G.R. No. 231658 – Representatives Edcel C. Lagman, Tomasito S. Villarin, Gary C. Alejano, Emmanuel A. Billones, and Teddy Brawner Baguilat, Jr. v. Hon. Salvador C. Medialdea, Executive Secretary, Hon. Delfin N. Lorenzana, Secretary of National Defense and Martial Law Administrator, and General Eduardo Año, Chief-of-Staff of the Armed Forces of the Philippines and Martial Law Implementor

G.R. No. 231771 – Eufemia Campos Cullamat, Virgilio T. Lincuna, Ateliana U. Hijos, Roland A. Cobrado, Carl Anthony D. Olalo, Roy Jim Balanghig, Renato Reyes, Jr., Cristina E. Palabay, Amaryllis H. Enriquez, ACT Teachers' Representative Antonio L. Tinio, Gabriela Women's Party Representative Arlene D. Brosas, Kabataan Party-List Representative Sarah Jane I. Elago, Mae Paner, Gabriela Krista Dalena, Anna Isabelle Estein, Mark Vincent D. Lim, Vencer Mari Crisostomo and Jovita Montes v. President Rodrigo Duterte, Executive Secretary Salvador Medialdea, Defense Secretary Delfin Lorenzana, Armed Forces of the Philippines Chief-of-Staff Lt. General Eduardo Año, and Philippine National Police Director-General Ronaldo dela Rosa

G.R. No. 231774 – Norkaya S. Mohaman, Sittie Nur Dyhanna S. Mohamad, Noraisah S. Sani, and Zahria P. Muti-Mapandi v. Executive Secretary Salvador C. Medialdea, Department of Defense (DND) Secretary Delfin Lorenzana, Department of the Interior and Local Government (DILG) Secretary (Officer-in-Charge) Catalino S. Cuy, Armed Forces of the Philippines (AFP) Chief-of-Staff General Eduardo M. Año, Philippine National Police (PNP) Director General Ronald M. dela Rosa, and National Security Adviser Hermogenes C. Esperon, Jr.

Promulgated:
July 4, 2017

MENDOZA, *J.:*

SEPARATE CONCURRING OPINION

Once again the Court is confronted with an issue raised to test the constitutional safeguards against abuses put in place by the Framers of the 1987 Constitution in response to the experiences of the nation during the regime of former President Ferdinand E. Marcos.

Martial law is a polarizing concept. On the one hand, it is an extraordinary constitutional power conferred on the president, which he may exercise when there is invasion or rebellion and when public safety requires it. Martial law is not merely an implied or necessary power, but a power expressly and categorically entrusted by the people to the president.

Yet, an invocation of the said power generates a dissonant reaction from various sectors of the citizenry—some are downright antagonistic. They still vividly recall how, during the Marcos regime, martial law was utilized, not as a shield to protect the sovereignty from both foreign and

local threats, but as a mechanism to stifle dissent, to oppress the opposition, and to plunder the economy. The same power intended to protect the citizenry from danger was instead used to violate their constitutional and human rights.

The present controversy stemmed from the issuance of President Rodrigo Duterte *(President Duterte)* of Proclamation No. 216, which placed several islands comprising Mindanao under martial law.

Considering the trauma sustained by the people during the Marcos regime, the Court understands the skepticism of some sectors of society. In case of invasion or rebellion and when the public safety requires it, however, the Court cannot just enjoin the implementation of martial law. It can only do so if the sufficiency of the factual bases for such declaration cannot be proven in an appropriate proceeding.

This case is the appropriate proceeding. It is *sui generis* in the absence of a corresponding specific procedure promulgated by the Court.

The Factual Antecedents

As early as November 2014, certain groups in Mindanao pledged allegiance to the Islamic State of Iraq and Syria *(ISIS)* Caliphate.[1] The four groups coming from different parts of Mindanao were (1) the Abu Sayyaf Group *(ASG)* from Basilan, headed by Isnilon Hapilon *(Hapilon)*; (2) the Dawlah Islamiya or the Maute Group from Lanao del Sur, headed by Omar Maute; (3) the Ansarul Khilafah Philippines *(AKP),* also known as the Maguid Group from Saranggani and Sultan Kudarat, led by Mohammad Jaafar Maguid; and (4) the Bangsamoro Islamic Freedom Fighters *(BIFF),* based in Maguindanao.

