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POLICY BRIEF



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Constitutional and Legal Perspective on the Philippines' COVID-19 Response

I. Introduction

As of 18 June 2020, the Philippines has recorded about 27,238 cases of COVID-19, with 1,108 deaths. Approximately 6,820 people have recovered, leaving the country with around 19,300 active cases. The first case was reported by the Philippines Department of Health on 30 January; with the first local transmission confirmed on 7 March.

Acknowledging the fluidity of the situation in the Philippines and globally, this Brief is meant to provide a snapshot analysis of the response to COVID-19 in the Philippines through June 2020, focusing on the constitutional and legal framework for the response and issues that have arisen thus far. The Brief concludes by identifying key take-aways that might also be relevant for other countries.

II. Constitutional and Legal Framework for the Response

The 1987 Philippines Constitution Article 6, Sec 23(1) reserves to Congress "by a vote of two-thirds of both Houses in joint session assembled, voting separately" the sole power to declare the existence of a state of war. Section 23(2) expands the wording to include "other national emergencies" and allowing Congress to "by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy."

Under Article 6 Sec. 26(2), the Constitution allows for expedited readings of bills certified as urgent by the President for "immediate enactment to meet a public calamity or emergency."¹ Where normally Bills have to pass through three readings on three different days, in times of emergency this can be bypassed.

¹ There is a bigger question about how this power has been used/misused in the past, as approximately one in five bills have been certified as urgent by the President (Atienza et. al 2020, 29).

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While not of a state of emergency as such, the Executive has the power to proclaim martial law, including suspensions of *habeas corpus*, for a period of up to 60 days as Commander of the military. This seems to be limited to cases of “violence, invasion or rebellion” (Article 7, Section 18), however the text also mentions “public safety”, which could be used to expand interpretations of these powers. After making such a proclamation, the President has 48 hours to submit a report to Congress on which Congress can vote to revoke, suspend or extend the period.

Beyond its constitution, the Philippines relied upon and cited several pieces of relevant legislation for the COVID-19 response, even before the passage of the Bayanihan To Heal as One Act (March 2020). The Philippine Disaster Risk Reduction and Management Act of 2010 (RA 10121) allows for declarations of states of calamity by the President upon recommendation of the National Council to the President; as well as local level states of calamity by local governments. The Mandatory Reporting of Notifiable Diseases and Health Events of Public Health Concern Act of 2019 (RA 11332) allows for the declaration of an epidemic or public health emergency (Section 7). Generally, it is the Secretary of Health who has the authority to declare these unless the crisis represents a threat to national security, and then the President shall declare a State of Public Health Emergency and mobilize a response to the threat. Sub-national health offices can also declare outbreaks, but only when contained in their area and based on scientific evidence.

III. Analysis of Response and Key Issues

Declaring, Terminating and Renewing Emergency Measures

On March 9th, President Duterte declared a state of public health emergency via Proclamation No. 922 on the advice of the Secretary of Health, in accordance with RA 11332. The state of public health emergency will remain in place until the President decides otherwise. The order encouraged cooperation between government units and facilitated the mobilization of necessary resources to fight the outbreak and noted that Duterte might engage the police and law enforcement in outbreak response.

On March 12th, presidential Proclamation No. 929 declared a national state of calamity for six months on the basis of a recommendation from the National Disaster Risk Reduction and Management Council in accordance with RA 10121; and announced “enhanced community quarantine” for the Philippines’ main island, Luzon. This involved severe restrictions on freedom of movement, and the provision of basic services with people only allowed to leave their homes for essential goods.

As cases in the Philippines continued to escalate, the President marked a proposed bill on COVID-19 response as urgent, triggering the expedited legislative procedure under the constitution. On March 24th, Republic Act 11469 or the Bayanihan To Heal as One Act officially declared a national state of emergency for an initial period of three months, unless extended by congress or terminated by Presidential proclamation. Both chambers of Congress passed the bill through emergency (and virtual) sessions in one day. The law calls for massive aid programs and the reallocation of national resources to respond to

the pandemic. It also establishes a Congressional oversight body, which the President must report to regularly.

