

Constitutional Performance Assessment in the Time of a Pandemic: The 1987 Constitution and the Philippines' COVID-19 Response

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Introduction

COVID-19 came to the Philippines in January 2020. The first three cases were imported. The first was a Chinese tourist confirmed positive on January 30, 2020; the second and third cases (a returning overseas Filipino worker [OFW] and another Chinese tourist) were confirmed in February. The first COVID death was recorded in early February. Community transmission was declared in early March with three new confirmed cases.

As of July 19, there are already a total number of 67,456 confirmed cases, with 43,160 active cases, 1,831 deaths, and 22,465 recoveries (DOH 2020). While the National Capital Region (NCR) or Metro Manila is considered to be the epicenter of the virus, recent rising cases point to Cebu City and Cebu Province in Central Visayas (Region 7) as emerging COVID-19 hotspots.

Building off the Constitutional Performance Assessment of the 1987 Philippine Constitution Project completed in partnership between the International Institute for Democracy and Electoral Assistance (International IDEA) and the University of the Philippines Center for Integrative and Development Studies (UP CIDS) in 2019, with its Summary of Findings published early this year (Atienza et al. 2020), this Discussion Paper examines key constitutional issues to watch out for as the Philippines responds to COVID-19. These issues cut across the constitutional design areas assessed as part of the original assessment, namely: (a) electoral institutions; (b) legislative–executive relations; (c) judiciary; (d) accountability institutions; (e) local governments; (f) rights; (g) security sector; (h) economy and labor; and (i) citizenship and equality.

The earlier assessment was based on “an adapted application of International IDEA’s constitutional performance assessment methodology. This methodology looks at how a constitution is enduring by examining constitutional design areas (institutions and issue areas), their implementation and how well they are performing in terms of promoting the vision and guidance that underlie the constitution” (Atienza et al. 2020, 12). The 1987 Constitution was reviewed first using a set of internal criteria identified with reference to the Constitution’s self-defined goals, and second, a set of external criteria which include democratization; decentralization; social justice, human rights, and gender equality; peace and conflict resolution; and economic development. The assessment methodology requires an examination of compliance with the Constitution in a thin and thick sense. “Thin compliance simply refers to whether government branches and institutions responded to their mandate in the Constitution” (Atienza et al. 2020, 21), e.g., to pass legislation, form policy, or perform other specific actions, while “thick compliance” is “more complex and requires a qualitative assessment of whether the Constitution has, for example, created a stable system of governance or equality between citizens, deepened democracy and transformed conflict” (ibid.).

The Assessment concluded that overall:

[T]here is only thin compliance with internal criteria used in the performance assessment. This means that many of the technical requirements in the Constitution have been met in terms of setting up mandated institutions, holding processes such as elections and enacting necessary laws and actions. However, thick or substantial compliance in terms of meeting the goals set in the Constitution is still wanting. Furthermore, some laws mandated by the Constitution have not yet been enacted ... Externally, although notable progress has been made, there is still limited or thin compliance in terms of promoting substantial democratization; decentralization; social justice, human rights and gender equality; peace and conflict resolution; and economic development. (Atienza et al. 2020, 49)

This Discussion Paper analyzes how the pandemic has affected the performance of the 1987 Constitution, as well as what the findings from the initial Performance Assessment suggest are areas and trends to watch out for as the Philippines continues to respond to COVID-19.

The Philippine Government's Response to the Pandemic

With the first case of COVID-19 detected in the Philippines in late January, different sectors already suggested that the government respond proactively and preventively. At first, the administration downplayed the virus and claimed that the country is on top of the situation. However, in early February, the government relented to public pressure and imposed a travel ban on flights from Wuhan (the epicenter of the virus in China), Macau, and Hong Kong. By February, voluntary repatriation of Filipinos from Wuhan was initiated.

After the first three cases of local transmission, President Rodrigo Duterte declared on March 9 a state of public health emergency in the country, and suspended classes in Metro Manila, or the National Capital Region (NCR). On March 12, a partial lockdown of Metro Manila from March 15 to April 14 was announced, together with suspension of land, domestic air, and domestic sea travel to and from Manila. On March 15, NCR and Cainta, Rizal, were placed under community quarantine. On March 16, the entire Luzon group of islands was placed under enhanced community quarantine. By March 17, the President signed a proclamation placing the country under a state of calamity. Various forms of lockdown continued around the country throughout April. After May 15, there was a gradual easing of lockdown in certain areas depending on the number of COVID-19 cases, with the main aim of enabling economic recovery. According to government data, the Philippine economy shrank by 0.2 percent in the first quarter of 2020 and “is projected to have lost as much as P1.1 trillion during the first 45 days of the lockdown” (Cruz 2020). NCR’s enhanced community quarantine was lifted on June 1, and the area is now under general community quarantine, which allows some economic activities to resume and limited public transportation to operate. Most of the rest of the country is now in modified general community quarantine, the loosest quarantine phase that permits many businesses such as restaurants and malls to open, and some social and physical activities with some limitations. Due to a spike in cases in the area, Cebu City is placed back under enhanced community quarantine.

In terms of legislation, on March 23 and 24, the two Houses of Congress approved the *Bayanihan* to Heal as One Act (Republic Act [RA] 11469), which was signed into law by President Duterte on March 25. The law gave the President some special powers to optimize efforts in the pandemic response. The law has eight policy objectives, which include mitigating the transmission of the virus; mobilizing the provision of basic necessities to families and individuals affected by the imposition of the community quarantine; undertaking measures to prevent overburdening the healthcare system; immediately and aptly providing healthcare to those affected by the virus; providing recovery and

rehabilitation in the form of social amelioration and provision of safety nets to all affected sectors; ensuring sufficient, adequate, and readily available funding; partnering with the private sector and other stakeholders to deliver measures and programs quickly and efficiently; and promoting and protecting the collective interests of Filipinos.

The law expired on June 25 and the Office of the President plans to request the two Houses of Congress to pass a second *Bayanihan* law focused on recovery.

On the positive front, the government was able to improve and set up facilities dedicated to COVID-19 that prevented the Philippines' overall healthcare capacity from being overwhelmed by the pandemic during the strict lockdown phase. Slowly, there were improvements in testing, but still not enough due to operational issues such as lack of supplies and personnel. There are also problems in terms of contact tracing as there are not enough personnel to support these efforts. Due to the lifting of strict lockdown measures in the country, however, the cases are rising and many hospitals have already reached full capacity again.

