G.R. No. 235935 (*Representatives Edcel C. Lagman, et al. v. Senate President Aquilino Pimentel III, et al.);* G.R. No. 236061 (*Eufemia Campos Cullamat, et al. v. President Rodrigo Duterte, et al.);* G.R. No. 236145 (*Loretta Ann P. Rosales v. President Rodrigo Duterte, et al.);* G.R. No. 236155 (*Christian S. Monsod, et al. v. Senate President Aquilino Pimentel III, et al.)*

Promulgated:

February 6, 2018

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DISSENTING OPINION

SERENO, CJ:

The Court is still adrift, unable in the Majority Decision, to find its mooring either on a well-reasoned interpretation of the text of the Constitution, or to present a logical continuum of this Court's jurisprudence. Instead, it has taken an extreme view, ceding all substantive points to respondents and allowing thereby no significant quarters to petitioners. In demonstrating its serious lack of balance, it has made itself even more vulnerable to political forces, rendering itself inert in exercising the power of judicial review.

With all due respect, I refer most especially to the *ponencia's* inability to establish sufficient parameters to determine whether the first or the second requirement under the Constitution is present to support a valid extension of the declaration of Martial Law and suspension of the privilege of the writ of *habeas corpus*. These two requirements are that actual rebellion persists, and that public safety requires the imposition of Martial Law or the suspension of the writ.

The *ponencia* has additionally defaulted by providing no limits to the length or the number of extensions that Congress may allow for Martial Law to take hold. The limitations on the power of extension are so insubstantial as to be invisible. It holds that "Section 18, Article VII is clear that the only limitation[s] to the exercise of the congressional authority to extend such proclamation or suspension are that the extension should be upon the President's initiative; that it should be grounded on the persistence of the invasion or rebellion and the demands of public safety; and that it is subject to the Court's review of the sufficiency of its factual basis upon the petition of any citizen."[1]

The *ponencia* then proceeds to cite the factual allegations of both the Executive and Congress and without any further test, yields to the spirit of deference and justifies its conclusion in this wise:

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[1]Decision, p. 34.

The information upon which the extension of martial law or of the suspension of the privilege of the writ of *habeas corpus* shall be based principally emanate from and are in the possession of the Executive Department. Thus, "the Court will have to rely on the fat-finding capabilities of the [E]xecutive [D]epartment; in turn, the Executive Department will have to open its findings to the scrutiny of the Court."

x x x x

The facts as provided by the Executive and considered by Congress amply establish that rebellion persists in Mindanao and public safety is significantly endangered by it. The Court, thus, holds that there exists sufficient factual basis for the further extension sought by the President and approved by the Congress in its Resolution of Both Houses No. 4

Necessarily, we do not see the merit in petitioner's theory in the Cullamat petition that the extent of threat to public safety as would justify the declaration or extension of the proclamation of martial [law] and the suspension of the privilege of the writ must be of such level that the government cannot sufficiently govern, cannot assure public safety and cannot deliver government services. Petitioners posit that only in this scenario may martial law be constitutionally permissible.

Restrained caution must be exercised in adopting petitioners' theory for several reasons. To begin with, a hasty adoption of the suggested scale, level, or extent of threat to public safety is to supplant into the plain text of the Constitution. An interpretation of the Constitution precedes from the fundamental postulate that the Constitution is the basic and paramount law to which all other laws must conform to and to which all persons, including the highest officials of the land, must defer. The consequent duty of the judiciary is to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This must be so considering that the Constitution is the mother of all laws, sufficient and complete in itself. For the court to categorically pronounce which kind of threat to public safety justifies the declaration or extension of martial law and which ones do not, is to improvise on the text of the Constitution ideals even when these ideals are not expressed as a matter of positive law in the written Constitution. Such judicial improvisation finds no justification.

For another, if the Court were to be successful in disposing of its bounden duty to allocate constitutional boundaries, the Constitutional doctrines the Court produces must necessarily remain steadfast no matter what may be the tides of time. The adoption of the extreme scenario as the measure of threat to public safety as suggested by petitioners is to invite doubt as to whether the proclamation of martial law would at all be effective in such case considering that enemies of the State raise unconventional methods which change over time. It may happen that by the time government loses all capability to dispose of all its functions, the enemies of the government might have already been successful in removing allegiance therefrom. Any declaration then of martial law would be of no useful purpose and such could not be the intent of the Constitution. Instead, the requirement of public safety as it presently appears in the Constitution admits of flexibility and discretion on the part of the Congress.

So too, when the President and the Congress ascertain whether public safety requires the declaration and extension of martial law,

> respectively, they do so by calibrating not only the present state of public safety but the further repercussions of the actual rebellion to public safety in the future as well. x x x.[2]

It is difficult to see how the *ponencia* can consider as inevitable its conclusion disagreeing with the Cullamat proposal that the danger posed to public safety must necessitate the imposition of Martial Law, and that only then can Martial Law be justifiable. Neither the difficulty posed by the process of examining necessity nor the need to adapt to different approaches in the future is sufficient reason for the Court to refuse to review the question of necessity. The automatic conclusion that as Government has established the existence and persistence of rebellion, therefore Martial Law is justifiable by its self-evident claims, is, sadly, gratuitous. It is not wrong to suspect that this halfhearted conclusion is rooted in the refusal to take seriously the doctrine of necessity.

The Doctrine of Necessity

To put texture into this discussion, it would help to recall the conversations in *Lagman v. Medialdea*,[3] where the Solicitor General called the declaration of Martial Law a "*Gulpi de Gulat*,"[4] an "exclamation point," and as the "calling out powers on steroids."[5] Note that the struggle to find a definition of Martial Law under the 1987 Constitution is, in turn, due to the need for Government to justify why it needs that kind of Martial Law. This is because, in essence, Government cannot escape facing the question of necessity.

An examination of the deliberations of the 1987 Constitutional Commission shows that our framers drew the Philippine concept of Martial

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[2] Id. at 57-59. The *ponencia* justifies this preemptive approach by using the language in the *amicus curiae* brief of Fr. Joaquin Bernas in *Fortun v. Gloria Macapagal-Arroyo.*

[3] *Lagman v. Medialdea*, G.R. Nos. 231658, 231771, and 231774, 4 July 2017.

[4] TSN, 14 June 2017, p. 122.

JUSTICE CARPIO:

x x x You earlier said that there is not much difference between the martial law powers of the president and his calling out powers under the present Constitution. xxx

x x x x

What is that difference?

SOLICITOR GENERAL CALIDA:

It's like a sentence, instead of a period there's an exclamation point, Your Honor.[4]

x x x x

JUSTICE CARPIO:

Psychological?

SOLICITOR GENERAL CALIDA:

Psychological probably. It's an exclamation point.

JUSTICE CARPIO:

"Gulpi de gulat?"

SOLICITOR GENERAL CALIDA:

Yes, Your Honor. *So you better listen to me now because I'm imposing martial law.* (TSN, 14 June 2017, 117-122).

[5] Id. at 138.

CHIEF JUSTICE SERENO:

I [am] very much enlightened by the new phrase that you have pronounced this afternoon which was martial law. As we understand it is the calling out powers on steroids.

SOLICITOR GENERAL CALIDA:

Thank you, Your Honor.

Law from American law, with certain differences. As explained by Father Joaquin Bernas:

> Since the Philippine Constitution is traceable to American origins and was formulated by jurists reared in the tradition of American constitutional law, it is legitimate to start the quest for a definition of martial law in the Constitution by looking back to the difference nuances which the term carries in American law.[6]

American cases on the concept of Martial Law show the doctrine of necessity at its very heart. The United States (US) Supreme Court's first look at Martial Law was in 1848 in *Luther v. Borden.*[7] The controversy centered on the state militia's warrantless forced entry into the home of Martin Luther[8] during a state of Martial Law in Rhode Island.[9] The case was dismissed for being a political question. Chief Justice Taney wrote that the decision whether or not to impose Martial Law to combat a crisis is left to the State.[10] Nevertheless, *Luther* touched on the substantive issue regarding the state's authority to invoke Martial Law and thereby laid the early foundations of Martial Law in the US. In describing this power, *Luther* went on to explain:

> And, unquestionably, a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.[11]

A conclusion that may be drawn from the foregoing dictum is that the state can determine when an internal unrest necessitates the declaration of Martial Law, a determination that then becomes conclusive upon the courts. Nevertheless, *Luther* went on to explain that **the power to make that determination is limited by the necessity of the situation** involved, *viz.*:

> And in that state of things, the officers engaged in its military service might lawfully arrest anyone who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury

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[6] Joaquin Bernas, The 1987 Constitution of the Philippines: A Commentary 898 (2009).
[7] 48 U.S. 1 (1849).
[8] No relation to the German religious leader Martin Luther (circa 1483).
[9] Jason Collins Weida, A Republic of Emergencies: Martial Law in American Jurisprudence, 36 Conn. L. Rev. 1397, 1403 (2004).
[10] *Luther*, 48 U.S. at 45-47.
[11] Id. at 45.

> wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.[12]

Subsequently, it was in *Ex Parte Milligan*[13] where the US Supreme Court was able to substantively explore Martial Law. The case stemmed from the arrest of Lamdin Milligan while the state was under Martial Law. Milligan was later on tried by a military commission, whose ruling was struck down by the Court. In that case, the imposition of Martial Law in Indiana was analyzed, to wit:

> It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[14]

Justice Davis, speaking for the majority, clarified **that there could be no Martial Law unless there is an actual need for it**:

> Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.[15]

Luther and *Ex Parte Milligan* were decided within the context of war emergencies.[16] However, there were questions that remained unanswered. After the Civil War, several cases that subsequently arose allowed the US Supreme Court to further define Martial Law, this time within the context of turmoil rooted in economic crisis.[17] Still, the doctrine of necessity persisted.