While Duterte has referenced the possibility of declaring martial law publicly several times, no such action has been made in accordance with Article 7 Section 18 of the Constitution. Despite some of his supporters arguing for analogies likening the virus to an “invasion” that would provide the grounds for declaring martial law, the Department of Justice has rejected this interpretation (Pazzibugan 2020).

Rights Limitations and Violations

Even before COVID-19 hit the Philippines, Duterte’s administration was accused of grave human rights violations, including most prominently the “war on drugs” and attacks on the media. There are fears that these will worsen during the Covid crisis, representing potential human rights violations ranging in severity from due process and access to justice and remedies, to right to life and prohibitions against summary executions.

The lockdown has already exacerbated existing rights violations, for example for victims of slum areas that are evicted and then being arrested for violating quarantine (Associated Press 2020). On April 1st more than 100 people from Sitio San Roque gathered to demand effective aid provision; 21 were beaten and arrested by the police as Duterte called for stricter implementation of enhanced community quarantine (ECQ). Following the incident, Duterte made clear: “I will not hesitate. My orders are to the police and military, as well as village officials, if there is any trouble, or occasions where there’s violence and your lives are in danger: shoot them dead” (Capatides 2020). Amnesty International issued a statement immediately after urging the President to “cease his dangerous incitement to violence against those critical of the government during the COVID-19 pandemic” (Amnesty International 2020). This statement reveals that in addition to posing specific human rights concerns about due process and disproportionate use of force by the police, the San Roque incident points to a broader trend of targeting voices critical of the pandemic response thus far. Despite many statements from national and international organizations and experts, arrests continue. In fact, the largest crackdown of the pandemic was seen exactly one month after the San Roque arrests on Labor Day, May 1st, when 92 individuals across five cities in the Philippines were imprisoned (Beltran 2020). According to the Philippines National Police up to 41,000 people have been arrested for violating ECQ regulations. Widespread reports document degrading, humiliating and otherwise inappropriate behavior on behalf of the police and local government officials tasked with implementing the ECQ (Human Rights Watch 2020).

There are also concerns that the enforcement of quarantine measures is uneven, targeting particularly those critical of Duterte or otherwise considered a risk to national security by his administration. Despite unilaterally declaring a ceasefire agreement with the New People’s Army on March 18th, Duterte and his administration continue to employ counter-insurgency measures against suspected members of the New People’s Army. Communities have reported unwelcome and unwarranted “visits” from military and police in a climate of increased surveillance and decreased security and protection. Some believe Duterte is exacerbating tensions with these groups as a basis

for declaring martial law, and thereby expanding his executive powers further. In a public statement, Duterte said he would declare martial law if “communist rebels” disrupted relief efforts: “I am now warning everybody, I am putting notice to the armed forces and police. I might declare martial law and there will be no turning back” (Reuters 2020).

Indigenous peoples, particularly in Mindanao, are also suffering from increased insecurity due to threats from non-state actors and lack of protection and other services from the government. Indigenous peoples have often been labeled and vilified as communists, and even terrorists by the current administration, leaving the populations highly concerned about Duterte’s shoot to kill orders and threats of martial law (IWGIA 2020). Furthermore, many indigenous IP communities rely on “arawan” or salary from day-to-day employment, leaving them economically vulnerable. The enforced lockdown has impacted their capacities to buy essentials goods; communities are therefore reliant on promised services and relief packages from the local government units, but relief materials are being distributed in central areas and not reaching more remote areas where indigenous communities live. In Sitio Kiatong, Barangay Kalamungog, Sultan Kudarat, at the height of the COVID-19 emergency approximately 432 families, mostly Lambangian and Teduray, but also settler and Moros, were forced to leave their homes and evacuate to the town center in Lebak gym due to harassment from an armed group. This group was also involved in an encounter with the Philippine military in the same village. On March 28th, the Mayor asked the displaced families to move to Sitio Tapudi to comply with the provincial government’s enhanced community quarantine. The displaced families were again attacked at the gym by armed groups forcing them to move to the even-more isolated (and therefore distance groups from state services) Sitio Gandung, in Barangay Kalamungog. The families have currently dispersed, with nowhere to take safe refuge together.

