 24 calendar days authorized under Section 29 without judicial warrant does not only violate the fundamental requirement that a warrant of arrest must be issued solely by a judge upon probable cause in order to assure a person's freedom from unreasonable seizure or arbitrary arrest, but it also infringes on other constitutional rights where time is of the essence, like (a) the right to be presumed innocent; (b) right to seasonably file bail; (c) right against torture; (d) right to speedy disposition on one's case; and (e) right to avail of the writ of *habeas corpus* and the writ of *amparo*.

113. While it is true that a statutory provision like Article 125 of the Revised Penal Code on the delay in the delivery of detained persons to the proper judicial authorities can be amended, **any amendment which inordinately prolongs the period of detention is odious and unconstitutional because the long delay in bringing an arrested suspect to the judicial authority violates a person's constitutional rights as mentioned above where time is of the essence**.

114. With the catalogue of fundamental rights debased by the ATA, this fearsome law reinstitutes state terrorism in its original mold reminiscent of the Reign of Terror during the

French Revolution. The ATA must be struck down with alacrity without waiting for an actual case for this repressive law to befall a citizen.

F. The House of Representatives gravely abused its discretion in passing with inordinate alacrity House Bill No. 6875, entitled "An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the Human Security Act of 2007", even as the constitutional infirmities originated from the Senate of the Philippines.

115. In the instant case, the bicameral grave abuse of discretion amounting to lack of jurisdiction is imprinted in the ATA as it is riddled with constitutional infirmities, including the patent unconstitutionality of Section 29 of the challenged Act.

116. The original culprit is the Senate of the Philippines which first approved the infirm measure under Senate Bill No. 1083. The House of Representatives approved House Bill No. 6875 which was deliberately made a complete copycat of the Senate version including its constitutional infractions.

117. The multiple odious violations of the Constitution authorized by the ATA evidently manifest the grave abuse of discretion of the Congress in passing this aberration of a legislation.

118. To reiterate, the original sin emanated from the Senate which first passed the grievously infirm Senate Bill No. 1083. For example, Sen. Panfilo Lacson, the bill's principal author, justified prolonged detention without judicial warrant of arrest purportedly to foreclose an "inchoate offense" or when no crime has yet been committed. This is an unmitigated assault on due process.

119. The House with censurable alacrity adopted *in toto* the Senate version, thus precluding the import and efficacy of a bicameral conference. It will be recalled that perfecting

amendments protective of human rights were incorporated in the erstwhile Human Security Act during the bicameral conference of which Petitioner Edcel Lagman was a conferee for the House in 2007.

120. The grave abuse committed by the House is highlighted by the utter denial of extensive debates and abusive rejection of curative amendments. Although petitioner Rep. Edcel Lagman, an opposition member of the House, was the third interpellator listed in the roster of interpellators, he and others similarly listed were not called to propound their searching questions. All amendments to cure the bill of constitutional infirmities were totally rejected upon the repeated bidding of the House leadership.

121. Petitioner Lagman scored the House leadership for not allowing him to interpellate when he explained his negative vote against the anti-terrorism bill:

> Before I explain my negative vote, I would like to ask the House Leadership to explain why I was not allowed to interpellate the sponsors of House Bill No. 6875 despite the fact that I seasonably registered my intention to interpellate and I was assured that I was number three in the list of interpellators. x x x
>
> When I complained that I was not being called to interpellate, I was told to call the Majority Leader but the Majority Leader could not be reached.
>
> If a member of the independent opposition is discriminated against in a parliamentary body, how can we expect the new Anti-Terror Law to be enforced with due respect to human rights and civil liberties of citizens? (House of Representatives TSN, June 3, 2020, 7:30 PM, p. 137).

122. The tyranny of the House supermajority railroaded the passage of the copycat H.B. No. 6875 in a single session of about four hours, from sponsorship to approval on second reading. A deliberative assembly like the House of Representatives was transformed into a feeble rubber stamp.

G. The ATA abandoned the safeguards in the Human Security Act (HSA) protective of the rights of the arrested and detained suspect.

123. The following safeguards provided for in the "Human Security Act of 2007" have been deleted and abandoned by the "Anti-Terrorism Act of 2020":

(a) As provided for in Section 18 of the HSA only a maximum of three days detention without judicial warrant consistent with the three-day benchmark provided by the Constitution even when the privilege of the writ of *habeas corpus* is suspended;

(b) Likewise, Section 18 of the HSA provided that the arrest of those suspected of terrorism or conspiracy to commit terrorism must **result from the surveillance** of the said suspects under Section 7 and **examination of bank deposits** under Section 27 of the HSA. The aforesaid Section 7 is now Section 16 and the examination of bank deposits under Section 27 is now Sections 35 and 36 of the ATA, the provisions of which are not anymore conditions precedent for effecting arrest and detention.