In *Moyer v. Peabody*,[18] the Court reviewed the Colorado governor's declaration of Martial Law to address a labor dispute in the state. It also looked into the exercise of Martial Law powers, such as the arrest of Charles Moyer. The opinion of the Court penned by Justice Holmes mirrored Chief Justice Taney's dictum in *Luther*. It ruled that the governor had the power to declare Martial Law sans a significant judicial review, as long as the declaration was done in good faith. Nevertheless, **necessity was still deemed the primary consideration,** to wit:

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[12] Id. at 45-46.
[13] 71 U.S. 2 (1866).
[14] Id. at 127.
[15] Id.
[16] Weida, supra at 1412.
[17] Id.
[18] 212 U.S. 78 (1909).

> When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.[19]

Twenty-three years later, *Sterling v. Constantin*[20] allowed the US Supreme Court to again review a governor's authority to declare Martial Law. This time, the governor of Texas had proclaimed Martial Law over several oil-producing counties of the state, declaring that insurrection and riot beyond civil control existed there due to the wasteful production of oil. The military force shut down the oil wells thereafter, an act the Court found to be excessive. It affirmed *Luther* and *Moyer* in that the governor's decision to declare Martial Law was conclusive upon the courts.[21] However, ***Sterling*** **went one step further and qualified the governor's power with the so-called "proportionality test"[22] – that the means employed by the governor in his exercise of Martial Law powers must bear a direct relation to the disturbance being faced.**[23] Finding the state's actions in *Luther* and *Moyer* to be in line with the proportionality test, the Court likewise concluded that the doctrine of necessity was still at the core of its considerations. In effect, *Sterling* affirmed its authority to review the executive's declaration of Martial Law.[24]

Duncan v. Kahanamoku[25] again provided the Court an opportunity to deal with the imposition of Martial Law during wartime. Set during the bombing of Pearl Harbor, the issue centered on Duncan's arrest and subsequent trial and conviction by the military commission. While the Court, through Justice Black, struck down the military tribunal's authority to try and convict Duncan, it still upheld the declaration of Martial Law in Hawaii. Nevertheless, it tested the extent of authority of the military commission against the doctrine of necessity enunciated in *Ex Parte Milligan*,[26] again confirming the centrality of that doctrine in US Martial Law jurisprudence.

All of the above pronouncements**, taken together, lead to the understanding that Martial Law is "the law of necessity in national emergency."**[27]

This doctrine of necessity was translated into the Philippine concept of Martial Law through the second requisite for its proclamation as specified by the text of the 1987 Constitution: "public safety requires it."

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[19] Id. at 85.
[20] 287 U.S. 378 (1932).
[21] Id. at 399.
[22] William Feldman, Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege, 38 Cornell Int'l L.J. 1021, 1034 (2005).
[23] *Sterling*, 287 U.S. at 399-400.
[24] Feldman, supra at 1034.
[25] 327 U.S. 304 (1946).
[26] Id. at 325-326.
[27] J.W. Brabner Smith, Martial Law and the Writ of Habeas Corpus, 30 Geo. L.J. 697, 697 (1942).

In other words, during a state of invasion or rebellion, the necessity posed by public safety serves as the gauge for the proclamation of Martial Law, as well as its scope and duration. As explained by Fr. Bernas:

> **Necessity creates the conditions for martial law and at the same time limits the scope of martial law.** Certainly, the necessities created by a state of invasion would be different from those created by rebellion. Necessarily, therefore, the degree and kind of vigorous executive action needed to meet the varying kinds and degrees of emergency could not be identical under all condition.[28] (Emphasis supplied)

Calibration Exercise and the Proportionality Test

Unlike the US concept of Martial Law, which did not define the specific circumstance of unrest that would trigger Martial Law, the Philippine Constitution specifies actual invasion or rebellion as the requisite factual antecedents, without which Martial Law cannot be proclaimed.

It is in the context of invasion or rebellion that the doctrine of necessity is considered. More aptly called the "necessity of public safety test," a calibration exercise must be undertaken to determine whether the crisis at hand poses such a danger to public safety and good order that Martial Law becomes necessary. If so, this exercise further requires a determination of the degree of Martial Law powers necessary to address the threat to public safety. This task entails a determination of the scope, coverage, and duration of Martial Law.

The proportionality test that the US Supreme Court instituted in *Sterling* can serve as a guide in undertaking a calibration exercise. The Court in *Sterling*, after reviewing the factual bases of the governor's declaration of Martial Law, found that the overproduction of oil was not serious enough to warrant the declaration of Martial Law and the exercise of Martial Law powers.[29] In analyzing the proportionality between the internal unrest and the government powers invoked to address the unrest, the Court therein examined the factual findings of the district court, as follows:

> It was conceded that at no time has there been any actual uprising in the territory. At no time has any military force been exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with, or their processes made impotent. Though it was testified to by defendants that, from reports which came to them, they believed that, if plaintiffs' wells were not shut in, there would be dynamiting of property in the oil fields, and efforts to close them and any others which opened by violence, and that, if that occurred, there would be general trouble in the field, no evidence of any dynamite having been used, or show of violence practiced or actually attempted, or even threatened against any specific property in the field, was offered. We find, therefore, that not only was there never any actual riot, tumult, or insurrection which

[28] Bernas, supra 903.
[29] *Sterling*, 287 U.S. at 403-404.

> would create a state of war existing in the field, but that, if all of the conditions had come to pass, they would have resulted merely in breaches of the peace, to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war.[30]

In was then found that the above circumstances did not amount to an "exigency which justified the Governor in attempting to enforce by executive or military order the restriction."[31] The US Court reasoned:

> By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. xxx The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.
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> x x x x
>
> It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theater of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service, and the officer may show the necessity in defending an action for trespass. "But we are clearly of opinion," said the Court, speaking through Chief Justice Taney,
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> > "that, in all of these cases, the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."*Mitchell v. Harmony,* 13 How. 115, 134. *See also United States v. Russell,* 13 Wall. 623, 628.
>
> There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.[32]

The *Sterling* Court examined the previous case, *Moyer*, which also upheld the temporary detention of one believed to be a participant in the insurrection launched during Martial Law. The *Sterling* Court applied the proportionality test and agreed that the action of the governor in *Moyer* had a

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[30] Id. at 390-391.
[31] Id. at 404.
[32] Id. at 399-401.

direct relation to the crushing of the insurrection.[33] Applying that model to the Texas governor's actions, the Court ultimately found that the declaration of Martial Law was not a proportional response to the crisis caused by the overproduction of oil.

Necessity of Public Safety as a Required Precursor of Martial Law

There is no dire lack of guidance or parameters in determining what sort of public safety necessity calls for a proclamation of Martial Law. It is *Sterling* that gives a clearer insight into what kind of necessity entails a Martial Law declaration. As deduced from the quoted portions above, there must be a semblance of a "state of war." Moreover, there must be a perceived inability of the civilian authority to address the crisis brought about by the "state of war." The logical consequence is the existence of a serious threat to public safety.

This finding was reiterated in *Duncan*, which ruled that Martial Law was "intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion."[34] This pronouncement essentially maintained the concept of Martial Law as defined in *Ex Parte Milligan* – that Martial Law is proper during war when civil institutions are paralyzed to a certain extent and military operations are necessary to preserve public safety and order.

War. Military operations. Crippled civilian functions. It was along these lines that the US Supreme Court has determined the propriety of Martial Law. It is apparent from the deliberations of the 1986 Constitution Commission that the framers somehow intended to define and characterize Philippine Martial Law along the same lines. Fr. Bernas himself used the term "theater of war" to define Martial Law:

> FR. BERNAS: This phrase was precisely put here because we have clarified the meaning of martial law; meaning, limiting it to martial law as it has existed in the jurisprudence in international law, that **it is a law for the theater of war. In a theater of war, civil courts are unable to function.** If in the actual theater of war civil courts, in fact, are unable to function, then the military commander is authorized to give jurisdiction even over civilians to military courts precisely because the civil courts are closed in that area. But in the general area where the civil courts are opened then in no case can the military courts be given jurisdiction over civilians. This is in reference to a theater of war where the civil courts, in fact, are unable to function.[35] (Emphasis supplied)

It would therefore be helpful for the Court to undertake its calibration exercise in weighing necessity *vis-a-vis* public safety along similar lines as well. To my mind, **the intensity of an invasion or a rebellion that**

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[33] Id. at 399.
[34] *Duncan*, 327 U.S. at 324.
[35] II RECORD, CONSTITUTIONAL COMMISSION 402 (29 July 1986).

endangers public safety must be discerned within the context of a state of significant armed conflict. In other words, the circumstances on the ground must be so severe that they entail the invocation of an extreme measure.

A balancing act is called for, specifically between the gravity of the situation and the extraordinary measure meant to address it, which is Martial Law. It is the established intent of the framers of our Constitution for Martial Law to be a measure that would be utilized only in extremely urgent circumstances as the following deliberation shows:

> 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.[36] (Emphasis supplied)

This intent leads to the general understanding that Martial Law is an extraordinary power to be wielded only in extraordinary circumstances.[37] That is the fundamental principle that must guide the Court in the conduct of its review powers.

The Court's Power of Review

While the President and Congress are expected to engage in a calibration exercise in the process of deciding whether or not to declare or extend Martial Law, this exercise is of utmost importance to this Court, which exercises the power of review over the sufficiency of the factual bases of the proclamation or its extension.

As emphasized in my dissent in *Lagman v. Medialdea*, it is the duty of the Court to inquire into the necessity of declaring Martial Law to protect public safety. I pointed out:

> **The duty of the Court to inquire into the necessity of declaring martial law to protect public safety logically and inevitably requires the determination of proportionality of the powers sought to be exercised by the President.** As pointed out by the *ponencia*, the exercise of the powers of the President under Section 18, Article VII "can be resorted to only under specified conditions." This means that greater powers are needed only when other less intrusive measures appear to be ineffective. When it is deemed that the power exercised is disproportional to what is required by the exigencies of the situation, any excess therefore

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[36] Id. at 412.

