SCIENTIFIC DECISION-MAKING AND THE EXECUTIVE'S POWER OF SUPERVISION OVER LOCAL GOVERNMENT UNITS*

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ABSTRACT

As a result of the COVID-19 pandemic, both the national and local governments have enacted policies aimed at securing the health and safety of its citizens. However, some measures enacted failed to consider scientific evidence and objective data in their implementation. This Note attempts to determine the limits of the Executive's power of supervision *vis-a-vis* local autonomy in instances of "scientific decision-making," *i.e.* the crafting and implementation of policies and local legislation that are, or should be, based on or influenced by scientific evidence or data. Exploring the power of supervision and local autonomy, especially with regard to measures enacted in light of the pandemic, the Note recognizes that the current Philippine legal framework limits the power of the executive to modify or reverse policies that result from the scientific decision-making of LGUs. Thus, it proposes several legal and policy recommendations to bridge the gap in the current framework.

> *"Kagaya ng SARS, I assure you even without the vaccines [COVID-19] will just die a natural death. [...] Ito matatapos rin ito. But would it worsen in the meantime? Maybe. But you know the progress of medical science now is far too different from [...] the yesteryears."*
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> —Pres. Rodrigo Duterte[1]

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[1] Presidential Communications Operations Office – Presidential News Desk, *Media Interview of President Rodrigo Roa Duterte following the briefing on the 2019 Novel Coronavirus – Acute Respiratory Disease*, Feb. 3, 2020, PCOO WEBSITE, *at* https://pcoo.gov.ph/media-

"Scientific truth is beyond loyalty and disloyalty."

—Isaac Asimov

INTRODUCTION

The COVID-19 pandemic has ravaged the Philippines—and the entire world—since 2020. What started as "pneumonia cases 'of unknown cause' in Wuhan"[2] led to a lockdown lasting a year and half, multiple classifications of "community quarantine,"[3] and a "new normal" standard of living for the Philippines. At the center of what came to be known as the "country's biggest health crisis in decades"[4] is the response of both the national and local governments. From travel bans[5] to vaccination drives (and controversies resulting therefrom),[6] multiple policies and measures were adopted by the government to curb the effects of the pandemic and transition back to the normal way of living.

At the forefront of these measures is the promotion of the minimum public health standards implemented by the Department of Health (DOH)—standards that include handwashing, social distancing, and wearing of face masks and face shields. These non-pharmaceutical interventions (NPIs) were first adopted by the DOH to "mitigate and suppress transmission of infectious diseases."[7] However, the DOH underscored that there is a shared accountability between the national and local governments in implementing

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interview/media-interview-of-president-rodrigo-roa-duterte-following-the-briefing-on-the-2019-novel-coronavirus-acute-respiratory-disease/.

[2] Cristina Eloisa Baclig, *Timeline: One year of Covid-19 in the Philippines*, INQUIRER.NET, Mar. 12, 2021, *at* https://newsinfo.inquirer.net/1406004/timeline-one-year-of-covid-19-in-the-philippines.

[3] Czar Matthew Gerard Dayday & Amer Madcasim, Jr., *(Un)fortuitous Event: The COVID-19 Pandemic as a Fortuitous Event*, 93 (Special Online Feature) PHIL. L.J. 71, 83-85 (2020).

[4] Baclig, *supra* note 2.

[5] *Id.*

[6] CNN Philippines Staff, *Duterte's security used 'smuggled' vaccines, but troops will wait for FDA-approved drug – Lorenzana*, CNN PHILIPPINES, Dec. 30, 2020, *at* https://cnnphilippines.com/news/2020/12/30/Duterte-PSG-smuggled-vaccines-COVID-19-Lorenzana.html; CNN Philippines Staff, *Mon Tulfo says 'thousands' of gov't officials, police, military got COVID-19 vaccines from his source*, Feb. 24, 2021, CNN PHILIPPINES, *at* https://www.cnn.ph/news/2021/2/24/Tulfo-Sinopharm-vaccines-govt-officials.html.

[7] Dep't of Health (DOH) Adm. Order No. 2020-0015 (2020), ¶ I. Guidelines on the Risk-Based Public Health Standards for COVID-19 Mitigation.

the minimum health standards and crafting policies geared toward curbing the pandemic.[8]

Notably, the DOH has also emphasized that its decisions shall be guided by scientific evidence. One of the principles in implementing these standards is evidence-based decision-making, where "evidence shall guide policy development and decision-making at all levels of government."[9] Furthermore, the DOH also provided that "as science continues to evolve, all actors shall periodically assess and recalibrate policies, plans, programs[,] and guidelines."[10] The importance of evidence-based decision-making cannot be overemphasized in a time when the country is in the middle of a pandemic.