(c) Section 18 of the HSA provided that **before detaining the person suspected of the crime of terrorism, the law enforcers shall present him or her before any judge** at the latter's residence or office nearest the place where the arrest took place at any time of the day or night **in order for the judge to ascertain the identity of the law enforcers and the person they have arrested, inquire on the reasons why they have arrested the subject person, and determine personally whether or not the subject person has been subjected to any physical, moral or psychological torture**;

(d) Section 19 of the HSA provided that in the event of an actual or imminent terrorist attack, the suspects may not be detained for more than three days without the written approval of a municipal, city, provincial or regional official of the Human Rights Commission or judge of the municipal,

regional trial court, the Sandiganbayan or a justice in the Court of Appeals nearest the place of arrest; and

(f) Section 19 of the HSA also provided that within three days after the detention of the suspect, whose connection with the terror attack or threat is not established, he shall be released immediately.

124. Verily, the challenged Section 29 of the new anti-terrorism law is patently unconstitutional on its very face. Perforce, it has to be jettisoned as constitutionally infirm.

125. In lieu of the safeguards provided for in the repealed HSA which have been abandoned, the ATA provides for mere motherhood safeguards which are orphaned by repressive provisions capped by a killer proviso.

126. The abandonment by the ATA of the safeguards protective of civil liberties and fundamental freedoms provided for under the repealed HSA has been abundantly stressed in the foregoing discussions.

127. Despite the utter deletion of said safeguards, the proponents and defenders of the new anti-terrorism law maintain that adequate safeguards on human rights and basic freedoms are still provided for in the challenged law.

128. However, the so-called "safeguards" provided for in the "Anti-Terrorism Act of 2020" are mere motherhood declarations vainly echoing already recognized constitutional rights, statutory guarantees, and jurisprudential pronouncements.

129. These motherhood safeguards, which are orphaned or eroded by repressive provisions in the challenged law, consist of the following:

(a) "In the implementation of the policy (Declaration of Policy) stated above, the State shall uphold the basic rights and fundamental liberties of the people as enshrined in the Constitution." (Section 2 of the "Anti-Terrorism Act of 2020").

This is a pretended safeguard because even without such declaration, the Constitution on "basic rights and fundamental liberties" shall always prevail. In fact, these "basic rights and fundamental liberties" are the ones derogated by the ATA.

(b) "Nothing in this Act shall be interpreted as a curtailment, restriction or diminution of constitutionally recognized powers of the executive branch of the government. It is to be understood, however, that the exercise of the constitutionally recognized powers of the executive department of the government shall not prejudice respect for human rights which shall be absolute and protected at all times." (Section 2 of the "Anti-Terrorism Act of 2020").

Although this declaration is not necessary because the Constitution already provides for the same, this engenders a sneaking suspicion that this is being made because there is a hidden agenda to derogate human rights as confirmed in the regressive provisions of the new anti-terror law.

(c) "[S]urveillance, interception and recording of communications between lawyers and clients, doctors and patients, journalists and their sources and confidential business correspondence shall not be authorized." (Section 16 of the "Anti-Terrorism Act of 2020").

Similarly, this is a restatement of what is already provided for under Section 24 of Rule 130 of the Rules of Court on privileged communication and pertinent jurisprudence.

(d) "Any listened to, intercepted, and recorded communications, messages, conversations, discussions, or spoken or written words, or any part or parts thereof, or any information or fact contained therein, including their existence, content, substance, purport, effect, or meaning which have been secured in violation of the pertinent provisions of this Act shall be inadmissible and cannot be used as evidence against anybody in any judicial, quasi-judicial, legislative, or administrative investigation, inquiry, proceeding or hearing." (Section 23 of the ATA).

Again, this is a mere restatement of Section 3 (2) of Article III on the Bill of Rights which provides that "Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding." It also parrots prevailing jurisprudence on inadmissibility of illegally procured evidence which states that "evidence obtained and confiscated on the occasion of such unreasonable searches and seizures are deemed tainted and should be excluded for being the proverbial fruit of the poisoned tree." (***People v. Bronola***, G.R. No. 213225, April 4, 2018).