[37] *Lagman v. Medialdea*, supra.

> is deemed not required to protect public safety, and should be invalidated.[38] (Emphasis supplied)

To perform this duty is to engage in the same kind of calibration exercise that the *Sterling* Court undertook. Hence, the Court herein is required not only to determine the existence of an actual invasion or rebellion, but also, to analyze and determine whether the nature and intensity of the invasion or rebellion endanger public safety in a way that makes Martial Law necessary.

The calibration would necessitate a determination not just of the propriety of a Martial Law declaration, but likewise its territorial coverage. In the case of an extension of Martial Law, the Court is called upon to take one step further and likewise calibrate whether the danger posed is commensurate with the period of extension fixed by Congress. In so doing, this Court needs to apply a trial judge's reasonable mind and common sense as honed by relevant experiences and legal proficiency.

It must be emphasized that this kind of exercise is no longer new to this Court, as it has in fact undertaken a similar calibration in *Lansang v. Garcia*.[39] In that case, the Court upheld the nationwide suspension of the privilege of the writ of *habeas corpus,* but only after a careful examination and calibration of the danger posed by the nationwide acts of rebellion.

To refrain from undertaking a similar calibration exercise this time around would amount to an abdication of this Court's obligation under Section 18, Article VII of the Constitution. To reiterate my dissent in *Lagman v. Medialdea*:

> The Court cannot be defending vigorously its review power at the beginning, with respect to the sufficiency-of-factual basis question, then be in default when required to address the questions of **necessity, proportionality, and coverage**. Such luxury is not allowed this Court by express directive of the Constitution.[40] (Emphasis supplied)

Help to Government

In the exchange between the undersigned and General Guerrero, an effort was made to elicit the operational necessity for Martial Law. Below is the exchange:

> **CHIEF JUSTICE SERENO:**
>
> Can you answer for us General, can you just answer for us what particular power do you want under a martial law system? You have already concluded that it was effective, immediate but what specific aspect is important for you?

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[38] Dissenting Opinion, CJ Sereno, *Lagman v. Medialdea,* supra at 7.
[39] *In re Lansang v. Garcia,* 149 Phil. 547 (1971).
[40] Dissenting Opinion, CJ Sereno, *Lagman v. Medialdea,* supra at 8.

GENERAL GUERRERO:

For now, Your Honor, what martial law [has] given us is the power for us to be able to effect immediate arrest of rebels because of the suspension of the privilege of *habeas corpus*.

CHIEF JUSTICE SERENO:

But there are jurisprudence already that authorize you to do that?

GENERAL GUERRERO:

Yes, Your Honor.

CHIEF JUSTICE SERENO:

Yes. Are these jurisprudence not enough for you?

GENERAL GUERRERO:

I cannot say for now, Your Honor, exactly what other powers could be avail[ed] to apply to in the Armed Forces for us to be able to perform our mission effectively, Your Honor.

CHIEF JUSTICE SERENO:

Because that's precisely the question we need to answer and we spend a lot of time yesterday afternoon saying what particular aspect of martial law do you need that you cannot use already under your present, under the ordinary powers of the President and the military because you see, you can already conduct surveillance on terrorists, all terrorists. You only need actually the declaration, the arrest, you only need, the arrest rather, you only need the declaration of the Anti-Terrorism Council, is that not correct? x x x

GENERAL GUERRERO:

Your Honor …

CHIEF JUSTICE SERENO:

Why are you not using that? [The] Anti-Terrorism Council[,] has it convene[d] since President Duterte became president?

GENERAL GUERRERO:

I cannot answer for the Anti-Terrorism Council, Your Honor.

x x x x

CHIEF JUSTICE SERENO:

Okay. So, only martial law can bring [everybody on board]? Why? Can you explain to us that ideological theory or operational justification?

GENERAL GUERRERO:

Your Honor, let me just cite my experience as System Mindanao Commander being the implement[e]r of martial law in my area of responsibility.

x x x x

Before the implementation of martial law, I had to request, to invite other heads of agencies for them to participate in our security engagements.

x x x x

It was a difficult task at that time.

CHIEF JUSTICE SERENO:

But the President can just give a directive through the Executive Secretary, *All calls from General Guerrero must be immediately obeyed.*

GENERAL GUERRERO:

It's not as easy as that, Your Honor.

x x x x

So, we have to understand that compliance needs to be improved.

x x x x

CHIEF JUSTICE SERENO:

Okay. So, what makes it easier, is it psychological? That's why I've been asking since yesterday, is it psychological, the calling out powers on steroids?

GENERAL GUERRERO:

Yes, Your Honor.

CHIEF JUSTICE SERENO:

So, it's psychological?

GENERAL GUERRERO:

It's partly psychological, Your Honor.

CHIEF JUSTICE SERENO:

Okay, partly psychological. What do you think makes people more cooperative in a martial law setting?

GENERAL GUERRERO:

It's that fact that [a] strong authority is in charge.

x x x x

A picture, an image of a strong…

CHIEF JUSTICE SERENO:

It's an image?

GENERAL GUERRERO:

Yes.

CHIEF JUSTICE SERENO:

So, the President issuing an order to civilians without anyone being a martial law administrator or implement[e]r is a weak message. But if you are the martial law implement[e]r, that's a strong message to comply?

GENERAL GUERRERO:

Your Honor, the President is the Commander-in-Chief.

x x x x

CHIEF JUSTICE SERENO:

xxx This is what martial law does. Because even in my dissenting opinion, xxx I said, *Until now nobody has really answered the question of what martial law is for?* So, finally we have this chance, can you tell us, candidly, why do we need martial law? Because I'm open to any idea, at this point. Why?

GENERAL GUERRERO:

As I have said, the problem in Mindanao as in the other parts of the country is multi-dimensional, the armed conflict, Ma'am, is just a manifestation of a deeper problem in society.

CHIEF JUSTICE SERENO:

So, there is a deeper problem in society. So, the SOLGEN is a, there is paranoia, or I'm sorry, one of the theories propounded is there is paranoia on the part of the petitioners. But you are now presenting to us that there is a deep problem that must be addressed and we need martial law as a psychological mooring because, first, we have observed greater compliance on the part of all government entities. What else? Can you enumerate for us? Because you only concluded that it was very good but you never in your presentation and J2 never presented why it was

effective? So, that's first, *there is more, there's easier compliance.* The second reason?

GENERAL GUERRERO:

It enhances climate of safety; safety and security, Your Honor.

CHIEF JUSTICE SERENO:

It enhances how?

GENERAL GUERRERO:

The people, especially in the affected areas of rebellion, (inaudible) and I was able to talk to the (inaudible), that they appreciate the implementation of martial law in their respective localities.

x x x x

CHIEF JUSTICE SERENO:

Yeah, I know, and how do they describe it?

GENERAL GUERRERO:

For instance, I was just there the other day in Basilan and I was able to talk to some of the residents there.

CHIEF JUSTICE SERENO:

Yes.

GENERAL GUERRERO:

And they said that they prefer the presence of the soldiers in the area and that they would not want the soldiers to pull out. And in fact they are supporting the implementation of martial law.

CHIEF JUSTICE SERENO:

So, *martial law enhances the presence of the military*, that's your second reason. And because it enhances the presence of the military there is greater safety on the part of the civilian population?

GENERAL GUERRERO:

Yes, Your Honor.

CHIEF JUSTICE SERENO:

Okay. What else?

x x x x

Because you know, if we are able to define really why you need martial law, we would have a breakthrough in this case. So, help me here. Third reason?

GENERAL GUERRERO:

To be honest with you, Your Honor, we have not really fully exploited the possibilities, but we can gain from the declaration of martial law, the present martial law.

x x x x

CHIEF JUSTICE SERENO:

So, there is still an ephemeral, undefinable element to martial law which you think is very effective but to some it is being characterized as paranoia, but there is fear. So, in other words, is it not the yin and yang concept here, there is the fear element, the fear enhances or the fear paralyzes and makes it possible that the civilian population will believe that their democratic rights are being endangered. Is that two sides of the same face, is it a janus situation here?

GENERAL GUERRERO:

Yes, Your Honor, and that is something that we, in the military, [are] also trying to balance in terms of perception and in terms of our actuations.

CHIEF JUSTICE SERENO:

So, fear can be used positively and fear is being said as [imposing] the cause of martial law in a negative way. So, is it not just an information campaign that needs to be done if you are going to be strong adheren[ts] to human rights that there is an information gap between the two interpretations? You agree?

GENERAL GUERRERO:

It could be, Your Honor. But I could not say for a fact because as I have said, if it would be an informational campaign then definitely it is not purely a military effort, Your Honor.

CHIEF JUSTICE SERENO:

Okay. So, what I see so far, what you have said is that there is a psychological impact on civilian authorities, there is a psychological impact on the civilian authorities in the areas where rebellion or terrorism abounds. So, [those are] the things that you have enumerated to the Court so far. So, we need these because it creates a favorable mindset for us to address the security problem in Mindanao, is that what you're saying?

GENERAL GUERRERO:

Yes, Your Honor.

x x x x

CHIEF JUSTICE SERENO:

So, you are actually asking this Court to say that there is factual basis sufficient to justify the extension of martial law because you have noted effectivity in your operations because of the martial law and you have noticed that its effectivity is brought about by the psychological impact it has on the authorities in the areas as well in the civilian population. That's a good summation?

GENERAL GUERRERO:

Partly, Your Honor. But as I have said, it's not only psychological, Your Honor. We have to look at the added dimensions as well.

CHIEF JUSTICE SERENO:

Logistical, is there a logistical efficiency?

GENERAL GUERRERO:

Yes, Your Honor. Financial.

CHIEF JUSTICE SERENO:

Why? *Logistical and financial*, why?

GENERAL GUERRERO:

Again, with the martial law authority, with the authority, enhanced authority given to us by martial law we are able to enjoin other agencies to cooperate with us and help us in addressing...