In 2016, Hapilon was appointed as the *Emir* in the Islamic State of the Philippines. The groups intended to establish Marawi City in Lanao del Sur as their capital as it is the central point from which other areas in Mindanao can be easily accessed.

In the first quarter of 2017, due to the heightened frequency of the armed attacks in Mindanao, the quality of the weapons used by the armed groups, and the evident political intention to dismember Philippine territory and deprive the President of his powers in Mindanao, Defense Secretary Delfin N. Lorenzana *(Secretary Lorenzana)* and National Security Adviser

[1]The word 'Caliph' means successor, and designates the political leader of the Islamic community, or ummah. By using the language of Caliph and Caliphate, ISIS is attempting to establish itself as the leader of a worldwide Muslim movement and mobilize a broad coalition of support by erasing national boundaries. (http://www.huffingtonpost.com/2014/06/30/what-is-a-caliphate-meaning_n_5543538.html)

General Hermogenes Esperon, Jr. *(General Esperon)*, during security briefings and cabinet meetings, expressed to the President the advisability of declaring martial law. Martial Law Administrator, Armed Forces Chief General Eduardo Año *(General Año),* confirmed that he had been briefing the President at least three (3) times a day on the situation in Mindanao, which was getting critical every day.

Sometime before May 23, 2017, the Maute Group, the ASG, the BIFF, and the AKP, who all vowed to overthrow the government and establish a *wilayah* (province) in Mindanao, met and discussed how to execute their plan to realize their aspirations. This has been validated by a video[2] showing Hapilon and the Maute brothers discussing their strategy on how to attack Marawi City.

On May 23, 2017, acting on intelligence so far gathered, the police, with the assistance of the military, moved out to serve a warrant of arrest on Hapilon, who was reported to be in a safe house of the Maute Group. A firefight between the military and the rebels ensued, but the latter, following their then secret plan, simultaneously laid siege to Marawi City in an unprecedented scale, occupied strategic positions therein, set up their own checkpoints, and virtually paralyzed the city. Several government and private infrastructures were destroyed and the operations of the local government were crippled. The ISIS-inspired local rebel groups had indeed succeeded in terrorizing the entire city of Marawi on the very first day of Ramadan with the goal of establishing a *wilayah* in Mindanao.

On the same day, May 23, 2017, acting on validated intelligence reports, President Duterte issued Proclamation No. 216 declaring a state of martial law in the entire Mindanao.

Hence, these consolidated petitions.

Overall, the petitioners challenge President Duterte's declaration of martial law on the ground that it is constitutionally infirm primarily because there is no actual rebellion, and even if there is, he should have exercised his calling out powers only.

Martial Law Powers under the 1987 Constitution

The power of the president to declare martial law is specifically provided under Section 18, Article 7 of the 1987 Constitution *("Commander-in-Chief" Clause), viz*:

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[2] Annex "B," Consolidated Comment.

> The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. **In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law.** Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.
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> The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without any need of a call.
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> **The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.**
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> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.
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> The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with the invasion.
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> 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. [Emphases and underscoring supplied]

As explained by revered constitutionalist Fr. Joaquin Bernas *(Fr. Bernas)*, the martial law contemplated under the present Constitution pertains to the traditional concept of martial law as espoused in American Jurisprudence. Thus:

> FR. BERNAS: That same question was asked during the meetings of the Committee: What precisely does martial law add to the power of the President to call on the armed forces? The first and second lines in this provision state:

> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies . . .
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> The provision is put there, precisely, to reverse the doctrine of the Supreme Court. I think it is the case *Aquino vs. COMELEC* where the Supreme Court said that in times of martial law, the President automatically has legislative power. So these two clauses denied that. A state of martial law does not suspend the operation of the Constitution; therefore, it does not suspend the principle of separation of powers.
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> The question now is: During martial law, can the President issue decrees? The answer we gave to that question in the Committee was: During martial law, **the President may have the powers of a commanding general in a theatre of war.** In actual war when there is fighting in an area, the President as the commanding general has the **authority to issue orders which have the effect of law but strictly in a theatre of war,** not in the situation we had during the period of martial law. In other words, there is an effort here to return to the traditional concept of martial law as it was developed especially in American jurisprudence, where martial law has reference to the theatre of war.[3] [Emphases supplied]