Civil liberties and the media

While the To Heal as One Act does not explicitly provide for a vast expansion of presidential powers relevant to human rights, it does include criminal prosecution for media actors and others, ordering those who spread false information regarding the COVID-19 crisis to up to two months in jail and a fine of up to 1 million pesos (\$19,500). This provision is concerning for journalists and the media broadly (Committee to Protect Journalists 2020; Conde 2020) but the provision has even been used to arrest people sharing information on Facebook (Rappler 2020), despite a constitutional court case on RA 10175 on cybercrime which struck down provisions of the law that would allow for criminal liability for sharing false information. The victim of one such case stated that legal recourse was difficult if not impossible as the courts are barely operating—impacting access to justice more broadly.

Although not specific to the pandemic, the Philippine TV network ABS-CBN was ordered to shut down on May 5th, worsening already limited access to information around the country. ABS-CBN has challenged the closure as part of a broader effort on Duterte’s part to silence the independent media and claiming that the closure has caused “grave injustice and irreparable injury” not only to the network itself, but also to the Philippine people and public (Regencia 2020).

Concentration of Power in the Executive, Erosion of Checks and Balances

As discussed above, all the changes in status—from state of public health emergency to national state of emergency—were executive-led, but at least in the case of the state of emergency itself, this has to be declared through passage of an Act in Congress. Congress also has rights vis a vis approving declarations of martial law. Also, the Supreme Court maintains the constitutional mandate to review any law/policy including executive proclamations.

Once enacted, the state of emergency does envision a transfer of powers to the executive in accordance with Art 6, Section 23 of the constitution. In the case of the Philippines, however, the role of Congress in passing this Act has seemed to constrain the powers given to the president. The Act enumerates 30 powers but all are narrowly tailored to COVID-19 response, including the presidential power to reappropriate the executive budget to enable responsiveness and aid programs (targeting 18 million families). Despite an initial bill that would have given the President “takeover power” to guide industries in accordance with Article 12, Section 17 of the constitution², RA 11469 limits this power to health-related industries, including private hospitals and transportation services. This was in response to broad concerns about abuse in taking over private industries.

As mentioned above, the Act does allow for criminal punishment for the spreading of false information and for disobeying quarantine orders. Given the underlying political climate and culture in the Philippines, as well as the on-going war on drugs and executive messaging, there is potential that these will be exploited by the executive branch and particularly by the President’s command control of the military. Indeed, many have noted the militaristic character of the Philippines response. For example, in announcing the National Action Plan for the Covid response, President Duterte announced that it would be chaired by the Secretary of Defense, Delfin Lorenzana, and co-chaired by the Secretary of the Interior, Eduardo Ano, essentially giving the Armed Forces of the Philippines and the Philippine National Police powers to oversee implementation of the plan. It is notable that comparatively Duterte only added that the Department of Health and the Department of Social Welfare and Development would be “important departments now in action” (Cagula 2020).

Decentralization and Autonomy

Responses to the COVID-19 emergency, are being coordinated with the Department of Interior and Local Government, and regional and local governments have formal roles and authority in the response, particularly under the Disaster Risk Reduction and Management Act (RA 10121). Decentralization has played a big role in the response, with local governments invoking the Local Government Code (RA 7160) to work around perceived delays and lack of appropriate support from the central government. The overall approach has been “deputization” of the local governments, where they

² “In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.”

are tasked to carry out certain policies in the name of the central government, for example managing distribution of the Social Amelioration Program's aid a complicated and conflict-inducing process.

The Bangsamoro Autonomous Region of Muslim Mindanao was only recently established, and notably, is given exclusive competency over health in the Bangsamoro Organic Law. While still subject to national states of emergency, the Bangsamoro Transitional Authority is mounting its own response to the virus, including issuing a total of P155 million to local government units in the region as part of an approved quick response fund. BARMM Chief Minister Ahod Balawag Ebrahim called for the release of the funds from the BARMM contingency fund through a memorandum circular. The region has also been able to exercise autonomy in closing mosques for congregational prayer and also changing Islamic death rituals to limit exposure (CNN Philippines 2020). BARMM has also formed an Inter-Agency Task Force on COVID-19 which is, amongst other tasks, organizing delivery of PPE and other support to remote communities like the island communities in the region. The BARMM Ministry of Health has also released additional funds to rural health units and augmented regional hospitals.