Notwithstanding this, some government officials still forward policies or conduct programs with doubtful scientific basis. For instance, the Provincial Government of Cebu issued a memorandum in June 2020, enjoining their employees to employ *tuob*,[11] a local method involving the "inhaling [of] steam from a small basin or bowl filled with boiled water infused with lemon, ginger[,] or eucalyptus."[12] This memorandum "enjoined" government employees to perform *tuob* twice a day to prevent catching COVID-19.[13] The City Government of Cebu, a highly urbanized city governed independently of the Province of Cebu, also spent 2.5 million pesos in purchasing *tuob* kits to distribute to COVID-19 patients, citing claims that the treatment helped patients recover from the disease.[14] However, these policy decisions run contrary to the warnings of the scientific community that there is no scientific evidence showing the positive effects of *tuob* on COVID-19 patients. The DOH has also stated that *tuob* does not kill the virus.[15]

Another example is the distribution of the ivermectin by members of the Congress. In April 2021, House Deputy Speaker Rodante Marcoleta and ANAKALUSUGAN Party-list Representative Michael Defensor distributed free ivermectin to citizens of Quezon City, claiming it is a recommended

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[8] *Id.*, ¶ V.B.1(a).

[9] *Id.*, ¶ V.B.2(a).

[10] *Id.*, ¶ V.B.2(b).

[11] Ador Vincent Mayol, *Provincial gov't memo: Make time for 'tuob'*, INQUIRER.NET, June 24, 2020, *at* https://newsinfo.inquirer.net/1296441/provincial-govt-memo-make-time-for-tuob.

[12] *Id.*

[13] *Id.*

[14] Ador Vincent Mayol, *Cebu City spends P2.5 million for 'tuob' kits*, INQUIRER.NET, July 13, 2020, *at* https://newsinfo.inquirer.net/1305865/cebu-city-spends-p-2-5m-for-tuob-kits.

[15] *Id. See also* Vernise Tantuco, *FALSE: Tuob is a cure for COVID-19*, RAPPLER, June 30, 2020, *at* https://www.rappler.com/newsbreak/fact-check/tuob-cure-covid-19.

treatment for COVID-19.[16] The Food and Drug Administration (FDA) earlier stated that ivermectin is only allowed for parasite treatment in animals and had even discouraged the public from using it against COVID-19.[17] It warned that the use of the same can cause serious harm and its intake at certain doses might already be toxic for humans.[18] Medical groups and experts have also explained that there is not enough evidence showing the efficacy of ivermectin as treatment for COVID-19.[19]

Despite the lack of scientific basis of these policies, the national government cannot countermand these measures considering their legality. The principle of local autonomy prevents the national government from interfering and changing the policies of these local government units (LGUs).[20] With this, there is now the question as to what the national government can do in response to local measures that run counter to scientific evidence. Can the national government prevent the LGUs from implementing such measures, or would that violate local autonomy? How can the executive use its power of supervision to act?

This paper attempts to reconcile the existing framework of local autonomy and the executive's power of supervision on the one hand with the concept of scientific decision-making on the other.

As used in this paper, the term "scientific decision-making" refers to the crafting and implementation of policies and local legislation that are, or should be, based on or influenced by scientific evidence or data. It focuses on measures that deal with public health, such as the COVID-19 pandemic. Part II of this paper expounds on the nature of the relationship between the national and local governments, particularly on the principle of local autonomy and the powers of the executive. Part III discusses the concept of scientific decision-making, provides examples, and explores how the powers of the executive, within the current legal framework, can be applied in the

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[16] Bonz Magsambol, *DOH, FDA told: Make a 'firm stand' on ivermectin use*, RAPPLER, Apr. 29, 2021, *at* https://www.rappler.com/nation/doh-fda-told-make-firm-stand-ivermectin-issue.

[17] *Id.*

[18] Food and Drug Admin., Adv. No. 2021-0526 (2021), *at* https://www.fda.gov.ph/fda-advisory-no-2021-0526-public-health-warning-on-the-purchase-and-use-of-ivermectin-veterinary-products-for-covid-19/.

[19] CNN Philippines Staff, *Results still inconclusive on ivermectin use on COVID-19 patients — doctors' groups*, CNN PHILIPPINES, May 2, 2021, *at* https://cnnphilippines.com/news/2021/5/2/ivermectin-philippine-medical-association.html.

[20] *See infra*, Part II.

scientific decision-making of LGUs. Part IV then analyzes the treatment of foreign jurisdictions of the power, or lack thereof, of national government over the scientific decision-making of local governments or their equivalent. Part V presents the study's recommendations to harmonize the principle of local autonomy and the need for evidenced-based policies of LGUs. Part VI concludes the study.