Justice Isagani Cruz wrote that "the declaration of martial law has no further legal effect than to warn the citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order and that while the emergency lasts, they must, upon pain of arrest and punishment, not commit any act which will in any way render difficult the restoration of order and the enforcement of law. When martial law is declared, no new powers are given to the executive; no extension of arbitrary authority is recognized; no civil rights of the individuals are suspended. The relation of the citizens to their State is unchanged."[4]

It is to be noted that the **Constitution does not define what martial law is and what powers are exactly granted to the president** to meet the exigencies of the moment. Fr. Bernas merely described it as one similar to the martial law of the American legal system. Thus, martial law is a fluid and flexible concept, which authorizes the president to issue orders as the situation may require. For said reason, it can be said that the president possesses broad powers, which he may exercise to the best of his discretion.

To confine martial law to a particular definition would limit what the president could do in order to arrest the problem at hand. This is not to say, however, that the president has unrestricted powers whenever he declares martial law. Compared to the past constitutions, the president's discretion

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[3] Records of the Constitutional Commission No. 42.
[4] Cruz, Philippine Political Law (2002 Ed.), p. 227 citing Willoughby, 2nd Ed., Sec. 1056, pp. 1591-1592.

has been greatly diminished. In the exercise of his martial law powers, **he must at all times observe the constitutional safeguards**.

In crafting the provisions, the Framers sought to establish equilibrium between the protection of the public from possible abuses and the president's prerogative to wield the martial law power. The sponsorship speech of Commissioner Sumulong is quite enlightening, *viz:*

> The Committee on the Executive has the honor to submit, for consideration and approval, Proposed Resolution No. 517, proposing to incorporate in the new Constitution an Article on the Executive. This Article on the Executive is based mainly on the many resolutions referred to our Committee for study and report. The members of the Committee have studied and discussed these resolutions which dealt with concrete instances of misuse and abuse of executive power during the Marcos regime especially after the declaration of martial law. The members of the Committee made an intensive and exhaustive study on the constitutional proposals contained in those resolutions intended to prevent a repetition of the misuse and abuse of executive power. **At the same time, the members of the Committee were always on guard and careful in their intense desire to undo and correct the misdeeds and mistakes of the Marcos regime, because we might impose safeguards and restrictions which may be unreasonable and unduly harsh and which might emasculate our future presidents in the exercise of executive power.**[5] [Emphasis supplied]

Clearly, the Framers were cognizant of the past abuses prevalent during the Marcos regime when they laid down the powers of the president under the Commander-in-Chief Clause. At the same time, they recognized the necessity to provide the president sufficient elbow room to address critical situations. Thus, the present Constitution is more stringent and more precise in contrast to past provisions because it imposed limitations on the exercise of the martial law power.

As can be gleaned from the Constitution, it did not define what martial law is in order to make it flexible enough to be an effective tool to address extraordinary needs during extraordinary times. To my mind, in not giving a positive definition on what martial law is and merely providing specific restrictions, the Framers were striking a balance between the right of the State to protect itself from local and foreign threats and the concern of the public over the abuse in the exercise of such potent power. The Framers deemed it wise to impose safeguards to curtail possible abuses of the martial law powers without categorically defining martial law as not to unduly restrict the president.

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[5] Records of the Constitutional Commission No. 42.

It must be borne in mind that it is **the people, through the Constitution, who entrusted to the president their safety and security**. They gave him enough latitude and discernment on how to execute such emergency powers. **If the Framers did not so cramp him, it is not for the Court to impose restrictions. To do so is dangerous for it would tie up the hands of future presidents facing the same, if not more serious, critical situations.** At any rate, the Framers have put in place several safeguards to prevent violations of the constitutional and other human rights.

Constitutional Safeguards

As above-stated, the harrowing experience of the Filipino people during the Marcos regime did not escape the minds of the Framers. It is for this reason that numerous safeguards were put in place to prevent another dictator from abusing the said power.