In terms of global comparisons, the V-Dem Pandemic Democratic Violations Index (PanDem), which captures the extent to which state responses to the pandemic violate democratic standards for emergency responses, mentioned that the Philippines is one of seven countries with a high risk of pandemic backsliding (V-Dem 2020). In International IDEA's new COVID-19 Monitor, it pointed out three worrying areas of concern from a democratic and human rights standpoint; these are in the areas of freedom of expression, media integrity, and predictable enforcement (International IDEA 2020).

Constitutional Design Areas: Trends and Warning Signs for the Pandemic Response

This section links the previous findings of the Constitutional Performance Assessment of the 1987 Constitution along several constitutional design areas to the key constitutional issues to watch out for as the country responds to the COVID-19 pandemic. Each constitutional design area will recap the relevant points in the previous assessment and how these findings connect with certain constitutional issues arising from the country's response.

Electoral Institutions

Based on the findings of the Performance Assessment, elections under the 1987 Constitution have largely taken place regularly; thus, there is thin compliance with the Constitution's mandate for free, fair, and regular elections, and generally peaceful transfers of power that promote democratization in general (Atienza et al. 2020, 26). There were several alterations in the schedule of holding the *barangay* (community-level local governments) and *Sangguniang Kabataan* (youth council) elections, but their schedules are not set in the Constitution.

As there are no regularly scheduled national and local elections this year, little impact from the pandemic has been observed in this constitutional design area. However, COVID-19 led to the postponement of a plebiscite in the province of Palawan that will decide on the ratification of a Congressional decision signed by the President into law that seeks to divide the province into three provinces. The plebiscite was originally scheduled to be on May 11. Furthermore, registration for new voters nationwide in preparation for the 2022 elections has been suspended four times to date (at least until the end of August). The Commission on Elections (COMELEC) stated that the suspension was activated to allow time to put in place preventive and protective measures against COVID-19 during the voter registration process (Hallare 2020).

The Constitutional Performance Assessment findings point to the continuing challenge of inclusivity of electoral processes for all qualified Filipinos, particularly for persons with disabilities, senior citizens, and illiterates, in order to achieve the broader goals of democratization and social justice. The challenge for COMELEC and Congress now is how to improve the voter registration process when it resumes, and prepare for the 2022 elections to make the processes more efficient and inclusive, despite the new precautions required due to the pandemic.

The government has conducted some measures with the potential to improve inclusivity in voting, thereby deepening democracy and allowing for improved performance of the 1987

Constitution in accordance with one of its key goals. For example, one COMELEC Commissioner announced on May 19, 2020 that COMELEC approved a test run for a mobile voting application catering to overseas voters. This is supposedly in keeping with Section 28 of RA 10590—the law providing for a system of absentee voting for qualified overseas Filipinos—which allows COMELEC to “explore other more efficient, reliable, and secure modes or systems, ensuring the secrecy and sanctity of the entire process, whether paper-based, electronic-based, or internet-based technology or such other latest technology available, for onsite and remote registration and elections and submit reports and/or recommendations to the Joint Congressional Oversight Committee ” (Patinio 2020a). The same Commissioner, in another release, also raised the prospect of allowing the “marginalized” such as “PWDs, IPs, elderly and pregnant women” to cast their votes ahead of other voters and exploring such mechanisms as voting by mail (Patinio 2020b). The Performance Assessment findings highlighted that Congress had yet to “design a procedure” for persons with disabilities and illiterates to vote without assistance as required by the Constitution (Atienza et al. 2020, 28).

Additionally, Senate Bill 1516 was filed, allowing voter registration through the development of an automated, online system which would ensure social distancing and minimize the risk of contracting the disease (Senate of the Philippines 2020). Philippine elections are usually characterized by long lines of people in crammed voting precincts, something that must be avoided and managed now with knowledge about disease transmission prevention and new safety precautions.

Add to all these considerations even during a pandemic is the Assessment’s findings that although electoral procedures set up by the 1987 Constitution have operated regularly since its ratification, there remains room for improvement in terms of ensuring that elections are competitive and inclusive (Atienza et al. 2020, 28). There is no assurance at this time of the pandemic that the proposed constitutional amendments, including making the provision on limits to political dynasties self-executing, even coming from the Department of the Interior and Local Government (DILG) (Andrade 2020), and other suggested reforms such as proposed laws on elections of party-list representatives and stronger political parties suggested by the Assessment, will be prioritized.

An additional angle for consideration that has been raised recently but that has not been discussed extensively in the previous Assessment is that of direct democracy. The 1987 Constitution allows for people’s initiative and referendum. An enabling law (The Initiative and Referendum Act or RA 6735) was passed in 1989. However, no national people’s initiative attempt has succeeded to date. Just recently, the rejection of the House Franchise Committee to give media giant ABS-CBN a new franchise has led to immediate plans of legal experts to explore the people’s initiative process to grant the ABS-CBN franchise. These legal experts and supporters of the media network have launched a nationwide petition to gather the required signatures. While feasible, it is more difficult to collect signatures during a pandemic, and COMELEC will still have to verify the signatures in the petition before holding a national referendum (Navallo 2020).

Legislative–Executive Relations

The Constitutional Performance Assessment findings suggested that there is thin compliance with the Constitution in terms of designing institutions that would bring greater oversight powers to the legislative branch, in pursuit of representative democracy and separation of powers. Legislative–executive relations in the Philippines is firmly established in the 1987 Constitution. However, the Performance Assessment findings indicated that current political institutions and their unintended consequences, coupled with weak political parties and pork-barrel politics, inhibit the establishment of a strong and independent legislature

(Atienza et al. 2020). The onset of public emergencies and crises such as COVID-19 gives the executive branch immense agenda-setting powers over Congress despite the Constitution's design for separation of powers. The Philippines' past experience with crises bears this out as highlighted by the Performance Assessment. After a 1989 coup attempt that damaged the economy, President Corazon Aquino was granted emergency powers by Congress. In the 1990s, then President Fidel Ramos faced a looming water crisis that threatened his bid for rapid economic growth. Congress granted Ramos emergency powers to privatize water companies in the country and overhaul water governance and its regulatory mechanisms.