CHIEF JUSTICE SERENO:

So, without martial law, they wouldn't be fast in helping provide you with necessary transportation, fuel, etc.?

GENERAL GUERRERO:

Not necessarily fuel and transportation, Your Honor.

CHIEF JUSTICE SERENO:

But like what?

GENERAL GUERRERO:

Information, Your Honor.

CHIEF JUSTICE SERENO:

Information. Information is one. They are able to relay information faster because of martial law?

GENERAL GUERRERO:

Yes, Your Honor.

CHIEF JUSTICE SERENO:

Evacuation is helped?

GENERAL GUERRERO:

Mobilization, Your Honor.

CHIEF JUSTICE SERENO:

Mobilization. Financial, you said financial, what financial efficiencies are being effected because of martial law?

GENERAL GUERRERO:

The rebels are able to channel in us report to conduits to the various channels in the localities.

x x x x

CHIEF JUSTICE SERENO:

But you just happened to be of the impression that things are made easier for you?

GENERAL GUERRERO:

It's not the impression, Your Honor. We have been actually able to apply this, Your Honor, in my area when I was Eastern Mindanao Commander.[41]

Nowhere in the exchange or the pleadings is there any indication of the factual or legal basis for claiming that Martial Law makes addressing public safety in the midst of rebellion easier, other than an undocumented experiential claim. But against this experiential claim of ease in military operations are the apparently documented claims of enhanced abuses under the existing Martial Law regime in Mindanao.[42] These claims bring this Court to a point of transcendental importance, one that goes into its very reason for existence – when petitioners make out a case of probable excess in the exercise of power that leads to the violation of constitutional rights, and when Government is unable to categorically put its finger on why it needs Martial Law, then this Court must define the parameters according to

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[41] TSN, 17 January 2018, pp. 136-153.

[42] Violation of Civil and Political Rights in Mindanao under the Rodrigo Duterte Government, May 23, 2017 to November 30, 2017, Based on reports gathered by Karapatan (Document "b" attached to Compliance dated 17 January 2018 submitted by Petitioners Cullamat, et al.).

During the oral arguments, General Guerrero admitted that there is at least one documented case of looting committed by a military personnel:

JUSTICE TIJAM:

Were there cases of abuses committed by military personnel and PNP personnel, as far as you know, whether it be a matter of torture, or killing, or looting, or destruction of property not arising from the war in Marawi?

GENERAL GUERRERO:

There were reports about looting, Sir, and about maltreatment but all of these were investigated and so far, Sir, there are records there is only one case of human rights violation and that is of looting that was filed against one.

JUSTICE TIJAM:

Under existing rules and regulation governing the Martial Law in Maguindanao, are these erring culpable military personnel exempt from liability?

GENERAL GUERRERO:

No, Sir, no, Your Honor. (TSN, 17 January 2018, pp. 75-76).

the tests of necessity; otherwise, it ceases to genuinely exist as a bastion of democracy.

Determination of the Period of Extension

Distinction must be made between the examination by this Court of the basis for the extension of Martial Law *per se* on the one hand, and the period of extension on the other hand. This distinction is clear in the following constitutional deliberations:

> MR. SUAREZ: Madam President.
>
> THE PRESIDENT: Commissioner Suarez is recognized.
>
> MR. SUAREZ: Thank you, Madam President.
>
> I concur with the proposal of Commissioner Azcuna but may I suggest that we fix a period for the duration of the extension, because it could very well happen that the initial period may be shorter than the extended period and it could extend indefinitely. So if Commissioner Azcuna could put a certain limit to the extended period, I would certainly appreciate that, Madam President.
>
> THE PRESIDENT: What does Commissioner Azcuna say?
>
> MR. AZCUNA: Madam President, **I believe that that is a different concept and should be voted on separately so as not to confuse the issue on the limitation of the period with the extension. My amendment would merely require that any extension should have the concurrence of both the President and the Congress. Commissioner Suarez may propose an amendment to limit the period of the extension.**[43](Emphasis supplied)

The extension *per se* of Martial Law involves a two-step process. First, there must be an initiative from the President addressed to Congress requesting the extension of his prior proclamation of Martial Law. Second, Congress determines as a joint body whether or not the extension is proper. If it approves of the extension, it then likewise determines the period thereof.

The wording of the Constitution leaves an initial impression that the determination of the extension period is an exclusive congressional prerogative. However, a look into the constitutional deliberations seems to show that the determination of the period was intended to remain a joint executive-legislative act. This conclusion may be drawn from the following deliberations, which came about as a solution to Commissioner Suarez's proposal to fix a 60-day period of extension:

> FR. BERNAS: **Madam President, may I just propose something because I see the problem. Suppose we were to say: "or extend the same FOR A PERIOD TO BE DETERMINED BY CONGRESS" — that gives Congress a little flexibility on just how long the extension should be.**
>
> MR. REGALADO: Is the Gentleman placing his amendment after "same" and before "if"?

[43] II RECORD, CONSTITUTIONAL COMMISSION 508 (31 July 1986).

FR. BERNAS: Yes.

MR. SUAREZ: Maybe that can be added after the final word "it" so that the clause would read: "if the invasion or rebellion shall persist and public safety requires it, FOR A PERIOD AS MAY BE [DETERMINED] BY CONGRESS."

FR. BERNAS: It is a question of style, Madam President. It seems to be very far from the verb.

THE PRESIDENT: **Is that accepted by Commissioner Suarez?**

MR. SUAREZ: **Yes, Madam President.**

MR. OPLE: May I just pose a question to the Committee in connection with the Suarez amendment? Earlier, Commissioner Regalado said that that point was going to be a collective judgment between the President and the Congress. **Are we departing from that now in favor of giving Congress the plenipotentiary power to determine the period?**

FR. BERNAS: **Not really, Madam President, because Congress would be doing this in consultation with the President, and the President would be outvoted by about 300 Members.**

MR. OPLE: **Yes, but still the idea is to preserve the principle of collective judgment of that point upon the expiration of the 60 days when, upon his own initiative, the President seeks for an extension of the proclamation of martial law or the suspension of the privilege of the writ.**

FR. BERNAS: **Yes, the participation of the President is there but by giving the final decision to Congress, we are also preserving the idea that the President may not revoke what Congress has decided upon.**[44] (Emphases supplied)

The principle of collective judgment, as stated by Commissioner Ople, is retained through the following process: the President provides the facts showing the persistence of invasion or rebellion and its perceived threat to public safety. In turn, Congress evaluates the facts provided by the President and on the basis of those facts determines the period of extension.

Parameters for the Determination of the Period of Extension

Indeed, Congress has been granted final authority in the determination of the period of extension. But as any grant of discretion goes, it is not unbridled. There are parameters that must be taken into consideration in the exercise of this discretion. It is clear from the constitutional deliberations that there was no intention to completely leave that exercise to Congress. Fr. Bernas himself said that the determination only "gives Congress a *little* flexibility on just how long the extension should be."[45] There was no complete or unlimited flexibility granted. Rather, Congress must be mindful of the following parameters in fixing the period of extension.

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[44] Id. at 509.
[45] Id.

First, the extension cannot be for an indefinite period of time – there must be a definite period fixed by Congress. This interpretation is apparent from the provision in Section 18, Article VII, which states that Congress may extend the proclamation of Martial Law "for a period to be determined by congress." A *period* is defined as "any point, space, or division of time."[46] From Section 18 itself, it is clear that this period must be "*determined.*" That is, the start and end points must be "limited," "fixed," "decided," or "settled" conclusively by Congress.[47] Otherwise, to effect the extension for an indefinite period would amount to Congress' abdication of the foregoing positive duty imposed upon it by the Constitution.

Further, the following discussion shows that prior to the approval of Fr. Bernas' amendment, Commissioner Suarez suggested a fixed period for the extension, supposedly to protect the interest of the citizens:

> MR. SUAREZ: x x x.
>
> May we suggest that on line 7, between the words "same" and "if," we insert the phrase FOR A PERIOD OF NOT MORE THAN SIXTY DAYS, which would equal the initial period for the first declaration just so it will keep on going.
>
> THE PRESIDENT: What does the Committee say?
>
> MR. REGALADO: May we request a clarification from Commissioner Suarez on this proposed amendment? This extension is already a joint act upon the initiative of the President and with the concurrence of Congress. It is assumed that they have already agreed not only on the fact of extension but on the period of extension. **If we put it at 60 days only, then thereafter, they have to meet again to agree jointly on a further extension.**
>
> MR. SUAREZ: **That is precisely intended to safeguard the interests and protect the lives of citizens.**
>
> MR. REGALADO: In the first situation where the President declares martial law, there had to be a prescribed period because there was no initial concurrence requirement. And if there was no concurrence, the martial law period ends at 60 days. Thereafter, if they intend to extend the same suspension of the privilege of the writ or the proclamation of martial law, it is upon the initiative of the President this time, and with the prior concurrence of Congress. So, the period of extension has already been taken into account by both the Executive and the Legislative, unlike the first situation where the President acted alone without prior concurrence. The reason for the limitation in the first does not apply to the extension.[48] (Emphases supplied)

The 60-day period, however, was not approved for its perceived impracticality. Nevertheless, the commissioners did not disagree on the validity of the point made by Commissioner Suarez – that there must be a fixed period. This was apparently the reason why Fr. Bernas did not negate the need for determining or fixing the period when he proposed his

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[46] Black's Law Dictionary 1138 (6th Ed. 1990).

[47] *Merriam-Webster.com*, 2018 <https://www.merriam-webster.com/dictionary/determine> (visited 26 January 2018).

[48] II RECORD, CONSTITUTIONAL COMMISSION 508-509 (31 July 1986).

amendment, which was subsequently approved by the body. Only, the amendment specified Congress as the entity that shall fix the period.