The present government is very much aware of these restrictions. Thus, the Department of National Defense *(DND)*, in its May 24, 2017 Memorandum, cited the **constitutional safeguards** under Section 18, Article VII of the Constitution, particularly: **(1) the continuing operation and supremacy of the Constitution; (2) military authority not supplanting Congress or the Judiciary; and (3) the military courts not acquiring jurisdiction over civilians, where civilian courts are fully functioning.** Stated differently, the president and the armed forces cannot issue orders violative of the Constitution. Otherwise, they may be held accountable to be determined in a *separate action.*

Pursuant thereto, the DND enjoined the Armed Forces of the Philippines *(AFP)*, and all its officers and personnel to faithfully observe the rule of law in places where martial law has been in effect. It is an assurance by the government that it would adhere to the constitutional safeguards in place and would not countenance any violation or abuse of constitutional or human rights.

Martial Law justified in cases of Rebellion or Invasion and when Public Safety requires it

One of the important reforms in the present charter is the removal of the phrase "imminent danger." Thus, at present, martial law may be declared only when following circumstances concur: (1) there is actual rebellion or invasion; (2) and the public safety requires it.

The initial determination of the existence of actual rebellion and the necessity of declaring martial law as public safety requires rests with the president. The following discussions of the Framers are enlightening, *viz*:

> MR. REGALADO: **If we consider the definition of rebellion under Articles 134 and 135 of the Revised Penal Code, that presupposes an actual assemblage of men in an armed public uprising for the purposes mentioned in Article 134 and by the means employed under Article 135.** I am not trying to pose as an expert about this rebellion that took place in the Manila Hotel, because what I know about it is what I only read in the papers. I do not know whether we can consider that there was really an armed public uprising. Frankly, I have my doubts on that because we were not privy to the investigations conducted there.
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> Commissioner Bernas would like to add something.
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> FR. BERNAS: **Besides, it is not enough that there is actual rebellion.** Even if we will suppose for instance that the Manila Hotel incident was an actual rebellion, that by itself would not justify the imposition of martial law or the suspension of the privilege of the writ because the Constitution further says: "when the public safety requires it." **So, even if there is a rebellion but the rebellion can be handled and public safety can be protected without imposing martial law or suspending the privilege of the writ, the President need not.** Therefore, even if we consider that a rebellion, clearly, it was something which did not call for imposition of martial law.
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> MR. REGALADO: **It becomes a matter of factual appreciation and evaluation.** The magnitude is to be taken into account when we talk about tumultuous disturbance, to sedition, then graduating to rebellion. **All these things are variances of magnitude and scope. So, the President determines, based on the circumstances, if there is presence of a rebellion.**
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> MR. DE LOS REYES: With the concurrence of Congress.
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> MR. REGALADO: And another is, if there is publicity involved, not only the isolated situations. **If they conclude that there is really an armed public uprising although not all over the country, not only to destabilize but to overthrow the government, that would already be considered within the ambit of rebellion.**If the President considers it, it is not yet necessary to suspend the privilege of the writ. It is not necessary to declare martial law because he can still resort to the lesser remedy of just calling out the Armed Forces for the purpose of preventing or suppressing lawlessness or rebellion.[6] [Emphases supplied]

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[6] Records of the Constitutional Commission No. 42.

Rebellion, as understood in the Constitution, is similar to the rebellion contemplated under the Revised Penal Code *(RPC)*. Thus, in order for the president to declare martial law, he must be satisfied that the following requisites concur: (1) there must be a public uprising; (2) there must be taking up arms against the government; (3) with the objective of removing from the allegiance to the government or its laws, the territory of the Philippine Islands or any part thereof, of any body of land, naval or other armed forces; (4) the Chief Executive or the Legislature, wholly or partially, is deprived of any of their powers or prerogatives;[7] and (5) the public safety requires it. In turn, the initial determination of the president must be scrutinized by the Court if any citizen challenges said declaration.

The President has Wide Discretionary Powers

The Commander-in-Chief Clause granted the president a sequence of graduated powers, from the least to the most benign, namely: (1) the calling out power; (2) the power to suspend the privilege of the writ of *habeas corpus*; and (3) the power to declare martial law.[8] In *Integrated Bar of the Philippines v. Zamora (Zamora)*,[9] the Court explained the supplementary role of the military in the exercise of the president's calling-out-power, to wit:

> We disagree. The deployment of the Marines does not constitute a breach of the civilian supremacy clause. The calling of the Marines in this case constitutes permissible use of military assets for civilian law enforcement. **The participation of the Marines in the conduct of joint visibility patrols is appropriately circumscribed**. The limited participation of the Marines is evident in the provisions of the LOI itself, which sufficiently provides the metes and bounds of the Marines' authority. **It is noteworthy that the local police forces are the ones in charge of the visibility patrols at all times, the real authority belonging to the PNP. In fact, the Metro Manila Police Chief is the overall leader of the PNP-Philippine Marines joint visibility patrols. Under the LOI, the police forces are tasked to brief or orient the soldiers on police patrol procedures. It is their responsibility to direct and manage the deployment of the Marines. It is, likewise, their duty to provide the necessary equipment to the Marines and render logistical support to these soldiers**. In view of the foregoing, it cannot be properly argued that military authority is supreme over civilian authority.[10] [Emphases supplied]

Under the calling-out-power, the president merely summons the armed forces to aid him in suppressing lawless violence, invasion and

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[7] Article 134, Book II of the RPC.
[8] *SANLAKAS v. Executive Secretary*, 466 Phil. 482, 510-511 (2004).
[9] 392 Phil. 618 (2000).
[10] Id. at 645-646.

rebellion.[11] The military merely supplements the police forces, with the latter having supervision over the former.

It is not, however, required that the president must first resort to his calling out power before he can declare martial law. Although the Commander-in-Chief Clause grants him graduated powers,[12] it merely pertains to the intensity of the different powers from the least benign (calling out powers) to the most stringent (the power to declare martial law), and the concomitant safeguards attached thereto. The Constitution does not require that the different powers under the Commander-in-Chief Clause be exercised sequentially.

So long as the requirements under the Constitution are met, the president may choose which power to exercise in order to address the issues arising from the emergency. In other words, when there is sufficient factual basis for the declaration of martial law, the president can resort to the most awesome power granted under the Commander-in-Chief Clause. He cannot be faulted for not resorting to his calling out power if he finds that the situation requires a stronger action. When the president declares martial law, he, in effect, declares that the military shall take a more active role in the suppression of invasion or rebellion in the affected areas. The armed forces can conduct operations on their own without any command or guidance from the police.

At any rate, prior to the issuance of Proclamation No. 216 on May 23, 2017, the President already opted to choose and exercise the most benign action – the calling out power. This is found in the first Whereas Clause of Proclamation No. 216. Unfortunately, the calling out power was ineffective in pre-empting the brewing rebellion. When such power was deemed inadequate, the President resorted to the declaration of martial law because public safety already required it in the face of the overwhelming attack against Marawi and the government forces.

Judicial Review

Another significant constitutional safeguard the Framers have installed is the power of the Court to review the sufficiency of the factual basis for the declaration of martial law or the suspension of the privilege of the writ of *habeas corpus*. The intent of the Framers to delimit the prerogative of the president to declare martial law is clear, to wit:

> MR. NATIVIDAD: First and foremost, we agree with the Commissioner's thesis that in the first

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[11] *David v. Arroyo*, 522 Phil. 705, 780 (2006).
[12] *Supra* note 8.

imposition of martial law there is no need for concurrence of the majority of the Members of Congress because the provision says "in case of actual invasion and rebellion." If there is actual invasion and rebellion, as Commissioner Crispino de Castro said, there is need for immediate response because there is an attack. Second, the fact of securing a concurrence may be impractical because the roads might be blocked or barricaded. They say that in case of a rebellion, one cannot even take his car and go to the Congress, which is possible because the roads are blocked or barricaded. And maybe if the revolutionaries are smart, they would have an individual team for each and every Member of the Congress so he would not be able to respond to a call for a session. So the requirement of an initial concurrence of the majority of all the

Members of the Congress in case of an invasion or rebellion might be impractical as I can see it.

Second, Section 15 states that the Congress may revoke the declaration or lift the suspension.

And third, the matter of declaring martial law is already a justiciable question and no longer a political one in that it is subject to judicial review at any point in time. So on that basis, I agree that there is no need for concurrence as a prerequisite to declare martial law or to suspend the privilege of the writ of *habeas corpus*. I notice in the Commissioner's proposal that he is requiring less factors for the suspension of the privilege of the writ of *habeas corpus* than for the declaration of martial law. Is that correct?

MR. PADILLA: That is correct.