During the pandemic, the trends identified in the Performance Assessment have only been further exacerbated, with greater consolidation of power in the executive branch and a further weakening of separation of powers, as the legislative branch has not taken deliberate measures to exercise its oversight functions over the executive.

More than a week after the declaration of a public health emergency, President Duterte asked Congress for emergency powers, citing the need to realign resources in order to combat the spread of COVID-19. The proposal was taken on by the House, and came to be known as the *Bayanihan* to Heal as One Act. In the earlier Assessment (Atienza et al. 2020, 29), there have been questions on the excessive use of the constitutional provision allowing an expedited approval of a legislative measure since 1987. Citing public emergencies, the provision allows the President to certify a bill as urgent due to public emergencies. Under this set-up, Congress does away with certain crucial steps in the normal legislative process that ensure important aspects of democratic deliberation, such as the three separate days for three readings. However, a report on emergency powers granted to Philippine presidents argues that “the slippery slope of frequent recourse to emergency rule is the ever-present possibility that such will slide into a permanent and unconstitutional regime” (La Viña et al. 2008, 1).

The swift approval of the law under Article VI Section 26(2) of the Constitution suggests the heightened influence of the President vis-à-vis Congress in times of emergency. The support of blocs allied with Duterte in both Houses of Congress likewise assured the *Bayanihan* Act would be quickly enacted into law. Moreover, prior to the onset of the pandemic, Duterte remains popular, with more than 70 percent net satisfaction rating among Filipinos (SWS 2020). There is a considerable body of literature indicating the positive relationship between popular presidents and congressional approval of their agenda (Lovett et al. 2015).

The *Bayanihan* Act gave Duterte 30 emergency powers, which, among others, provided a Social Amelioration Program to Filipinos to cushion the economic impacts of the pandemic, and the restrictions on public transportation. It also provided hazard pay and allowance to health workers who are the so-called “frontliners” in the fight against the virus. As a measure of legislative oversight, Congress required the President to submit reports on the implementation of the law, which was to take effect only for three months. As of June 2020, Duterte submitted his 14th Report to Congress (Aguilar 2020). Currently, there is little information as to the extent Congress has scrutinized these reports or how much deliberation has surrounded their submission. Ideally, Congress should examine these reports prior to the planned second version of the *Bayanihan* Act, which was expected after the legal lapse of the law on June 24, 2020.

Although the powers granted to the President under the *Bayanihan* Act were not extreme, critics still argue that the grant of emergency powers was unnecessary as the emergency could have been addressed without Congress delegating its powers to the executive. According to La Viña (2020), “Congress must not easily surrender its power to legislate, as well as its oversight and budget powers. It can provide flexibility to the President and enact supplementary budgets.” He reiterates that “In sum, emergency powers should only be a last

resort, because they ultimately grant to the executive a wide array of powers that is heavily guarded against by the Bill of Rights and the provisions on the independence and separation of the 3 branches of government.” In fact, a former dean of Laguna State Polytechnic University filed before the Supreme Court to declare the *Bayanihan* Act unconstitutional based on “‘undue delegation’ of legislative power to the President and its ‘usurpation’ when the latter issued proclamations declaring a state of calamity and a state of public health emergency in the country” (Terrazola 2020). The Supreme Court dismissed the petition on the ground that the respondents “failed to show grave abuse of discretion” (CNN Philippines 2020).

Aside from the fast grant of emergency powers to President Duterte under the *Bayanihan* Act, two other incidents manifested the immense hold of the President and the executive branch over Congress during the pandemic. On June 1, 2020, Duterte certified as “urgent” an amendment to the Human Security Act of 2007. Dubbed as the “Anti-Terrorism Law,” the measure is feared to potentially violate basic human rights due to its draconian provisions, foremost of which is the creation of a Council appointed by the President that can authorize the detention of critics of the administration without warrants for 14 days. Civil society groups and the opposition in the Senate protested the passage of the law and its alleged urgency in the midst of the country’s fight against COVID-19. On June 3, 2020, the House of Representatives approved the version of the Bill (passed by the Senate in 2019) without much deliberation due to the “urgent” certification by the President. By approving the Senate version without changes, the lower House avoided a bicameral conference committee which could have delayed the law’s final approval, as it would have allowed for the opposition to ask open questions and thereby shape the language of provisions. Under the Rules of both the House and the Senate, when both Houses of Congress have different versions of a proposed law’s key provisions, a bicameral meeting is convened to reconcile a unified version. Although the committee is not allowed to amend the entire bill, a deadlock would have stalled the measure’s approval.

The second issue that demonstrated President Duterte’s hold on Congress is the much talked about non-renewal of the ABS-CBN franchise. ABS-CBN is the country’s largest media network and is perceived by Duterte and his allies as critical of the administration. The President has himself issued statements expressing his desire to close the network. In May 2020, the National Telecommunications Commission issued a cease and desist order to the network, prompted by pressure from the Office of the Solicitor General. Congress filed a bill extending its franchise until October 2020. However, a revised bill was refiled that would now allow the network a fresh 25-year franchise. The series of hearings since May 26, 2020 saw legislators close to Duterte interrogating the network on a range of issues such as ownership and labor issues. While this was happening, the public has been reeling from a pandemic that has caused unemployment and a potential economic crisis. For some, the spectacle of the ABS-CBN drama distracts Congress from its main purpose at the time, which is to provide the necessary direction post-COVID-19 and how to recover from its severe impact.

Overall, the above discussion shows that there is thin compliance in terms of enhancing the separation of powers of the executive and legislative branches. The government response to the pandemic is evidence of the President’s power over Congress, and therefore the limited impact of constitutionally entrenched separation of powers in ensuring meaningful oversight or accountability of the executive branch. In this way, the response to the pandemic has highlighted the Performance Assessment’s earlier findings (Atienza et al. 2020, 29), indicating there is only thin compliance with the Constitution’s goal of providing greater power to Congress in response to the post-Marcos regime.

The Judiciary

As found in the Constitutional Performance Assessment, the 1987 Constitution gave many powers to the judiciary, particularly the Supreme Court, with the goal of making it independent from the other two branches of government. However, the performance of its functions is constrained by pressures from the two other branches of government, as well as by limits in its resources (Atienza et al. 2020, 32). The judiciary is still lacking in efficiency and accessibility to all citizens, regardless of social stature, which constrains its performance in the area of democratization and social justice.