Second, the extension must be for a reasonable period. This is clear from the following deliberations:

> MR. REGALADO: **Madam President, following that is the clause "extend the same if the invasion or rebellion shall persist and public safety requires it." That by itself suggests a period within which the suspension shall be extended, if the invasion is still going on.** But there is already the cutoff of 60-day period. Do they have to meet all over again and agree to extend the same?
>
> MR. SUAREZ: That is correct. **I think the two of them must have to agree on the period;** but it is theoretically possible that when the President writes a note to the Congress, because it would be at the instance of the President that the extension would have to be granted by Congress, it is possible that the period for the extension may be there. It is also possible that it may not be there. **That is the reason why we want to make it clear that there must be a reasonable period for the extension.** So, if my suggestion is not acceptable to the Committee, may I request that a voting be held on it, Madam President.[49] (Emphases supplied)

The question now is *what would make the period of extension reasonable*? The term "reasonable" is defined as "fair, proper, just, moderate, suitable under the circumstances."[50] It is also to be understood as "rational; governed by reason."[51] As can be gathered from the deliberations quoted above, and in light of the definitions provided, the question of reasonableness is closely related to the existence of the two requisites for the exercise of the authority to extend – that the invasion or rebellion persists, and public safety requires it. That is, there must be a rational match between the existence of the two requisites and the period of extension.

Therefore, to come up with a reasonable period, Congress has to conduct an independent investigation and evaluation of the persistence of invasion or rebellion and the requirement of public safety. Admittedly, there must be due consideration of what is happening on the ground, which is possible only if Congress is in close coordination with the President. It is in this manner that the determination of the period of extension remains a joint judgment of the President and Congress. It was acknowledged during the deliberations that the President has the most accurate idea of how long it would take to quell the persisting invasion or rebellion and secure the public. For Congress to conduct its own investigation of the matter would necessitate consulting the Chief Executive.

Nevertheless, a close coordination with the President does not amount to a blind submission to him – rather, Congress has to independently determine the length of extension, so that it can even reduce or increase the

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[49] Id. at 509.
[50] Black's Law Dictionary, supra at 1265.
[51] Id.

period proposed by the President. The following deliberations are enlightening:

> MR. DAVIDE: I would like to propose that instead of "AT THE INSTANCE OF," we use UPON THE PETITION OF. It will be upon the petition of the President to confirm the fact that any extension is just a matter of his request, not his prerogative.
>
> THE PRESIDENT: Not on his own initiative?
>
> MR. DAVIDE: No, not on his own initiative, Madam President.
>
> MR. AZCUNA: I believe the word "petition" is more proper for the courts, Madam President. **Maybe with the intention put on the record that this is not mandatory upon Congress to grant an extension simply because the President is requesting it,** I am willing to change it to INITIATIVE instead of "INSTANCE" but not "PETITION" because "petition" has more relevance to courts. So it will be "UPON THE INITIATIVE of the President."[52]
>
> x x x x
>
> MR. OPLE: May I just pose a question to the Committee in connection with the Suarez amendment? Earlier, Commissioner Regalado said that that point was going to be a collective judgment between the President and the Congress. **Are we departing from that now in favor of giving Congress the plenipotentiary power to determine the period?**
>
> FR. BERNAS: **Not really, Madam President, because Congress would be doing this in consultation with the President, and the President would be outvoted by about 300 Members.**
>
> MR. OPLE: Yes, but still the idea is to preserve the principle of collective judgment of that point upon the expiration of the 60 days when, upon his own initiative, the President seeks for an extension of the proclamation of martial law or the suspension of the privilege of the writ.
>
> FR. BERNAS: **Yes, the participation of the President is there but by giving the final decision to Congress, we are also preserving the idea that the President may not revoke what Congress has decided upon.**[53]
>
> x x x x
>
> MR. PADILLA: According to Commissioner Concepcion, our former Chief Justice, the declaration of martial law or the suspension of the privilege of the writ of *habeas corpus* is essentially an executive act. If that be so, and especially under the following clause: "if the invasion or rebellion shall persist and public safety requires it," I do not see why the period must be determined by the Congress. We are turning a purely executive act to a legislative act.
>
> FR. BERNAS: I would believe what the former Chief Justice said about the initiation being essentially an executive act, but what follows after the initiation is something that is participated in by Congress.
>
> MR. CONCEPCION: If I may add a word. **The one who will do the fighting is the executive but, of course, it is expected that if the Congress wants to extend, it will extend for the duration of the fighting. If the fighting goes on, I do not think it is fair to assume that**

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[52] II RECORD, CONSTITUTIONAL COMMISSION 508 (31 July 1986).
[53] Id. at 509.

> **the Congress will refuse to extend the period, especially since in this matter the Congress must act at the instance of the executive. He is the one who is supposed to know how long it will take him to fight. Congress may reduce it, but that is without prejudice to his asking for another extension, if necessary.**[54] (Emphases supplied)

Ultimately, Congress must be able to clearly demonstrate the reasonableness of the period in its resolution approving the extension and fixing the period thereof.

Judicial Power of Review of Martial Law Extension and the Period Thereof

The third paragraph of Section18, Article VII of the Constitution, provides that the sufficiency of the factual basis for the extension of Martial Law may be reviewed by the Court:

> 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. (Emphasis supplied)

As can be gleaned from the discussions above, the extension of a proclamation of Martial Law necessarily entails a determination of the period of its extension. Therefore, the Court's exercise of its review power is not limited to a resolution of the factual sufficiency of the extension *per se*. That power likewise includes a review of the sufficiency of the factual basis of the period of extension.

While the question that faces the Court is whether or not such period is reasonable, this question can be answered through an examination of the factual basis of the extension *per se.*

Specifically, the Court has to look into the public safety element – whether the period fixed is commensurate with the necessity of public safety. This determination essentially involves a calibration exercise as previously discussed. Therefore, in the same way that this duty inevitably requires a delineation of the areas to be validly covered by Martial Law,[55] the Court also has the duty to determine the length of period necessary to quell the existing threat to public safety. There must be a calibration based on the proportionality of the danger at hand to the period of extension. As a result, the Court may do one of three things: affirm the period fixed by Congress, extend it, or shorten it.

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[54] Id. at 510.
[55] Dissenting Opinion, CJ Sereno, *Lagman v. Medialdea,* supra.

Burden of Proof

Lagman v. Medialdea established that the President carried the burden of proof to show that there was sufficient factual basis for the proclamation of Martial Law.[56] The Court ruled that "the President satisfactorily discharged his burden of proof. After all, what the President needs to satisfy is only the standard of probable cause for a valid declaration of Martial Law and suspension of the privilege of the writ of *habeas corpus*."[57]

As discussed above, the extension of the period of effectivity of the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus* is a joint executive-legislative act. The Constitution has vested both the President and Congress with the power of extending the Martial Law period, with the President initiating it and Congress actually extending or not extending the period. The President provides Congress with the necessary factual basis to justify his request for the extension of the Martial Law period. Congress must then assess the sufficiency of the factual basis. Both the executive and the legislative branches of Government bear the burden of proving the sufficiency of the factual basis.

In response to petitioners' claim that the President bears the burden of proving the sufficiency of the factual basis for the Martial Law extension, respondents argue that petitioners are the ones who must prove that rebellion has already been completely quelled. According to respondents, the Court in *Lagman v. Medialdea* has already ruled that rebellion exists in Mindanao and, following the doctrine of conclusiveness of judgment, the resolution of the instant case must be confined to the issue of whether or not the rebellion has been completely quelled.

In effect, respondents argue that instead of them proving that rebellion persists, the burden of proof has already shifted to petitioners to show that rebellion no longer exists.

That contention is erroneous.

To justify the extension of the period of Martial Law, the Constitution provides two requisites: (1) invasion or rebellion persists, and (2) public safety requires it. The persistence of rebellion is a factual issue that must be proven. The initial proclamation of Martial Law is distinct from its extension, and respondents cannot base their claim of the existence of rebellion merely on *Lagman v. Medialdea*. Certainly, *Lagman* was decided based on the circumstances surrounding the time of the initial proclamation of Martial Law. That actual rebellion was found to have existed then does not automatically lead to a conclusion that rebellion still persisted at the time the period was extended.

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[56] *Lagman v. Medialdea*, supra.
[57] Id. at 61.

Furthermore, respondents cannot shift the burden of proof to petitioners. As held by Justice Caguioa in his Dissenting Opinion in *Lagman v. Medialdea*:

> [C]onsidering that the declaration of martial law and suspension of the privilege of the writ can only be validly made upon the concurrence of the requirements of the Constitution, the very act of declaration of martial law or suspension of the privilege of the writ **already constitutes a positive assertion** by the Executive **that the constitutional requirements have been met – one which it is in the best position to substantiate. To require the citizen to prove a lack or insufficiency of factual basis is an undue shifting of the burden of proof that is clearly not the intendment of the framers.** (Emphasis supplied)

In fine, it can be concluded that the burden of proof remains with the Government. For purposes of fulfilling the constitutional requirements of a valid declaration of Martial Law and its extension, the burden of proof never shifts to petitioners. It is the constitutional duty of the Government to show that the requirements of the Constitution have been met.

Abandonment of the Permissive Approach

In my Dissenting Opinion in *Lagman v. Medialdea*, I espoused a permissive approach in weighing the evidence or drawing from interpretative sources. I adopted that approach considering that this was the first post-Marcos examination of Martial Law undertaken by the Court under the 1987 Constitution. No rule or jurisprudence existed then that sufficiently guided the President in crafting the Martial Law proclamation under the present Constitution.

Pursuant to this permissive approach, I examined the available evidence more closely in order to understand what the correct description of the realities in Mindanao should have been – beyond what was described in Proclamation No. 216, the President's Report to Congress, and the Comment of the Office of the Solicitor General filed before this Court.

After adopting the permissive approach, I concluded that Martial Law was valid not only in Marawi City, but in the entire province of Lanao del Sur, as well as in the provinces of Maguindanao and Sulu.