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MR. MONSOD: Yes, Madam President, in the case of Mr. Marcos, he is undoubtedly an aberration in our history and national consciousness. But given the possibility that there would be another Marcos, our Constitution now has sufficient safeguards. **As I said, it is not really true, as the Gentleman has mentioned, that there is an exclusive right to determine the factual basis because the paragraph beginning on line 9 precisely tells us that the Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof** and must promulgate its decision on the same within 30 days from its filing.

I believe that there are enough safeguards. The Constitution is supposed to balance the interests of the country. And here we are trying to balance the public interest in case of invasion or rebellion as against the rights of citizens. And I am saying that there are enough safeguards, unlike in 1972 when Mr. Marcos was able to do all those things mentioned.[13] [Emphases supplied]

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[13] Records of the Constitutional Commission No. 43.

As can be gleaned from the deliberations, the power of the Court to review the sufficiency of the factual basis for the declaration of martial law was precisely included to remove from the president the unbridled prerogative to determine the necessity thereof. It is a precautionary measure to prevent a repeat of possible abuses in cases where the awesome power to declare martial law rests only on one individual. Consequently, the Executive Department cannot hide behind the cloak of the political question doctrine because the Constitution itself mandated the review, thus, unquestionably justiciable.

The question as to the sufficiency of the factual basis for the declaration of martial law and the manner by which the president executes it pursuant to such declaration are entirely different. The Court, upon finding that the factual basis is sufficient, cannot substitute the president's judgment for its own. "In times of emergencies, our Constitution demands that we repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive, but at the same time, it obliges him to operate within carefully prescribed procedural limitations."[14]

In *Fortun v. Macapagal-Arroyo*,[15] it was written:

> Consequently, although the Constitution reserves to the Supreme Court the power to review the sufficiency of the factual basis of the proclamation or suspension in a proper suit, it is implicit that the Court must allow Congress to exercise its own review powers, which is automatic rather than initiated. Only when Congress defaults in its express duty to defend the Constitution through such review should the Supreme Court step in as its final rampart. The constitutional validity of the President's proclamation of martial law or suspension of the writ of habeas corpus is first a political question in the hands of Congress before it becomes a justiciable one in the hands of the Court.
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> If the Congress procrastinates or altogether fails to fulfill its duty respecting the proclamation or suspension within the short time expected of it, then the Court can step in, hear the petitions challenging the President's action, and ascertain if it has a factual basis.[16]

I agree with the *ponencia* that this should be set aside. There is nothing in the constitutional provisions or the deliberations which provide that it is only after Congress fails or refuses to act can the Court exercise its power to review. I am of the position that the Court can act on any petition

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[14] *Supra* note 11, at 744.
[15] 684 Phil. 526 (2012).
[16] Id. at 558-561.

questioning such sufficiency independently of the congressional power to revoke.

Burden of Proof re Sufficiency of Factual Basis rests on the Government

In this appropriate proceeding to review the sufficiency of the factual basis for declaring martial law or suspending the privilege of the writ of *habeas corpus*, **the burden to prove the same lies with the government.** If it were otherwise, then, the judicial review safeguard would be rendered inutile considering that ordinary citizens have no access to the bulk of information and intelligence available only to the authorities.

Indeed, "he who alleges, not he who denies, must prove."[17] This rule, however, exists in recognition of the fact that in most court proceedings, he who puts forth an allegation is, in all probability, in possession of documents or other pieces of evidence to substantiate his claim.

It is not, however, without an exception. If a party's case depends upon the establishment of a negative fact, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative fact.[18] To put it in another way, when the parties are not in an equal position with respect to the evidence to prove a negative fact, then, the party denying the negative fact is bound to establish its existence.[19]

Doubtless, the petitioners do not have access to the intelligence gathered by the military. Instead, they principally rely on information provided by the Office of the President and reports from mainstream media and social media. For said reason, it is readily apparent that the petitioners are not in an equal position with the government, which has a trove of intelligence reports, security briefings and other vital information at its disposal.