COVID-19 further complicated the judiciary's existing challenges, though some positive developments can be opportunities for institutionalizing innovative reforms in the future. When lockdowns were announced in March, legal proceedings were also affected. For a few weeks, courts were closed, worsening existing backlogs. In addition, reported infections of COVID-19 of persons deprived of liberty (PDLs) in different detention facilities restrained the movement and travel of PDLs, judges, and other court personnel. The Supreme Court acted decisively by partnering with a software company to improve the efficiency and productivity of legal proceedings through videoconferencing hearings in Metro Manila and selected cities nationwide. At least, cases are still acted on while complying with government's social distancing and work from home guidelines. This is an example of an innovation that was introduced to ensure the broader goals of access to justice and rule of law promoted by the 1987 Constitution and thereby improve constitutional performance, even in the pandemic.

As documented by many rights, media, and academic groups, the Philippines has the most congested penal system in the world—even before the pandemic. In order to decongest jails and limit the spread of COVID-19, the Supreme Court revised procedures to release inmates, particularly low-level offenders and sick and elderly prisoners at the earliest possible time (Aben 2020). The revised procedure, as well as the institution of videoconferencing hearings, expedited the release of more than 22,500 PDLs as of May 2020 (Murcia 2020), though human rights groups said that there are more PDLs, especially political detainees, needing to be released. Courts restarted full operations on June 1 but only with essential (skeletal) staff; videoconferencing hearings will continue for cases involving PDLs but the other court proceedings and processes, unfortunately, have to be done physically.

The Supreme Court also allowed the e-filing of complaints, petition for bail, and submission of requirements for bail to minimize physical contact in judicial proceedings during the strict lockdown period. This is a historic and significant development that allows the courts to continue operating in a pandemic in order to not result in further delays in delivering justice. However, for these developments to further benefit all stakeholders and all regions of the country beyond the pandemic, there should be sufficient budget for all courts in the country to develop the technical infrastructure, train personnel and other stakeholders, and make mechanisms more accessible for indigents and persons with disabilities—issues that were already identified in the findings of the Performance Assessment as challenges for the judicial sector (Atienza et al. 2020, 34–35).

Videoconferencing, digitization, and simplification of procedures are definitely important to continue with court procedures beyond the pandemic, but access to justice is still an important challenge for the judiciary. The pandemic has put additional stresses on the Philippine justice system, as also seen in the sections on executive–legislative relations and rights, as cases of abuse of power (including that of the police), human rights violations, weaponization of the law, and impunity during the pandemic, will further add to the issues that need to be resolved by courts, especially the Supreme Court.

Now, additionally, the Supreme Court is inundated by petitions from different sectors as regards the constitutionality of the Anti-Terrorism Act of 2020 (RA 11479), particularly on the grounds that it violates provisions on human rights, as well as the rule of law and the oversight functions of both the judiciary and the legislature. As former Supreme Court Chief Justice Artemio Panganiban wrote in his column in the *Inquirer*, the fact that various sectors brought their petitions to the Court is proof that there is public trust in the institution; however, he also said that “it behooves the court to exert every effort to be worthy of the trust reposed by the parties on their merits” (Panganiban 2020). As the Constitutional Performance Assessment found, the judiciary, particularly the Supreme Court, has to also prove itself as an independent branch of government that can side with the Constitution and the interests of vulnerable people as it had in previous landmark cases (Atienza et al. 2020, 33).

Accountability Institutions

As reported in the Constitutional Performance Assessment, independent constitutional bodies—in particular, the Civil Service Commission (CSC, the government’s personnel system), COMELEC (which safeguards elections), and the Commission on Audit (COA, tasked with safekeeping public funds)—were included in the 1987 Constitution not only to safeguard democratic institutions, but to ensure that government can be held accountable to the citizens and the constitutional process as part of a broader goal of independent and expert oversight of different government functions. However, the Assessment also found that while these bodies provide important additional checks on major institutions of power, institutional incapacity can hamper their efforts. Moreover, the independence of accountability institutions is sometimes threatened by other agencies (Atienza et al. 2020).

When Metro Manila was placed in a lockdown March 16, 2020, operations also halted for many government offices headquartered in the metropolis. In many parts of the world where COVID-19 has taken its toll, governments quickly resorted to alternative work arrangements to ensure the delivery of public services. A Commission on Audit and Department of Budget and Management (COA-DBM) joint circular issued on March 19, 2020 enjoined government agencies, including local governments, to allow contract of service and job order workers to engage in alternative work arrangements such as work from home schemes, skeletal workforce, compressed work week, and staggered work hours, as well as to provide appropriate technologies to reduce face to face contact (COA-DBM Joint Circular 1, s. 2020). However, Civil Service Commission Resolution No. 2000540, which allowed a number of alternative work arrangements for the government sector while the country is in a state of public health emergency, only came out on May 7, 2020, suggesting that government has been having difficulties coping with the new normal workplace in the pandemic (Dancel 2020).

The *Bayanihan* Act authorized the executive branch to seek alternative work arrangements in order to allow personnel in key government institutions to continue to work safely during the health crisis. These arrangements also ensure staffing for accountability institutions, which monitor government operation and the proper delivery of public funds and public services. However, adopting these arrangements can be a challenge in a country where the government has yet to fully embrace e-governance (Lim 2018), where home broadband speed is among the lowest in the world (Marcelo 2017), and where the lack of public transport hounds the daily commuter.

For its part, the Commission on Audit as the watchdog of public funds has relaxed audit compliance under the Government Procurement Reform Act (RA 9184) and allowed the negotiated procurement of goods, infrastructure projects, and consulting services directly related to the mitigation and containment of COVID-19 as a public health emergency. The

general rule is that the government can only make purchases through competitive bidding. By allowing negotiated procurement, the waiting time for the purchase of essential goods in emergency cases is cut as agencies are allowed to directly negotiate a contract with a technically, legally, and financially capable supplier.