(e) "Immediately after taking custody of a person suspected of committing terrorism or any member of a group of persons, organization or association proscribed under Section 26 hereof, the law enforcement agent or military personnel shall notify in writing the judge of the court nearest the place of apprehension or arrest of the following facts: (a) the time, date, and manner of arrest; (b) the location or locations of the detained suspect/s and (c) the physical and mental condition of the suspect/s. The law enforcement agent or military personnel shall likewise furnish the ATC and the Commission on Human Rights (CHR) of the written notice given to the judge." (Section 29 of the ATA).

This requirement of notice is a superficial safeguard because what the Constitution and jurisprudence require is that the apprehended suspect should be first brought personally to the proper judicial authority in order for the judge to determine probable cause of such apprehension. A written report, which is not even required to be under oath, is a useless formality

(f) "Rights of a Person Under Custodial Detention" provided for in Section 30 of the ATA is a mere repetition of the rights of a detained person as recognized in various statutes and jurisprudential rulings.

(g) "The use of torture and other cruel, inhuman or degrading treatment or punishment, as defined in Sections 4 and 5 of Republic Act No. 9745 otherwise known as the 'Anti-

Torture Act of 2009', at any time during the investigation or interrogation of a detained suspected terrorist is absolutely prohibited..." (Section 33 of the ATA).

Again, this is a pseudo safeguard because this is already covered, as admitted in the provision, by the "Anti-Torture Act of 2009". More importantly, Section 19 (2) of Article III on the Bill of Rights provides "No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him (person under investigation)." What is important to stress is that a prolonged detention of a suspect incites the commission of torture to extract involuntary and coerced confessions.

(h) "The program (legal affairs program of the ATC) shall ensure respect for human rights and adherence to the rule of law as the fundamental bases of the fight against terrorism." (Section 45 of the ATA)

Likewise, this is a cosmetic safeguard because under the new anti-terrorism law the war against terrorism is made ascendant over human rights and the rule of law.

(i) "[T]errorism 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**." [Emphasis supplied]. (Section 4 of the ATA).

This is an inordinately superficial and artificial recognition of the people's exercise of civil and political rights because what has been supposedly acknowledged and protected is decimated by a killer proviso which reads "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". All that a devious and underhanded law enforcer or prosecutor has to do is to conveniently invoke the killer proviso to stifle political dissent and peaceable assembly for redress of grievances.

130. This killer proviso is the malevolent torpedo that destroys all of the so-called safeguards provided for in the ATA.

131. Even before the ATA was signed into law, police officers have already shown their dangerous predisposition to crush freedom of speech by (a) rounding up and detaining students who were protesting inside the University of the Philippines (UP) Cebu campus against the passage of the anti-terrorism bill; and (b) dispersing and apprehending members of the LGBTQ community who were demonstrating near Malacañang against the then-proposed ATA. Many were detained for days before they were released.

132. These ominously portend of the police harassment and illegal arrests of legitimate dissenters once the new anti-terrorism law is implemented. In fact, after the approval of the ATA, red-tagging, terror-baiting, and violent assaults generally and against some of the petitioners became rampant.

133. The genuine safeguards were those abandoned as enshrined in the erstwhile HSA, like the following:

(a) Inclusion of political or ideological motive as an indispensable element of the crime of terrorism to distinguish it from common crimes of violence;

(b) Non-criminalization of "threat", "proposal", and "inciting" to commit terrorism to preclude abridgement of the freedom of speech;

(c) Maximum of only three (3) days detention without a judicial warrant of arrest;

(d) Before detaining a suspected terrorist, he must be personally presented to a judge who shall determine why he has been arrested and observe whether he has been tortured;

(e) Arrest of a suspected terrorist must be based on prior surveillance and/or examination of bank accounts, not on mere suspicion;

(f) Requirement of prior judicial authorization for the investigation and search of bank deposits and records as well as the freezing of property or funds of a suspected terrorist;

(g) Right of a suspected terrorist to be informed about the ongoing surveillance against him and the wiretapping of his communication, and the investigation of his bank accounts and deposits to afford him the opportunity to challenge and controvert the actions of the law enforcers and the AMLC;

(h) The surveillance and wiretapping can only be made if there is no other effective means of securing the needed evidence; and

(i) There is adequate penal sanction for securing maliciously an order authorizing wiretapping based on *ex-parte* application.