Threshold of Evidence re Sufficiency of the Factual Basis

In the *ponencia*, it has been written that probable cause is the allowable standard of proof as the President needs only to convince himself

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[17] *Heirs of Sevilla v. Sevilla*, 450 Phil. 598, 612 (2003).
[18] *Spouses Cheng v. Spouses Javier*, 609 Phil. 434, 441 (2009).
[19] *Apines v. Elburg Shipmanagement Philippines, Inc.*, G.R. No. 202114, November 9, 2016.

that there is evidence showing that, more likely than not, a rebellion has been committed or being committed. Others are of the view that as the Court exercises its *certiorari* jurisdiction, the point to determine should be arbitrariness, as enunciated in *Lansang v. Garcia.*[20]

In this regard, I share the view of Justice Estela Perlas-Bernabe that it is neither. I agree with her that there is **no action, but a proceeding**, *a sui generis* one, **to ascertain the sufficiency of the factual bases of the proclamation,** and that the Constitution itself provided the parameter for review – ***sufficient factual basis***, which means that there exists clear and convincing proof (1) that there is invasion or rebellion; and (2) that public safety requires the proclamation of martial law. **The threshold is reasonableness.**

On probable cause, I concur with her that the purpose and vantage point of a prosecutor or judge in the determination of probable cause are fundamentally different from those of the president when he proclaims martial law. She cited Fr. Bernas who, as the then *amicus curiae* of the Court, wrote that "the function of the President is far from different from the function of a judge trying to decide whether to convict a person for rebellion or not."[21]

"For purposes of filing a criminal information, probable cause has been defined as such facts as are sufficient to engender a well-founded belief that a crime has been committed and that respondents are probably guilty thereof. It is such set of facts and circumstances which would lead a reasonably discreet and prudent man to believe that the offense charged in the Information, or any offense included therein, has been committed by the person sought to be arrested. A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspect."[22] Accordingly, in a criminal case, it is necessary that a crime has been committed.

In contrast, the president establishes the existence of rebellion or invasion, not as a crime for purposes of prosecution against the accused, but merely as a factual occurrence to justify his declaration of martial law. If the president has sufficient and strong basis that a rebellion has been planned and the rebels had started to commit acts in furtherance thereof, he can already command the military to take action against the rebels.

This is to say that the president is afforded much leeway in determining the sufficiency of the factual basis for the declaration of martial law. Unlike in the executive or judicial determination of probable cause, the

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[20] 149 Phil. 547, 592-594 (1971).
[21] Cited in the Dissenting Opinion of J. Velasco in *Fortun, supra* note 15, at 629.
[22] *People v. Borje*, G.R. No. 170046, December 10, 2014, 744 SCRA 399, 409.

president may rely on information or intelligence even without personally examining the source. He may depend on the information supplied by his subordinates, and, on the basis thereof, determine whether the circumstances warrant the declaration of martial law. While the president is still required to faithfully comply with the twin requirements of actual rebellion and the necessity of public safety, he is not bound by the technical rules observed in the determination of probable cause.

As to arbitrariness, suffice it to say that the Framers did not refer to it as one akin to a *certiorari* petition. They were silent on it because they really intended it to be a unique proceeding, a *sui generis* one, with a different threshold of evidence.

Sufficiency of the Factual Basis

Guided by the above-mentioned standard, I fully concur with the *ponencia* that the proclamation of martial law by the President **has sufficient factual basis.** *First*, it has been unquestionably established that the ISIS-linked local groups had planned to, and did, invade Marawi City. *Second*, they were heavily armed and posed a dangerous threat against government forces. *Third*, the occupation by the ISIS-linked groups paralyzed the normal functions of Marawi and caused the death and displacement of several Marawi residents. *Fourth*, they sought to sever Marawi from the allegiance of the government with the goal of establishing a *wilayah* in the region.

The intention of the rebels to isolate and sever Marawi from the government is evident from the video retrieved by the military from their initial operations in Marawi. In the said video,[23] it can be seen that Hapilon, together with other unidentified members, were listening in closely as Abdullah Maute was giving directions or suggestions on how to commence and execute their planned offensive. In particular, they sought to isolate Marawi so that it could be used as their center of operation to access all points in Mindanao.

It need not be repeated that the ISIS-linked group attacked, stormed and rampaged all over Marawi City, terrorizing the whole populace, killing soldiers, policemen and civilians, effecting the escape of inmates from the Marawi City jail, taking over hospitals and other similar centers, controlling the business district, major thoroughfares and three bridges, burning Dansalan College, setting fire to the Cathedral of Maria Auxiliadora, kidnapping and taking hostages, and ransacking banks and residences. They also commandeered police and other vehicles, planted ISIS flags on them and rambled around the city, displaying their intimidating presence and power.