It is important, however, to emphasize that the application of the permissive approach was *pro hac vice* in view of the paucity of rules and jurisprudence to guide an evidentiary determination of the sufficiency of the factual basis for the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus*. Considering the views expressed in *Lagman v. Medialdea*, a permissive approach in considering the evidence in this *sui generis* proceeding cannot remain to be the rule.

Allow me to point out that contrary to the majority's position in *Lagman v. Medialdea* that they are unable to rule on the appropriate coverage of Martial Law, I was able to demonstrate in my dissent that it was

possible for this Court to undertake an **independent factual review of the coverage of Martial Law**. While I agree that the Court could recognize the unique fact-finding capabilities of the executive department, it did not follow that the conclusions derived by the President from these facts were to be adopted blindly by this Court. Rather, the Court should have been able to arrive at an independent conclusion after a careful review of the facts provided.

In the Resolution dated 5 December 2017 in *Lagman v. Medialdea*, the majority dabbled in surmises and conjectures by saying that "there is always a possibility that the rebellion and other accompanying hostilities will spill over."[58] Behind a sweeping generalization that "martial law is a flexible concept,"[59]the majority opinion posited that the precise extent or range of the rebellion and the public safety requirement could not be measured by exact metes and bounds.

However, this is not really the case. The elements of actual rebellion and public safety are inflexible requirements for the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus*. They also provide a sufficient guide for this Court to determine the sufficiency of the factual basis for that declaration.

Worse than the Court's act of effectively abdicating its duty to fully review the President's action under Article VII, Section 18 of the Constitution, is its failure to lay down parameters for the future review of the President's same or similar actions. Weak, sweeping statements today can encourage their misuse as precedents in future cases.

Factual Basis for the Extension of Martial Law in Mindanao

In Resolution of Both Houses (RBH) No. 4 dated 13 December 2017,[60] the Congress of the Philippines determined that rebellion persists, and that public safety indubitably requires the further extension of Proclamation No. 216[61] declaring a state of Martial Law and the suspension of the privilege of the writ of *habeas corpus* in the whole of Mindanao. In a joint session that yielded 240 affirmative votes, Congress approved the extension for a period of one year from 1 January to 31 December 2018.

Congress took note of the following essential facts:

1. Despite the death of Hapilon and the Maute brothers, the remnants of their groups have continued to rebuild their organization through the

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[58] *Lagman v. Medialdea*, supra at 7.
[59] Id.
[60] Resolution of Both Houses Further Extending Proclamation No. 216, Series of 2017, Entitled "Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao" for a Period of One (1) Year from January 1, 2018 to December 31, 2018.
[61] Entitled "Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao" dated 23 May 2017.

recruitment and training of new members and fighters to carry on the rebellion.

2. The Turaifie Group has likewise been monitored to be planning to conduct bombings, notably targeting the Cotabato area.

3. The Bangsamoro Islamic Freedom Fighters (BIFF) continues to defy the Government by perpetrating at least 15 violent incidents during the Martial Law period in Maguindanao and North Cotabato.

4. The remnants of the Abu Sayyaf Group (ASG) in Basilan, Sulu, Tawi-Tawi, and the Zamboanga Peninsula remain a serious security concern.

5. The New People's Army (NPA) took advantage of the situation and intensified their decades-long rebellion against the Government and stepped up terrorist acts against innocent civilians and private entities, as well as guerrilla warfare against the security sector and public and government infrastructure, purposely to seize political power through violent means and to supplant the country's democratic form of government with Communist rule.

RBH No. 4 was issued by Congress in connection with the President's letter dated 8 December 2017 requesting the further extension of Proclamation No. 216 for a period of one year or for such other period of time as Congress may determine. The report of the President in his letter gave the following particulars of the foregoing essential facts narrated in RBH No. 4:

1. At least 185 persons listed in the Martial Law Arrest Orders have remained at large and, in all probability, are presently regrouping and consolidating their forces.

2. The remnants, together with their protectors, supporters, and sympathizers, have been monitored in their continued efforts towards radicalization/recruitment, financial and logistical buildup, as well as in their consolidation/reorganization in Central Mindanao, particularly in the provinces of Maguindanao and North Cotabato and also Sulu and Basilan. Their activities are geared towards the conduct of intensified atrocities and armed public uprisings in support of their objective of establishing the foundation of a global Islamic caliphate and a *Wilayat* not only in the Philippines, but also in the whole of Southeast Asia.

3. Turaifie is said to be Hapilon's potential successor as Amir of DAESH Wilayat in the Philippines and Southeast Asia.

4. In 2017, the BIFF initiated at least 89 violent incidents consisting mostly of harassments and roadside bombings directed at government troops.

5. In 2017, the ASG conducted at least 43 acts of terrorism including attacks using improvised explosive devices, harassments, and kidnappings. These acts resulted in the killing of 8 civilians, 3 of whom were beheaded.

6. In 2017, the NPA perpetrated at least 385 atrocities in Mindanao, which resulted in 41 killed and 62 wounded in action on the part of the government forces. These incidents also resulted in the killing of 23 and the wounding of 6 other civilians. The most recent incident was the ambush on 9 November 2017 that resulted in the killing of 1 and wounding of 3 Philippine National Police (PNP) personnel, as well as in the killing of a four-month-old infant and the wounding of 2 other civilians.

7. Apart from perpetrating these atrocities, the NPA also committed at least 59 arson incidents in Mindanao targeting businesses and private establishments and destroying an estimated ₱2.2 billion worth of properties. The most significant attacks were launched against the Lapanday Food Corporation in Davao City on 9 April 2017 and the Mil-Oro Mining and Frasec Ventures Corporation in Mati City, Davao Oriental, on 6 May 2017, resulting in the destruction of properties valued at ₱1.85 billion and ₱109 million, respectively.

8. These activities of the NPA constrained the President to issue Proclamation No. 360[62] on 23 November 2017 declaring the termination of peace negotiations with the Communist Party of the Philippines-New People's Army-National Democratic Front (CPP-NPA-NDF).

9. On 5 December 2017, the President issued Proclamation No. 374[63] declaring the CPP-NPA-NDF a designated/identified terrorist organization under Republic Act No. (R.A.) 10168 (The Terrorism Financing Prevention and Suppression Act of 2012). The presidential proclamation was coupled with a directive to the Secretary of Justice to file a petition in the appropriate court praying that the CPP-NPA-NDF be proscribed for being a terrorist organization under R.A. 9372 (Human Security Act of 2007).

The request of the President to the Congress was prompted by the letter dated 4 December 2017 from Secretary of National Defense Delfin N. Lorenzana. The latter recommended "the extension of Martial Law for another 12 months or 1 year beginning January 1, 2018 until December 31, 2018 covering the whole island of Mindanao primarily to ensure total eradication of DAESH-inspired Da'awatul Islamiyah Waliyatul Masriq (DIWM), other like-minded Local/Foreign Terrorist Groups (L/FTGs) and Armed Lawless Groups (ALGs), and the communist terrorists (CTs) and

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[62]Entitled "Declaring the Termination of Peace Negotiations with the National Democratic Front-Communist Party of the Philippines-The New People's Army."

[63] Entitled "Declaring The Communist Party Of The Philippines (CPP)-New People's Army (NPA) as a Designated/Identified Terrorist Organization Under Republic Act No. 10168."

their coddlers, supporters and financiers, and to ensure speedy rehabilitation, recovery and reconstruction efforts in Marawi, and the attainment of lasting peace, stability, economic development and prosperity in Mindanao."

Secretary Lorenzana indicated that the armed struggle in Mindanao was still relatively strong. He emphasized that the proposed extension would significantly help not only the AFP but also other stakeholders in quelling the ongoing DAESH-inspired DIWM groups. He also said that the extension would help put an end to the rebellion being staged by communist terrorists, as well as in restoring public order, safety and stability in Mindanao.

Secretary Lorenzana attached the letter of General Guerrero, who was also recommending the extension for compelling reasons based on "current" security assessment. The latter added the following information in support of his request for the extension of the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus*:

1. The remnants of the groups of Hapilon and the Maute brothers, with the help of their sympathizers and supporters, are still capable of strengthening their organization in preparation for the conduct of more hostilities in the Lanao provinces and other vulnerable areas in Mindanao.

2. The Turaifie Group is undertaking propaganda to show that it is still a capable force to be reckoned with.

3. The BIFF is still equipped with 388 manpower and 328 firearms.

4. Mindanao, particularly Eastern Mindanao, continues to be the hotbed of communist insurgency and accounts for 47% of the total manpower, 48% of firearms, 51% of the affected *barangays* and 45% of guerrilla fronts nationwide.

5. Of the 14 active provinces in terms of communist insurgency, 10 are in Mindanao.

6. The Komisyon Mindanao (KOMMID) of the Communists Terrorists is now capable of sending augmentation forces, particularly party cadres, to Northern Luzon.

7. The infiltration, recruitment, indoctrination and political mobilization of indigenous peoples (IP) remain unabated with the support of party organizers from the urban areas.