H. The Solicitor General's defense of the constitutionality of Section 29 of the ATA is feeble and mistaken.

134. Adopted in this Memorandum is the submission of Petitioners CenterLaw, et al. that contrary to the OSG's (Office of the Solicitor General) arguments, there is no way to harmonize Section 29 with legitimate instances of warrantless arrests under Section 5 of Rule 113. Hereunder are the contentions of Petitioners CenterLaw, et al.:

- The OSG has oscillated between various interpretations of the role of judges within the context of the execution of Section 29 of the ATA.

- The OSG initially argues that Section 29 of the ATA, insofar as it characterizes the ATC's power, does not encroach upon judicial authority to issue a warrant. OSG argues that the ATC's power is limited to allowing an extension of the period of detention. They argue that Section 29 only contemplates instances where a suspected terrorist is arrested under the instances of a valid warrantless arrest as allowed by the Rules of Criminal Procedure.

- However, if lawmakers intended that arrests made under Section 29 are those where the Rules of Criminal Procedure allow warrantless arrests, the legislature should have worded the provision accordingly.

- In fact, the OSG, in arguing that the word "suspected" as used in Section 29 merely pertains to a person not yet formally charged with violation of the ATA but nonetheless has been arrested and detained under any of the circumstances justifying a warrantless arrest, contradicts its point that Section 29 is not an encroachment upon judicial authority to issue a warrant.

- First, if it is true that the person suspected of violation of the ATA has already been arrested under any of the circumstances justifying a warrantless arrest, the law enforcer or military officer has no more need to apply for a judicial warrant of arrest as the person in question is already detained or a written authorization from ATC because the suspect has been arrested.

- With the issuance of the ATC of a written authorization for the arrest and detention of a suspect without judicial warrant, the determination of probable cause by the judge is supplanted by ATC's own administrative determination.

- Second, the OSG has agreed with the Petitioner's characterization of the word "suspect" insofar as it depicts one who is imagined to be guilty or culpable on slight evidence or without proof.

- However, the bases of warrantless arrest is not mere suspicion but probable cause and/or personal knowledge of the person effecting the arrest that the arrestee attempted or committed the offense.

- Government has thus admitted that Section 29 encroaches upon judicial authority to issue warrants of arrest.

- The OSG argues further that the entire context of the law must be considered in construing the provisions.

- However, the OSG is unable to properly illustrate how considering the entire context of the law as written would lead to an interpretation wherein Section 29 does not encroach upon judicial power.

- The OSG points to Section 45 which states that "nothing herein shall be interpreted to empower the ATC to exercise any judicial or quasi-judicial power or authority."

- This provision, however, does nothing to remedy the fact that Section 29 encroaches upon judicial power.

- The OSG further argues that Section 29 of the ATA is meant to address those instances where the law enforcement agent or military personnel would not "have the luxury of time to go to court and ask for a warrant of arrest." The OSG has said that "if law enforcement agents or the military personnel would receive information, they should immediately effect a warrantless arrest rather than go to court."

- "Receiving information" that a crime is being committed or has been committed is not one of the grounds for a valid warrantless arrest under the Rules of Criminal Procedure. This goes against the OSG's pronouncements that arrests within Section 29 should be made within the framework of allowable warrantless arrests.

- This shows that the OSG itself seems to be confused on how to treat warrantless arrests vis-à-vis the application of Section 29 of the ATA. It has not been able to show how warrantless arrest can fit into Section 29.

- Lastly, the OSG argues the following:

> Your Honor, we submit that the judge was not given the role of determining whether the continuous detention is warranted. The judge, as mentioned in Rule 9.3 and as mentioned in Section 29, has to be notified of the fact that there is a person held for questioning by the law enforcement

> agents and this person could probably be charged with terrorism. But there is no additional function imposed upon the judge, Your Honor.

- This further highlights the encroachment on the judicial power to issue warrants of arrest upon finding of probable cause. The OSG has essentially admitted that the judge has no role when it comes to Section 29.

- It has already been discussed that if the lawmakers intended that Section 29 of the ATA be interpreted to cover warrantless arrest, the legislators should have explicitly provided for such circumstance.

- Rule 9.1 and 9.2 of the IRR has no authority to insert the instances of valid warrantless arrest as listed in the Rules of Criminal Procedure as qualifying the instances when the law enforcer or the military personnel can make arrests under the ATA.

- This cannot correct the constitutional infirmity of Section 29 as administrative issuances must not be *ultra vires* or beyond the limits of the authority conferred.

- Simply stated, an administrative issuance, such as an IRR, cannot supplant or modify its enabling statute. Thus, Rule 9.1 and 9.2 unduly expand on the provisions of the ATA, and they are void for being ultra vires.