The contingent nature of COVID-19-related funds poses practical challenges to both state auditors and agency accountants who are affected by travel and quarantine restrictions. And yet, COA's oversight function becomes all the more critical when the nature of disbursement does not follow regular government processes, such as in the case of appropriations and procurements made in response to the pandemic. Aside from billions that Congress allocated to the executive department, the government also incurred loans that drove the country's debt to a new high (De Vera 2020). Already, some members of the Senate have been calling for immediate audit of funds released under the *Bayanihan* Act, especially after news broke of the Department of Health's overpriced procurements and slow contact tracing efforts (Lozada 2020).

While we can credit both CSC and COA, together with COMELEC, whose initiatives were discussed earlier in the Electoral Institutions section of this Discussion Paper, in thinking of ways to respond more effectively in their respective areas to the challenges brought about by COVID-19, they will have to exert more oversight in making sure that all processes, personnel, and units under their jurisdiction are accountable in this particular period of the pandemic, especially in implementing the provisions of the *Bayanihan* Act.

Local Governments

The Constitutional Performance Assessment findings highlighted the fact that there are many exemplary local government units (LGUs) that are able to deliver services and perform the functions expected of them by the Constitution and the 1991 Local Government Code (RA 7160), which significantly devolved powers to LGUs. However, not all LGUs are able to do this due to a number of constraints, including lack of resources and skilled personnel, patronage, low participation of people, among others (Atienza et al. 2020, 37–38). Therefore, the goals of having strong local governments and achieving decentralization and local autonomy have not yet been fully actualized under the 1987 Constitution, since the capacity of LGUs is uneven. These Performance Assessment findings have proven true during the COVID-19 pandemic. While the government has relied on and deputized LGUs to deliver services, their genuine autonomy is restricted by the more top-down style of the national government in handling the pandemic, which is in contrast with the principle and goal enshrined in the Constitution.

Since COVID-19, there have been a number of LGUs led by fast-thinking and innovative mayors both within and outside the NCR, which have been proactive not only in trying to mitigate the spread of the virus in their localities, but in dealing with the dislocation of constituents and other effects of the lockdown (see for example Serafica 2020; Rappler 2020). Some of these LGUs had good coordination with national agencies, but some had to work with other sectors in the absence of clear instructions from the national government, particularly in the beginning of the pandemic. These LGUs and mayors had at their disposal relatively larger incomes and resources compared to other LGUs, skilled local bureaucracy, good data management and evidence-based decision-making, good partnerships with the private sector and civil society groups, and participatory mechanisms. However, some LGUs failed to meet the challenges of COVID-19 and the responsibilities during the crisis because of limited resources, lack of good management skills, the dominance of patronage politics, corruption, and other problems. This inequity in capacity and access to resources among LGUs, and how it impacts consistency in effective service delivery, was highlighted by the

Performance Assessment findings (Atienza et al. 2020, 37–42). This trend is seen in the pandemic and has consequences on the quality of response.

The Duterte administration, which initially championed a shift to federalism, and still officially advocates local and regional development, paradoxically has also not been supportive of the full development of local autonomy and devolution. The Performance Assessment suggested that the dominance of certain national agencies also sometimes stifles the capacity of LGUs to deliver the mandated responsibilities (Atienza et al. 2020, 39). Since 2016, the attitude of the President has mostly been top down, and the administration looked to LGUs as simply implementers of national government policies. With the pandemic, especially before the passage of the *Bayanihan* Act, LGUs were ordered to simply follow the President and the Inter-Agency Task Force on Emerging Infectious Diseases (IATF) and were threatened with being sued if they did not follow the changing guidelines of the IATF, as well as the confusing and contradictory pronouncements of the President (Rañada, Talabong, and Gotinga 2020). Decisions, including declaring lockdowns, were mostly made at the top, with very limited coordination or consultation with LGUs. It was only around April that the IATF realized that they needed to coordinate and work with LGUs if the goals of containing the virus and delivering assistance and services to the people were to be pursued. The national government is also quick to scapegoat LGUs and local officials when programs face problems in implementation—this has been seen in the pandemic response as well.

Perhaps one potential development of the pandemic is that there might be more roles for regional bodies or groupings of LGUs in the future as well. For instance, the Metro Manila Development Authority is the only local government representative in the IATF. Regional Inter-Agency Task Forces were also eventually created to be the local counterparts of the IATF, though they are supervised by a Cabinet member assigned to the region by the President. In the case of the newly-created Bangsamoro Autonomous Region, the regional government has sole responsibility over healthcare and policy as per the Bangsamoro Organic Law. The regional government has been trying its best to address the pandemic by issuing a quick response fund to LGUs, imposing limits on religious gatherings, revising Islamic burial rituals to address health protocols regarding COVID-19, creating its own regional Inter-Agency Task Force on COVID-19, and providing additional funds to rural health units and public hospitals (Cats-Baril 2020, 6). This experiment with autonomy, if it proves to enhance responsiveness in the face of the pandemic, might inspire greater decentralization in the Philippines in the future. The pandemic response has demonstrated the need for a stronger role of LGUs and the regions, not only in economic planning and implementation (Atienza et al. 2020, 40) but particularly in localizing responses to crises and problems, even if they need to coordinate with national agencies. This role would enable realization of the Constitution's goals of local empowerment, autonomy, decentralization, and development (which are part of the Performance Assessment criteria), improving constitutional performance towards those goals.

Rights

As discussed in the Constitutional Performance Assessment findings, the 1987 Constitution ensured that human rights are observed and enforced to respond to violations made during the Marcos regime. As such, it established the independent Commission on Human Rights in Article XIII (Atienza et al. 2020, 41–43). The Constitution also includes a Bill of Rights in Article III, Sections 1 to 22, which contains the right to life, liberty, property, speech, assembly, expression, information, travel, among others. However, the Performance Assessment findings suggested that despite this thin compliance in establishing institutions for rights protection, many of these rights are not exercised freely by Filipinos.

With the onset of COVID-19 in the Philippines, some of these rights have been further compromised mainly due to the Duterte administration's response to the pandemic. To mitigate the impact of the crisis, the Philippine Congress acted swiftly to allocate budget for social amelioration, and ensure food and needed medical supplies by approving the *Bayanihan* Act. It gave Duterte US\$5.4 billion to address the pandemic. The measure instituted a National Action Plan whose implementers are largely from the military and the police, essentially increasing the trend of militarization of government in the Philippines. While it set the nation's direction in addressing the impact of the virus, its implementation, as well as the ambiguity in some of its provisions, resulted in violations of civil liberties that have been enshrined in the Bill of Rights.