[23] Annex "B" of the Consolidated Comment.

Further, **the requirement of public safety has been met** considering the capability of the rebel group to wreak more havoc on the region. The petitioners argue that what the group has launched does not amount to an actual rebellion. The contrary, however, has been sufficiently established. At the time Proclamation No. 216 was issued, the Maute-led group had already commenced their offensive in Marawi. Their past actions, validated by subsequent events, serve as indicia of their ability to wage a protracted war and shed more blood. To date, 82 soldiers have given up their lives and the government is still not in total control of Marawi. The military has confirmed that there are already 39 dead civilians, not to mention those wounded, displaced and missing.

The nation is fortunate that the country has a decisive president who took immediate action to prevent the expansion of the rebellion to other areas. At a great price, its spread to other areas was checked. If it has indeed been contained, **the Court, however, cannot order the authorities to lift martial law in this appropriate proceeding because the judicial review, provided in the Constitution as a mechanism to check abuses, is limited only to the ascertainment of the sufficiency of the factual basis. When there is no longer any basis to continue the imposition of martial law,** the **remedy** is to **file a certiorari petition to question the arbitrariness of the assessment to prolong the period.**

At any rate, General Año gave his assurance that when the situation becomes normal, he will recommend the lifting of martial law.

Territorial Coverage of the Proclamation

Under the Commander-in-Chief Clause, the president may declare martial law in the Philippines or in any part thereof. Thus, it is understood that the president has the discretion to determine the territorial scope of the coverage as long as the constitutional requirements are met. In other words, there must be concurrence of an actual rebellion or invasion and the necessity for public safety. There is no constitutional provision suggesting that martial law may only be declared in areas where actual hostilities are taking place. The president must be given much leeway in deciding what is reasonably necessary to successfully quash such rebellion or invasion. As Commander-in-Chief, he has under his command the various intelligence networks operating in the country and knows what is needed and where it is needed.

To limit the coverage of martial law to Marawi City only is unrealistic and impractical. As can be gleaned from the records, ISIS-linked local groups came from different places in Mindanao. The ASG, headed by Hapilon, came from Basilan; the Maute Group, from Lanao del Sur; the AKP or the Maguid Group, from Saranggani and Sultan Kudarat; and the BIFF, from Maguindanao.

These rebels previously wreaked havoc on other parts of Mindanao. Thus, President Duterte cannot be faulted for declaring martial law all over Mindanao because public safety would be greatly imperilled if these rebel groups would be able to expand their operations beyond Marawi City. Their capability to launch further attacks from Marawi City, serving as a spring board to extend their influence over other areas, impelled President Duterte to act swiftly and decisively.

Further, judicial notice can be taken of the fact that several members of the rebel groups had been apprehended in areas other than Marawi, such as Iligan City and Cagayan de Oro City. In fact, the father of the Maute brothers, Casamora Maute, was arrested at a Task Force Davao checkpoint in Sirawan, Toril District, Davao City. Their mother, Omenta Romato Maute, also known as Farhana, was apprehended in Masiu, Lanao Del Sur, beyond Marawi City. Others were intercepted in far away Bacolod City.

The fear of the petitioners that the constitutional rights of the people of the rest of Mindanao would be violated is unfounded. As earlier pointed out, the DND reminded the AFP and all its officers and personnel to faithfully observe the rule of law. As provided in the Constitution itself,

> **The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with the invasion.**[24]

Restricting the operation of the armed forces within the confines of Marawi City would be ineffective in quelling the uprising. The insurgents would simply cross city borders and be beyond the reach of the martial law authorities, who would not be able to exercise martial law powers. They will not be able to arrest any of them, unless they have personal knowledge of what the rebels have just committed, are committing or about to commit. Certainly, this is not what the Framers intended in including the martial law provisions in our Constitution. First and foremost in their minds were the security, safety, and territorial integrity of the country.

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[24] Section 18, Article 7 of the 1987 Constitution.

To ignore the reality is to dishonor the memory of the 82 soldiers who gallantly sacrificed and gave up their lives so that this country may still be one.

Accordingly, I vote to dismiss all the petitions.

JOSE CATRAL MENDOZA
Associate Justice