- Consequently, there can be no possibility where Section 29 of the ATA can be harmonized with the Constitution. Thus, Section 29 of the ATA is void for being unconstitutional.

SUMMATION

135. Section 29 of the Anti-Terrorism Act of 2020 is irredeemably unconstitutional because:

(a) No less than its subtitle, which reads "*Detention Without Judicial Warrant of Arrest*" is an express admission that the written authorization of the Anti-Terrorism Council

(ATC) for the arrest and detention of a terrorist suspect is without the requisite judicial warrant of arrest, thus violating Section 2 of Article III of the Bill of Rights which mandates that the seizure of a person can only be effected by a warrant of arrest issued solely by a judge upon finding of probable cause. A subsequent detention without a prior judicial warrant of arrest is arbitrary and void.

(b) The limited periods of detention of a person provided for under Article 125 of the Revised Penal Code (RPC) cannot be suspended or cast aside, particularly so if the detention is arbitrary because no judicial warrant of arrest has been issued. The said Article 125 of the RPC still applies even in warrantless arrest under Section 5 of Rule 113 of the Rules of Court.

(c) Considering that detention is the logical consequence of an arrest or taking into custody of the suspect, the written authorization of the ATC includes the seizure of the suspect. This is explicit in the provision of Section 29 of the ATA which provides that "any law enforcement agent or military personnel, **who, having been duly authorized in writing by the ATC has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act**". This indubitably shows that the written authorization of the ATC includes an order to arrest the suspect because there can be no detention without first taking the suspect into custody.

(d) Under Section 29 of the ATA mere suspicion justifies the arrest and detention of a suspect. This violates the constitutional requirement of probable cause before a person can be arrested. Moreover, it abandons the requirement under the erstwhile Human Security Act of 2007 that the arrest of a suspect must be based on a prior surveillance and/or investigation of his bank accounts.

(e) The arrest and detention under Section 29 of the ATA, despite the arguments of the Solicitor General and the provisions of the IRR, do not fall under Section 5 of Rule 113 of the Rules of Court on warrantless arrest. No less than Section 29 itself does not invoke or refer to warrantless

arrest. Moreover, a warrantless arrest requires probable cause or personal knowledge of the agent or person effecting the arrest that the arrestee has committed, is committing, or is about to commit a crime, a prerequisite not prescribed in Section 29. Furthermore, the element of immediacy of the arrest is not present under Section 29 because of the requirement that the law enforcement agent or military personnel must first secure a written authorization from the ATC, which takes time and negates the imperativeness of an instant arrest.

(f) The IRR on the ATA does not give any relief. Settled is the rule that the IRR cannot supplement, modify, amend or cure the substantive law which it seeks to implement or enforce.

(g) The arrest and detention without any judicial warrant, intervention or oversight violates the constitutional guarantees of the right to due process, right against unreasonable seizures or arrest, right to presumption of innocence, right to bail, right to speedy disposition of one's case, right against torture, and the right to secure the writs of *habeas corpus* and *amparo*.

(h) The inordinately long detention period of a maximum of 24 days authorized under Section 29 of the ATA violates not only the foregoing fundamental rights, but also the provisions of international covenants like the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights prohibiting arbitrary arrest and arbitrary detention. The Philippines is a State party to these Conventions.

136. Finally, the ATA has abandoned the real and effective safeguards for the protection of constitutional rights and civil liberties provided for under the erstwhile Human Security Act, and these genuine safeguards were substituted with mere motherhood statements.

137. Attached as ANNEX "A" is the list of authorities in the order they were cited in the Memorandum.

PRAYER

ACCORDINGLY, the petitioners in the 37 consolidated kindred petitions respectfully pray that Section 29 of the Anti-Terrorism Act of 2020 be declared unconstitutional together with the other challenged provisions of the ATA, and the ATA as a whole.

Petitioners pray for other just and equitable reliefs.

Quezon City, for Manila

June 26, 2021

EDCEL C. LAGMAN
Petitioner and Counsel in
G.R. No. 252579 which is
consolidated with the
36 other petitions
Roll of Attorneys No. 021381
IBP Lifetime No. 923026 CALMANA
PTR No. 0632841/ 1-8-2021
MCLE Exemption No. IV-001527
karina_lagman@yahoo.com
Mobile No. 0917-102-3737

Copy furnished:

THE SOLICITOR GENERAL
Office of the Solicitor General
134 Amorsolo St., Legazpi Village
Makati City 1229
osgatateam@osg.gov.ph
June 27, 2021