The Constitutional Performance Assessment found that extra-judicial killings worsened in the time of Duterte, bringing back Marcos-style human rights violations (Atienza et al. 2020, 42). There are indications that Duterte is carrying over discourse from his war on drugs into the pandemic response (Cats-Baril 2020, 3), controversially ordering citizens to "shoot to kill" if they catch others violating the quarantine restrictions (Capatides 2020). Counter-insurgency measures continue against the New Peoples' Army despite a ceasefire, as well as reports of intimidation and harassment committed against indigenous peoples, militant labor, and others disadvantaged by the COVID-19 response (Cats-Baril 2020, 3–4). This is worrying, as such emboldened vigilante justice in the Philippines has led to high murder rates, with essentially no accountability for perpetrators, or justice for victims in the past. The rule-by-force style of governance represents potential human rights violations ranging in severity from due process to right to life/against summary execution.

Illegal arrests and detention are cases in point. Reports of curfew violators placed in dog cages, as well as killings (Alindogan 2020; Human Rights Watch 2020), including the killing of an unarmed mentally-challenged individual in broad daylight (Manahan 2020). Even student volunteers and Labor Day protestors were subjected to so-called "red-tagging" and arrested. The country's Anti-Terrorism Act was also approved by Congress in what was perceived by many as being insensitive to the times (see previous section on Legislative–Executive Relations). Protesters critical of this proposed measure were also detained. Alarmed by these incidents, the Philippine Alliance of Human Rights Advocates and In Defense of Human Rights and Dignity Movement launched a 19-point agenda advocating a human rights approach post-lockdown (Gavilan 2020). According to the Philippine National Police, there are 110,889 violators of the quarantine including those who hoarded and manipulated prices of basic goods and medical supplies. Nonetheless, little is known about high-profile cases of violators, including those from their ranks and legislators. Images in media reports show that those who are likely to be arrested and detained are the poor and the disadvantaged.

The curtailment of the right to information as part of the pandemic response is also a concern. International IDEA's Global Monitor of COVID-19's impact on Democracy and Human Rights (2020) cites freedom of expression as a fundamental right to be watched during this period. The *Bayanihan* Law has a provision allowing the government to interpret what it deems to be misinformation. While the idea was to protect the public from supposed misinformation that can lead to more COVID-related deaths, the provision can also have a chilling effect on people or sectors seeking accountability, thereby limiting the goals of the Constitution to instill representative democracy and social justice as indicated in the findings of the Constitutional Performance Assessment. Ensuring accountability is particularly crucial in the time of a public health emergency, when government services are much needed, and when public officials need to act with urgency. Accountability is also important given that rights violations are committed in the name of quelling the pandemic. This is reminiscent of trends in the Philippines of using emergencies as a justification for curtailing essential rights. Another issue related to media integrity, right to information, and freedom of speech,

involves the non-renewal of the franchise of the country’s largest media network at the height of the pandemic, when information provides the public with certainty and direction (see previous section on Legislative–Executive Relations). ABS-CBN is often cited by Duterte in his speeches as being “unfairly” critical of him. Supporters also mention that its television arm failed to air the campaign ads of then-candidate Duterte in 2016. Media attacks in the midst of the pandemic also came into stark focus when Maria Ressa, a staunch media critic of Duterte, was convicted of cyber libel on June 15, 2020.

The right to travel and decent work was also imperiled. Under Section 6 of Article III of the Bill of Rights, “[t]he liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.” The justification of “public health” and safety has been extensively used by the government in curtailing the right to travel via various quarantine measures in place around the country, which are more or less serious depending on the number of cases in certain areas. While this measure is necessary, this was the same provision that was used to issue a ban on overseas work for health workers in a resolution by the Philippine Overseas Employment Administration. The ban was meant to address the foreseen shortage of health workers given the spread of the pandemic. When netizens and interest groups decried the ban, the administration backtracked and amended the ban by allowing those with work contracts abroad to leave whenever they can. For local health workers, the initial total lockdown in March resulted in their lack of access to transportation. Private sector groups and the government offered free rides to remedy the situation and quell negative public outcry (Panay News 2020). When the strict lockdown was relaxed in the middle of May, and allowed workers in selected industries to return to work, public transportation was still minimal. Some resorted to walking and using alternative modes of transportation such as bicycles. The lack of coordination between the national and local government units over the lockdown (see previous section on Local Governments), coupled with the lack of transportation, also prevented locally stranded individuals, most of which are OFWs displaced by COVID-19 in their host countries, to return to their provinces of origin.

Overall, the 1987 Constitution established the institutional framework to allow human rights to flourish in the country after Marcos. However, the Performance Assessment findings pointed to thin compliance with this constitutional goal since the Commission on Human Rights and other government agencies and policies were established, but rights are not realized in practice. The COVID-19 response, and its militaristic (see section below on Security Sector) implementation have highlighted the vulnerability of the rights promised in the Constitution, and point to a need to strengthen a culture of human rights throughout the Philippines and beyond the specific institutions established to protect these rights.

Security Sector

The 1987 Constitution provides a robust legal and institutional framework for the governance of the security sector, and there is an explicit delineation of responsibilities between the security forces such as the police and the military. These measures were included to try and prevent a return to a military-backed dictatorship and consolidate the democratization process, which were central goals of the 1987 Constitution. However, the COVID-19 crisis presented a set of challenges in keeping the security sector within the parameters of its constitutional mandate. This can be attributed to the dominance of the network of military officials within the Duterte administration, the poor quality of civilian oversight institutions (e.g., legislature, judiciary, Commission on Human Rights, ombudsman), and the lack of appreciation of the pandemic as a public health crisis.

The Constitutional Performance Assessment findings showed with respect to the security sector the prevalence of informal norms and practices that undermined the ability of the Constitution to truly ensure good governance of the security sector. Under the Duterte administration in particular, this refers to the dominance of the military through both active and retired generals in policy and decision-making. These powerful actors have embedded themselves in a complex network with civilian politicians and bureaucrats, thereby obfuscating the boundaries between the civil and military spheres in the government.