IV. Take-Aways

1. The Philippines demonstrates how a number of different legislative and constitutional mandates and procedures can be utilized to address differing stages of an emergency. President Duterte first availed himself of the ability to declare a public health emergency and then a state of calamity under legislation, before working with Congress to declare a national state of emergency under the constitution's framework. Declaring martial law would be the next level, and is something to watch out for.
2. Underlying political cultures and levels of trust are affecting the response; for example, many journalists in the Philippines are already scarred from the previous years under the Duterte regime so they are skeptical of how this state of emergency will be used to further restrict their rights. Members of insurgency groups also lack trust in the administration to apply restrictions fairly. This lack of trust extends to the general public who believe that people in power are receiving preferential treatment, like when the president of PDP-Laban, Senator Aquilino "Koko" Pimentel III violated quarantine protocols without any response or reprimand from the government.
3. While Duterte has so far not claimed too many/drastring additional powers under the constitution, the behaviors and discourse that characterize his populist strong-man presidency persist. The shoot to kill order is one example of this. He also may be positioning himself to formally declare martial law, limited to rebellions/invasions under the Constitution Duterte has publicly stated: "Our enemy during martial law are invaders and rebels. But now, our enemy is this disease called COVID-19" (Gregorio 2020).
4. While all post-Covid laws and proclamations include mention of safeguards and constitutional oversight from Congress, there is still an underlying problem of loyalty to the President as a personality instead of as an office in the Philippines which makes it questionable how effective these mechanisms will be. For example, although Congress can override Presidential vetoes in the Philippines,

this has not occurred once under the 1987 constitution presumably due to the fact that legislators are aligned with the President's coalition, instead of a party platform or constituent interests. That being said, there have been moments where even Duterte supporters have come forward to criticize the response, for example the Senate resolution filed to urge for the firing of Health Secretary Francisco Duque III on account of incompetence and failure to prepare the health sector for the outbreak (Palatino 2020).

5. It is too early for comparisons with other regions that do not have the same autonomy, but it seems that meaningful enhanced autonomy within the unitary Philippines' structure has enabled a more robust response to the crisis in Bangsamoro. Certainly, rural communities within BARMM, like the island communities, are receiving support from a more proximate government and the region has been free to pass necessary regulations on, for example, religious practices that are not as prominent in the rest of the country. Time will tell if this experience gives rise for greater calls for regional autonomy and federalism around the country.

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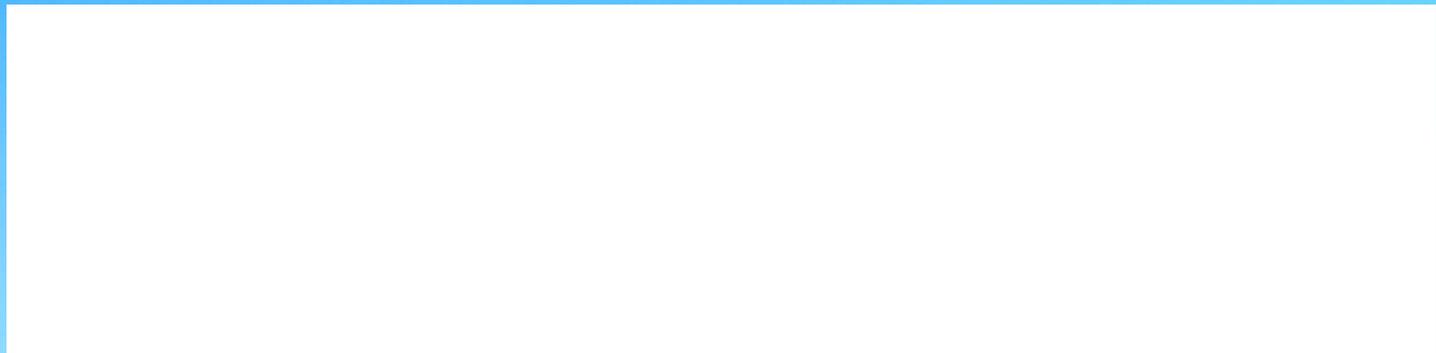
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