8. The ASG is currently holding nine kidnap victims in captivity.

In all, General Guerrero offered the following as justification for the recommended extension:

> 1. The DAESH-inspired DIWM groups and allies continue to visibly offer armed resistance in other parts of Central, Western and

Eastern Mindanao in spite of the neutralization of their key leaders and destruction of their forces in Marawi City;

2. Other DAESH-inspired and like-minded threat groups such as the BIFF, AKP, DI-Maguid, DI-Toraype, and the ASG remain capable of staging similar atrocities and violent attacks against vulnerable targets in Mindanao, including the cities of Davao, Cagayan De Oro, General Santos, Zamboanga and Cotabato;

3. The CTs have been pursuing and intensifying their political mobilization (army, party and mass-base building; rallies, pickets, and demonstrations; financial and logistical build-up), terrorism against innocent civilians and private entities, and guerrilla warfare against the security sector, and public and government infrastructures;

4. The need to intensify the campaign against the CTs is necessary in order to defeat their strategy, stop their extortion, defeat their armed component, and to stop their recruitment activities;

5. The threats being posed by the CTs, the ASG, and the presence of remnants, protectors, supporters and sympathizers of the DAESH/DIWM pose a clear and imminent danger to public safety and hinders the speedy rehabilitation, recovery and reconstruction efforts in Marawi City, and the attainment of lasting peace, stability, economic development and prosperity in Mindanao;

6. The 2nd extension of the implementation of Martial Law coupled with the continued suspension of the privilege of the writ of habeas corpus in Mindanao will significantly help not only the AFP, but also the other stakeholders in quelling and putting an end to the on-going DAESH-inspired DIWM groups and CT-staged rebellion, and in restoring public order, safety, and stability in Mindanao; and

7. In seeking another extension, the AFP is ready, willing and able to perform anew its mandated task in the same manner that it had dutifully done so for the whole duration of Martial Law to date, without any reported human rights violation and/or incidents of abuse of authority.[64]

Analysis of the Factual Claims of the Government

In *Lagman v. Medialdea*, the majority observed there was no question that there was an armed public uprising in Marawi City. The only contention of the petitioners therein was that the armed hostilities did not constitute rebellion in the absence of the element of a culpable political purpose.[65] Their argument was found to be unmeritorious in view of the conclusion of the Court that the President had sufficient factual basis tending to show that actual rebellion existed.[66]

Under Section 18, Article VII of the Constitution, an extension of the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus* may be made by Congress, upon the initiative of the

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[64]Letter of AFP General Rey Leonardo B. Guerrero, pp. 3-4.
[65]*Lagman v. Medialdea*, supra at 54.
[66]Id. at 61.

President, for a period to be determined by it if the invasion or rebellion persists and public safety requires it.

Thus, the question posed to this Court in the instant cases is whether or not rebellion persists and public safety requires the extension.

Considering the facts alluded to by the President, Secretary of Defense Lorenzana, General Guerrero, and ultimately Congress, the answer is no. Their pronouncements in fact show that there is no armed public uprising that justifies the conclusion that rebellion persists.

With respect to RBH No. 4, the fact that the rebel groups have "continued to rebuild their organization through recruitment and training of new members and fighters to carry on the rebellion,"[67] or that the Turaifie Group was "monitored to be planning to conduct bombings,"[68] or that the remnants of the ASG "remain a serious security concern"[69] shows that there is no armed public uprising or taking up of arms against the Government. At most, what the facts show is that there is danger of an armed public uprising that may turn out to be imminent.

The President can always call on the armed forces to suppress an imminent danger of rebellion. The deliberation of the Constitutional Commission is clear in this regard:

> FR. BERNAS: Let me just say that when the Committee decided to remove that, it was for the reason that the phrase "OR IMMINENT DANGER THEREOF" could cover a multitude of sins and could be a source of a tremendous amount of irresistible temptation. And so, to better protect the liberties of the people, we preferred to eliminate that. So, we submit it to the body for a vote.
>
> MR. PADILLA: I would just like to state that the term OR IMMINENT DANGER THEREOF appears in the 1935 and 1973 Constitutions and it has not even resulted in a multitude of sins, temptations nor confusion.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Will Commissioner de Castro speak in favor of the amendment?
>
> MR. DE CASTRO: I am in favor of the amendment.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Commissioner de Castro is recognized.
>
> MR. DE CASTRO: Section 15 speaks of actual rebellion and actual invasion, if we eliminate "OR IMMINENT DANGER THEREOF." When there is already actual invasion or rebellion, the President no longer suspends the privilege of the writ of *habeas corpus* because we already have actual shooting. There is nothing more to be remedied by the Chief Executive. But when we put the words "OR IMMINENT DANGER THEREOF," perhaps they are still assembling; they are still preparing for their departure or their provisions for immediate rebellion. The Chief Executive then has the power to suspend the writ of *habeas corpus*, but with the situation I mentioned there is nothing more to suspend.

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[67] Resolution of Both Houses No. 4 dated 13 December 2017, p. 2.
[68] Id.
[69] Id.

> MR. REGALADO: Mr. Presiding Officer.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Commissioner Regalado is recognized.
>
> MR. RAMA: Mr. Presiding Officer.
>
> THE PRESIDING OFFICER (Mr. Bengzon): The Floor Leader is recognized.
>
> MR. REGALADO: I yield to the Floor Leader.
>
> MR. RAMA: I ask that Commissioner Concepcion be recognized.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Commissioner Concepcion is recognized.
>
> MR. CONCEPCION: **The elimination of the phrase "IN CASE OF IMMINENT DANGER THEREOF" is due to the fact that the President may call the Armed Forces to prevent or suppress invasion, rebellion or insurrection. That dispenses with the need of suspending the privilege of the writ of habeas corpus.** References have been made to the 1935 and 1973 Constitutions. The 1935 Constitution was based on the provisions of the Jones Law of 1916 and the Philippine Bill of 1902 which granted the American Governor General, as representative of the government of the United States, the right to avail of the suspension of the privilege of the writ of *habeas corpus* or the proclamation of martial law in the event of imminent danger. And President Quezon, when the 1935 Constitution was in the process of being drafted, claimed that he should not be denied a right given to the American Governor General as if he were less than the American Governor General. But he overlooked the fact that under the Jones Law and the Philippine Bill of 1902, we were colonies of the United States, so the Governor General was given an authority, on behalf of the sovereign, over the territory under the sovereignty of the United States. Now, there is no more reason for the inclusion of the phrase "OR IMMINENT DANGER THEREOF" in connection with the writ of *habeas corpus*. As a matter of fact, the very Constitution of the United States does not mention "imminent danger." In lieu of that, there is a provision on the authority of the President as Commander-in-Chief to call the Armed Forces to prevent or suppress rebellion or invasion and, therefore, "imminent danger" is already included there.[70] (Emphasis supplied)

The 15 violent incidents allegedly committed by the BIFF during the Martial Law period have not been described with sufficient particularity as to enable this Court to conclude that an armed public uprising with a culpable political purpose has been mounted by the BIFF against government forces. More important, these alleged violent incidents during the Martial Law period do not by themselves justify the extension.

Neither does the letter of the President dated 8 December 2017 point to the fact that an armed public uprising is still underway. He reported that at least 185 persons who had been sought to be arrested during Martial Law remained at large and, "in all probability, are presently regrouping and consolidating their forces."[71] He also stated that "Turaifie is said to be

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[70] I RECORD, CONSTITUTIONAL COMMISSION, 773-774 (18 July 1986).

[71] Letter of President Duterte to the Senate of the Philippines and House of Representatives, dated 8 December 2017, p. 3.

Hapilon's potential successor as Amir of DAESH Wilayat in the Philippines and Southeast Asia."[72] There is enough speculation in these statements to conclude that the Government is not even sure about the gravity of the threats that these "remnants" might pose. An impression of a foreboding rebellion is also given by the statement that "[t]heir activities are geared towards the conduct of intensified atrocities and armed public uprisings in support of their objective of establishing the foundation of a global Islamic caliphate and of a Wilayat not only in the Philippines but also in the whole of Southeast Asia."[73]

The President has alluded to 89 violent incidents initiated by the BIFF and 43 acts of terrorism committed by the ASG last year. Aside from the fact that these violent incidents and acts of terrorism have not been described with sufficient particularity, there is a clear possibility that most of them have already been cited as justification for the President's original proclamation of Martial Law and suspension of the privilege of the writ of *habeas corpus* and likewise for Congress' approval of the first extension.

That rebellion is potentially imminent is also shown by the letter of General Guerrero. He states that the remnants of the groups of Hapilon and the Maute brothers are "still capable of strengthening their organization with the help of their sympathizers and supporters in preparing for the conduct of more hostilities in the Lanao provinces and other vulnerable areas in Mindanao."[74]Notably, the Turaifie Group is not even mounting an armed uprising, as it is merely undertaking "propaganda to show that it is still a capable force to be reckoned with."[75]

That the BIFF is still equipped with 388 manpower and 328 firearms or that the ASG currently has nine kidnap victims held in captivity, while absolutely deplorable, cannot justify the extension of Martial Law and the suspension of the privilege of the writ of *habeas corpus*. While the BIFF may be armed, the statement fails to show that the firearms are being used for the conduct of a public uprising coupled with a culpable political purpose. It is also difficult to see the culpable political purpose behind the kidnap of nine innocent civilians.

The Inclusion of the CPP-NPA-NDF

It is clear from the letter of the President that the "decades-long rebellion" of the NPA had very little to do with the uprising of the DAESH-inspired DIWM, and whatever connection there was consisted mainly of their similarity in geographical location.

The Solicitor General believes otherwise. He posits that the CPP-NPA rebellion was already included as a ground for the declaration of Martial

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[72]Id.
[73]Id.
[74]Letter of AFP General Rey Leonardo B. Guerrero to the President through the Secretary of National Defense, p. 2.
[75]Id.

Law and the suspension of the privilege of the writ of *habeas corpus* in Proclamation No. 216, as well as in the request to Congress for the first extension:

> **JUSTICE CARPIO:**
> Thank you. Counsel, let['s] settle it. Just one more point. In the original declaration of martial law, only the Maute rebellion was mentioned specifically, correct?
> **SOLICITOR GENERAL CALIDA:**
> There were others, Your Honor.
>
> **JUSTICE CARPIO:**
> And other rebels? But not, no other specific rebellions? Maute or Maute group [DAESH] is ISIS inspired, but no and other rebels?
> **SOLICITOR GENERAL CALIDA:**
> Yes, Your Honor.
>
> **JUSTICE CARPIO:**
> Okay, so no specific mention of CPP-NPA rebellion. It's just other rebels.
> **SOLICITOR GENERAL CALIDA:**
> Yes, but it is subsume[d] under that term, Your Honor.
>
> **JUSTICE CARPIO:**
> Yes, okay. Now, in the first extension. There was also no also [sic] mention of CPP-NPA specifically it was not mentioned. Correct?
> **SOLICITOR GENERAL CALIDA:**
> Actually, Your Honor, the [P]resident mentioned it, Your Honor. And may I read for the record.
>
> **JUSTICE CARPIO:**
> First extension?
> **SOLICITOR GENERAL CALIDA:**
> Yes, Your Honor.
>
> **JUSTICE CARPIO:**
> As the government security forces intensified efforts during the implementation of martial law, one hundred eleven members of the New People's Army (NPA) had been encountered and neutralized while eighty-five forearms have been recovered from them.
>
> **JUSTICE CARPIO:**
> But what was [sic] the first extension merely extended the initial declaration. Correct?
> **SOLICITOR GENERAL CALIDA:**
> Yes, Your Honor.
>
> **JUSTICE CARPIO:**
> So what governs is the initial declaration? Because you were just extending it.
> **SOLICITOR GENERAL CALIDA:**
> Yes, Your Honor. But I mentioned the term.
>
> **JUSTICE CARPIO:**
> Yes.