Civilian supremacy over the military as envisioned by the Constitution (Article II, Section 3) becomes a mere formality, as influence emanating from the security sector largely informed the government's response to the pandemic. It was not surprising that the Duterte administration placed a retired general to lead the implementation of the government's response with the Inter-Agency Task Force on COVID-19 largely composed of other retired generals. This has reduced the space for other relevant voices and perspectives in dealing with the health crisis, including the voices of health experts. In other words, the response was not only securitized in its approach, it was also heavily militarized in its implementation.

Given this, enforcing lockdowns and mobilizing the armed forces and the civilian police (using military gear) in urban and rural areas has been a primary manifestation of the security sector's contribution to the pandemic response. However, the Duterte administration went further by expanding the roles of the security sector to include distributing aid relief to poor communities and implementing quarantine protocols. While this might be necessary in addressing COVID-19, these measures should be part of a larger strategy that treats this pandemic as a public health crisis, and not as a military emergency.

The dominance of the security sector within Duterte's cabinet leaves little room for the technical expertise needed to respond to a pandemic. As retired military generals-turned-implementors lead the effort, they might lack the full appreciation of the severity and complicated nature of this unprecedented health crisis. The silence and/or timidity of civilian oversight institutions such as the legislature, ombudsman, the civilian bureaucracy, and the courts is also indicative of the domineering stance of the security sector within the government.

The 1987 Constitution became a foil rather than the foundation of the government's COVID-19 response, as the Duterte administration improvises in implementing a strategy mostly defined by the security sector's coercive power. While the military and the police are the most prepared institutions of government in any given emergency, they lack critical knowledge, including health and scientific expertise, and tools to face this health crisis. A lot still depends on the civilian political leadership, which must know how to use the security sector without losing sight of constitutionalism, democracy, and civilian supremacy—all primary goals of the 1987 Constitution. In the absence of this leadership, the performance of the Constitution towards institutionalizing these principles will be compromised.

Economy and Labor

The Constitutional Performance Assessment observed that there is no dearth of policies allowing for equitable access to economic opportunities for women, the elderly, single parents, persons with disabilities, and other marginalized sectors. However, poor implementation often reduces these efforts into thin compliance. COVID-19 has further exposed not only the vulnerability of certain sectors but also how poor execution of otherwise well-meaning policies can aggravate economic dislocations and inequities.

The *Bayanihan* Act is, by all means, primarily an economic recovery plan. As part of emergency measures under the law, cash subsidies have been distributed to low-income households. As of March 2020, the government reportedly has allotted some P200 billion worth of aid for low-income families (Nakpil 2020). However, as reported in the section on

Local Governments, irregularities in *barangay*-level identification of beneficiaries has left five million households from the most vulnerable sectors out of the recipient list. Poor screening has also emboldened some to abuse the system. Some reportedly even used the money as capital to peddle illegal drugs (Garcia 2020) or finance vices they could not afford (Momblan 2020).

Others complained that the package overlooked certain sectors even though the crisis affects everyone (Talabong 2020). The economic stimulus has been particularly criticized for leaving out those whose jobs have been directly affected by business suspensions but whose income taxes directly support the stimulus (Venzon 2020).

Likewise, the economic stimulus plan is eerily silent on the plight of OFWs whose remittances have practically served as the Philippine economy's lifeline in recent years. The Department of Labor and Employment estimates that some 43,000 OFWs are expected to return home to the Philippines by June 2020 due to widespread unemployment caused by the COVID-19 pandemic.

Also, while employees welcomed the go-signal for flexible work arrangements, many businesses were simply unprepared for the alternative work schemes. Slow average fixed broadband speed, for instance, made work from home untenable, especially for employees in the business process outsourcing industry (Erram 2020). These problems are not new. The Constitutional Performance Assessment notes that investors have long complained of poor telecommunication and transportation infrastructure as major business obstacles in the Philippines (Atienza et al. 2020, 46).

The number of COVID-19 cases continues to increase especially in urban centers where a large portion of the population are daily wage earners engaged in economic activities in which social distancing is not always possible. These workers cannot afford not to return to work. In response, Executive Order 114 institutionalizing the *Balik Probinsya* (Return to the Province) Program was issued on May 6, 2020. *Balik Probinsya* is essentially a reverse migration program whose goals include boosting rural development and, of course, averting the pandemic from overwhelming urban health facilities. Experts warn, however, that without economic hubs, the program is doomed to fail (Ordinario 2020), echoing what the Constitutional Performance Assessment observed about how recent policies have become detached from economic realities (Atienza et al. 2020, 46). As the Assessment notes, people in the rural areas have long shifted their preoccupation from agriculture to migrant labor as a vector of economic mobility. Without genuine countryside development, this mode of economic subsistence is likely to persist.

In sum, COVID-19 poses a difficult challenge for government policymakers who must think of ways to address not just the health crisis, but the looming economic recession. While a stimulus package giving money directly to the people might work in the short term, authorities must also be forward-looking and contemplate long-term economic programs that catalyze fundamental growth-drivers and strengthen people's resilience to survive a crisis. These were already lacking when COVID-19 hit the Philippines, but the pandemic and its consequences make the need for them ever more apparent and pressing.

Citizenship and Equality

The findings of the Constitutional Performance Assessment on citizenship and equality suggest that full implementation of constitutional provisions on social justice and human rights is yet to be realized. While relevant laws have been passed by Congress, the executive branch failed to properly implement these laws on time, especially in the areas of labor, agrarian reform, housing and urban settlements, and human rights. This deficiency has been exposed and magnified under the COVID-19 crisis.

Active citizenship promotes the role of the citizens in the policy- and decision-making processes, which are even more important in the context of a pandemic. By involving the citizens, policies and decisions can be comprehensive enough to include the variegated concerns of the population, which the government may sometimes mistake as uniform. In this context, citizens are seen not merely as subjects of laws and rules formulated by the government, but as partners in governance.

The Constitution encourages the participation of the public at different levels of governance (Article XIII, Section 16). Following this, the pandemic response requires the cooperation of everyone. The responsibility for an effective and efficient response lies in the hands of both the government and the public. However, as seen in the course of government action, citizens' involvement has not been maximized. With the exception of a number of LGUs, little or no effort has been made to be inclusive and, instead, the government's top-down orientation of decision-making has been strengthened (see the section on Local Governments). The Constitutional Performance Assessment findings had already highlighted that citizens have difficulties in actually being included substantially in decision-making processes (Atienza et al. 2020), even before the pandemic.