SOLICITOR GENERAL CALIDA:
And other rebel groups includes the NPA, Your Honor.

JUSTICE CARPIO:
Yeah, but the first proclamation of the President in the first declaration mentions other rebels.
SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE CARPIO:
Without specifying what these other rebels are, other rebels aside from the Maute Group, there were other rebels.
SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE CARPIO:
Now, in this second extension, it says now, CPP-NPA?
SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE CARPIO:
Now, my question is, when the Constitution says that if the rebellion persists, then Congress may extend. When you use the word persist and extend, you [are] referring to the original ground for declaration of martial law. Correct?
SOLICITOR GENERAL CALIDA:
Yes, Your Honor. But as I've said, it covers the NPA because the Court can take judicial notice the oldest rebel group in the Philippines is the NPA. They have been fighting the government way back in 1960s, Your Honor.

JUSTICE CARPIO:
You are saying that when the Congress approved or approved the extension, the first extension, they were also referring to the CPP-NPA rebellion? Is that what you are saying?
SOLICITOR GENERAL CALIDA:
That's what I assumed, Your Honor.

JUSTICE CARPIO:
Okay, and also this Court, also when the Court approved.
SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE CARPIO:
When the Court said that it's constitutional, the Court understood that the rebellion that the ground for the declaration of martial law included the rebellion of the CPP-NPA?
SOLICITOR GENERAL CALIDA:
Yes.[76]

The Solicitor General is, of course, mistaken. Proclamation No. 216 was issued on the basis of the rebellion of the ISIS-inspired Maute Group. In *Lagman v. Medialdea*, the Court focused on the facts that had convinced the President that "there is probable cause or evidence showing that more likely

[76]TSN, 17 January 2018, pp. 190-193.

than not, a rebellion was committed or being committed."[77] The facts cited at the time are as follows:

> *a) Facts, events and information upon which the President anchored his decision to declare martial law and suspend the privilege of the writ of habeas corpus.*
>
> Since the President supposedly signed Proclamation No. 216 on May 23, 2017 at 10:00 PM, the Court will consider only those facts and/or events which were known to or have transpired on or before that time, consistent with the scope of judicial review. Thus, the following facts and/or events were deemed to have been considered by the President in issuing Proclamation No. 216, as plucked from and extant in Proclamation No. 216 itself:
>
> 1. Proclamation No. 55 issued on September 4, 2016, declaring a state of national emergency on account of lawless violence in Mindanao;
>
> 2. Series of violent acts committed by the Maute terrorist group including:
>
> a) Attack on the military outpost in Butig, Lanao del Sur in February 2016, killing and wounding several soldiers;
>
> b) Mass jailbreak in Marawi City in August 2016 of the arrested comrades of the Maute Group and other detainees;
>
> 3. On May 23, 2017:
>
> a) Takeover of a hospital in Marawi;
>
> b) Establishment of several checkpoints within Marawi;
>
> c) Burning of certain government and private facilities;
>
> d) Mounting casualties on the part of the government;
>
> e) Hoisting the flag of ISIS in several areas; and
>
> f) Capability of the Maute Group and other rebel groups to sow terror, and cause death and damage to property not only in Lanao del Sur but also in other parts of Mindanao;
>
> and the Report submitted to Congress:
>
> 1. Zamboanga siege;
>
> 2. Davao bombing;
>
> 3. Mamasapano carnage;
>
> 4. Cotabato bombings;
>
> 5. Sultan Kudarat bombings;
>
> 6. Sulu bombings;
>
> 7. Basilan bombings;
>
> 8. Attempt to capture Hapilon was confronted with armed resistance by combined forces of ASG and the Maute Group;
>
> 9. Escalation of armed hostility against government troops;

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[77] *Lagman v. Medialdea*, supra at 53.

10. Acts of violence directed not only against government authorities and establishments but civilians as well;

11. Takeover of major social, economic and political foundations which paralyzed Marawi City;

12. The object of the armed hostilities was to lay the groundwork for the establishment of a DAESH/ISIS *wilayat* or province;

13. Maute Group has 263 active members, armed and combat-ready;

14. Extensive networks or linkages of the Maute Group with foreign and local armed groups;

15. Adherence of the Maute Group to the ideals espoused by ISIS;

16. Publication of a video showing Maute Group's declaration of allegiance to ISIS;

17. Foreign-based terrorist groups provide financial and logistical support to the Maute Group;

18. Events on May 23, 2017 in Marawi City, particularly;

a) at 2:00 PM, members and sympathizers of the Maute Group and ASG attacked various government and privately-owned facilities;

b) at 4:00 PM, around fifty (50) armed criminals forcibly entered the Marawi City Jail; facilitated the escape of inmates; killed a member of PDEA; assaulted and disarmed on-duty personnel and/or locked them inside the cells' confiscated cellphones, personnel-issued firearms, and vehicles;

c) by 4:30 PM, interruption of power supply; sporadic gunfights; city-wide power outage by evening;

d) from 6:00 PM to 7:00 PM, Maute Group ambushed and burned the Marawi Police Station, commandeered a police car;

e) BJMP personnel evacuated the Marawi City Jail and other affected areas;

f) control over three bridges in Lanao del Sur, namely Lilod, Bangulo, and Sauiaran, was taken by the rebels;

g) road blockades and checkpoints set up by lawless armed groups at the Iligan-Marawi junction;

h) burning of Dansalan College Foundation, Cathedral of Maria Auxiliadora, the nuns' quarters in the church, and the Shia Masjid Moncado Colony;

i) taking of hostages from the church;

j) killing of five faculty members of Dansalan College Foundation;

k) burning of Senator Ninoy Aquino College Foundation and Marawi Central Elementary Pilot School:

l) overrunning of Amai Pakpak Hospital;

m) hoisting the ISIS flag in several areas;

n) attacking and burning of the Filipino-Libyan Friendship Hospital;

> o) ransacking of a branch of Landbank of the Philippines and commandeering an armoured vehicle;
>
> p) reports regarding Maute Groups' plan to execute Christians;
>
> q) preventing Maranaos from leaving their homes;
>
> r) forcing young Muslims to join their group; and
>
> s) intelligence reports regarding the existence of strategic mass action of lawless armed groups in Marawi City, seizing public and private facilities, perpetrating killings of government personnel, and committing armed uprising against and open defiance of the Government.[78]

During the Oral Arguments for the instant petitions, the Solicitor General argued that the atrocities committed by the NPA were in fact already included in Proclamation No. 216 as shown by the use of the phrase "other rebel groups" in the sixth WHEREAS Clause. According to him, the NPA was not categorically identified in view of the then ongoing peace talks with the CPP-NPA-NDF:

> **JUSTICE TIJAM:** Considering that the government made mentioned [sic] of the NPA rebels as one of the reasons for asking for the extension of martial law, this does not seem to fall within the ambit of the word persist since the original declaration was made on the basis of the rebellion committed by the Maute in Mindanao and no mentioned [sic] whatsoever was made of the NPA?
>
> **SOLICITOR GENERAL CALIDA:** Actually, there's a phrase there, Your Honor, that will include the NPA in the proclamation of the President, Proclamation No. 216, there's a phrase there which says, 'of other rebels.' And because there [were] peace negotiations during that time as a matter of comity and to the other party, the NPA was not explicitly included there but if you read the entire contents of the letter of the President and the proclamation of the President, Your Honor, it is very clear that all rebels including NPA which has waged the longest time of rebellion in the Philippines they are included there. In fact, Your Honor, in the recommendation of the Chief of Staff the NPA was explicitly mentioned in that recommendation.[79]

Even if we were to accept the argument that the atrocities of the NPA were already included among the grounds justifying the issuance of Proclamation No. 216, the reality is that when the Court upheld the sufficiency of the factual basis for the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus* in *Lagman v. Medialdea*, no facts involving the NPA were examined by this Court for the determination of probable cause or of evidence showing that, more likely than not, a rebellion had been committed or was being committed.

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[78] Id. at 54-58.
[79] TSN, 17 January 2018, pp. 176-177.

Clearly, for the purposes of the Court in *Lagman v. Medialdea*, Proclamation No. 216 did not include the "decades-long rebellion" of the NPA as factual basis.

Thus, for the Court now to determine that rebellion "persists," it can only do so by answering the question of whether or not the rebellion of the ISIS-inspired Maute Group or of the DAESH-inspired DIWM persists. The addition of a new actor as factual basis for arguing that a rebellion persists is self-contradictory and cannot be accepted.

Whether "defanged" or not, the present extension of the period of effectivity of the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus* has not been shown to be necessary for public safety. Petitioners are more than justified in reminding this Court and respondents of the lessons of Martial Law past.

Accordingly, I vote to declare that there is **no sufficient factual basis for the extension** of the period of effectivity of the declaration of Martial Law and the suspension of the privilege of the writ of *habeas corpus* in the whole of Mindanao, and that Resolution of Both Houses No. 4 dated 13 December 2017 should be struck down as **unconstitutional**.

MARIA LOURDES P. A. SERENO
Chief Justice