With the absence of a direct avenue to participate as citizens, social media has become an alternative means for people to air their grievances, comments, and suggestions on how the actions of national and local governments can be improved. There is no guarantee that these sentiments expressed online will be considered in the decision-making process. However, there have been instances when public clamor and support through these means have proved effective, especially for the cities in the NCR (for examples, see Madarang 2020; Mia 2020; Virtudes 2020).

As most of the government response and implementation of strategies have been "devolved" to the LGUs, the extent of citizen involvement varies depending on the locality and the openness of the local officials. With strict quarantine in place for several weeks, officials who are more open have taken advantage of the interactive nature of social media to gather inputs from citizens. Nevertheless, following the trend identified in the earlier Performance Assessment, the quality and quantity of services received by the citizens are impacted by political dynamics, especially in LGUs, making them unequal (Atienza et al. 2020, 47).

In the area of social justice and equality, the Constitution highlighted the primary role of the state in the promotion of a better quality of life (Article II, Section 9). However, a natural consequence of a prolonged lockdown implemented throughout the national capital is the deterioration of the quality of life for millions of Filipinos. Many Filipinos have lost their sources of livelihood (see the section above on Economy and Labor). Unemployment and underemployment rates have increased. While the government and some private companies continued to give salaries to their employees, those working in small and medium scale enterprises, as well as self-employed individuals, drivers of public utility vehicles, and those who live on a per-day income, suffered. The unequal opportunities for development present prior to the pandemic, as observed in the Constitutional Performance Assessment, have most likely worsened.

Another area of concern is equal access to services for all citizens. The Constitution promotes the right to healthcare of every Filipino and mandates the state to adopt an integrated and comprehensive approach to health development. The Constitutional Performance Assessment showed that access to services has been affected by political dynamics and socio-economic classification. As the country has been placed under a public health emergency, equal access to health services has been a huge concern. Those who can afford to go to private hospitals receive better quality of health services, while those who are poor have no choice but to wait in the long queue of patients in public hospitals. The pandemic exposed the problematic health system the government has failed to support.

In sum, the constitutional requirements on equality, active citizenship, and social justice have been partly sidelined as the government responded to the pandemic. In order to contain the spread of the virus, citizens' rights and privileges have been regulated. The government has also further limited the extent of public participation in decision-making. Despite this, citizens have found a way to demand accountability from the government through social media. At the same time, the quality of life has declined and economic opportunities for development have decreased. While acknowledging the efforts of the government to address the situation, it must also be pointed out that some of the problems faced during this pandemic are a product of years of neglect on the improvement of the national health system, in particular, and social services, in general, which the 1987 Constitution expressly mandated. Compared to the findings in the Constitutional Performance Assessment, the measures taken by the government to address the pandemic may have stalled the developments, albeit limited, on citizenship and equality in the previous years.

Conclusions

The *Constitutional Performance Assessment of the 1987 Philippine Constitution* concluded that most of the technical requirements of the Constitution have been met, but that there has not been substantial compliance in terms of meeting the broader external and internal goals of the Constitution, including democratization; decentralization; social justice, human rights, and gender equality; peace and conflict resolution; and economic development. What this Discussion Paper on the performance of the 1987 Constitution in a period of a pandemic shows is that areas that were already identified as problematic in the Assessment findings are indeed proving to be so, and even areas where positive performance was recognized in the Assessment are being challenged as a result of the pandemic. Despite the challenges, some positive innovations were noted in the judiciary and local government sectors that could provide inspiration for more institutional policies and programs that could improve performance on key goals of the Constitution such as decentralization and autonomy, as well as social justice.

One of the possible casualties of the pandemic is the prioritization of proposed amendments to the 1987 Constitution and the reform process that was underway before the number of COVID-19 cases rose and lockdowns were imposed. In February 2020, the House Committee on Constitutional Amendments was supportive of the amendments proposed by the Inter-Agency Task Force on Constitutional Amendments led by the DILG. However, the committee deliberations have been suspended due to COVID-19 (Yap and Ramos 2020). The move to collect two million signatures, even digitally, in support of constitutional reform initially planned to be presented to the opening of Congress in July had to take a backseat, as the DILG said that its main priority now is combatting COVID-19 (Andrade 2020). However, there was a recent development of about 1,000 municipal mayors of the League of Municipalities who are supporting constitutional reforms, particularly institutionalizing the Supreme Court ruling on national income shares to local governments and lifting of restrictions on foreign investment in industries that are presently limited to Filipinos, to empower LGUs (Bajo 2020). It is uncertain if this will gain momentum and support at this point though the DILG welcomes this development in view of LGUs' difficulties in this pandemic (Casilao 2020).

While the future of the amendment process is currently on hold or unsure, it remains critical to continually assess the ways in which the 1987 Constitution is fulfilling its goals and the ways in which it is being challenged; this can allow for sub-constitutional changes and innovation, like some of the practices and reforms discussed in this Discussion Paper and in the Constitutional Performance Assessment that can further constitutional performance in the absence of formal constitutional change.

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About the Partners

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

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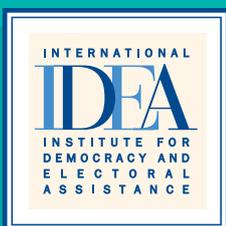
Mandate

As stated in the Executive Order 9 issued on 24 September 1985 by former UP President Angara, the objectives and functions of the Center are as follows:

- Develop, organize, and manage research issues of national significance. Such issues, because of their importance and inherent complexity, require an integrative and collaborative approach and also more sophisticated research methodologies and skills.
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- Secure funding from public and private persons and agencies.
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The *Constitutional Performance Assessment of the 1987 Philippine Constitution* concluded that most of the technical requirements of the 1987 Constitution have been met but there has not been substantial compliance in the Philippines in terms of meeting the broader external and internal goals of the Constitution, including democratization; decentralization; social justice, human rights, and gender equality; peace and conflict resolution; and economic development.

In this Discussion Paper, International IDEA and the University of the Philippines partnered once again to look back on the Performance Assessment findings and assess how the COVID-19 pandemic has affected the performance of the 1987 Constitution. The Discussion Paper identifies specific trends within constitutional design areas to keep a watch on as the Philippine Government continues to respond to COVID-19.



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