I. THE NATIONAL AND LOCAL GOVERNMENTS

A. The principle of local autonomy

The central principle governing the relationship between the national and local governments is local autonomy, as enshrined in the 1987 Constitution and the Local Government Code ("LGC").[21] The seminal case of *Ganzon v. Court of Appeals* explains that local autonomy "involves a mere decentralization of administration, not of power, in which local officials remain accountable to the central government."[22] This pronouncement would guide the Supreme Court in defining the limits of local autonomy under the 1987 Constitution and the LGC, despite *Ganzon* being promulgated before the effectivity of the LGC.[23] This definition of local autonomy emphasizes the existence of a relationship between the national and local governments, with the former having some form of control over the latter, albeit in a limited degree.[24]

The passage of the LGC brought about some changes in this relationship. Under the LGC, the Congress brought forth a policy of *devolution* of powers in certain areas, such as delivery of basic services and income generation.[25] In affirming this policy, the Court ruled that in case of doubt, laws should be interpreted in favor of granting local autonomy to LGUs.[26] Nevertheless, the Court's earlier pronouncement in *Ganzon* remained, and it clarified that the constitutional policy of local autonomy still remains to be merely a decentralization of administration and not of power.[27]

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[21] CONST., art. II, § 25; art. X, § 2; LOCAL GOV'T CODE, § 2(a).

[22] Ganzon v. Court of Appeals, G.R. No. 93252, 200 SCRA 271, 290, Aug. 5, 1991.

[23] The current LGC took effect in 1992, and *Ganzon* was promulgated in 1991.

[24] Magtajas v. Pryce Properties Corp., Inc., G.R. No. 111097, 234 SCRA 255, 273, July 20, 1994.

[25] LOCAL GOV'T CODE, § 5(a).

[26] San Juan v. CSC, G.R. No. 92299, 196 SCRA 69, 75, Apr. 19, 1991; Mandanas v. Ochoa, G.R. No. 199802, 869 SCRA 440, 484, July 3, 2018.

[27] Pimentel v. Ochoa, G.R. No. 195770, 676 SCRA 551, 560, July 17, 2012.

The nature of this relationship was the focal point of the Court's discussion in *Magtajas v. Pryce Properties Corporation, Inc.*,[28] which involved the constitutionality of an ordinance enacted by the *Sangguniang Panlungsod* of Cagayan de Oro City. This ordinance prohibited the issuance of business permits to any establishments operating casinos, including those operated by the Philippine Amusement and Gaming Corporation. The Court held that the ordinance was invalid for being inconsistent with Presidential Decree No. 1869.

In explaining its ruling, the Court discussed the relationship between LGUs and the national government:

> *Municipal governments are only agents of the national government.* Local councils exercise only delegated legislative powers conferred on them by Congress as the national lawmaking body. The delegate cannot be superior to the principal or exercise powers higher than those of the latter.
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> This basic relationship between the national legislature and the local government units has not been enfeebled by the new provisions in the Constitution strengthening the policy of local autonomy. Without meaning to detract from that policy, we here confirm that Congress retains control of the local government units although in significantly reduced degree now than under our previous Constitutions. [...] By and large, however, *the national legislature is still the principal of the local government units, which cannot defy its will or modify or violate it.*[29]

The Court also discussed this point in *Pimentel v. Aguirre*,[30] which involved the constitutionality of President Estrada's Administrative Order 372 allowing a portion of the internal revenue allotment to be withheld from LGUs. In invalidating the Administrative Order, the Court emphasized the local autonomy of LGUs. [31] Nevertheless, it explained that this grant of local autonomy does not entirely divorce the LGUs from the national government, emphasizing the role of the national government in setting policy objectives and goals:

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[28] Magtajas v. Pryce Properties Corp., Inc., G.R. No. 111097, 234 SCRA 255, July 20, 1994.

[29] *Id.* at 272-273. (Emphasis supplied.)

[30] G.R. No. 132988, 336 SCRA 201, July 19, 2000.

[31] *Id.* at 215-216.

> Under the Philippine concept of local autonomy, the national government has not completely relinquished all its powers over local governments, including autonomous regions. Only administrative powers over local affairs are delegated to political subdivisions. The purpose of the delegation is to make governance more directly responsive and effective at the local levels. In turn, economic, political and social development at the smaller political units are [sic] expected to propel social and economic growth and development. *But to enable the country to develop as a whole, the programs and policies effected locally must be integrated and coordinated towards a common national goal. Thus, policy-setting for the entire country still lies in the President and Congress.*[32]

B. The power of control vs. the power of supervision

In relation to the executive departments and LGUs, the President is granted two kinds of powers under the Constitution, namely, the power of control and the power of supervision. The former is exercised over executive departments, bureaus, and offices,[33] while the latter is exercised over LGUs.[34] The LGC is more detailed—it provides that "the President shall exercise general supervision over LGUs to ensure that their acts are within the scope of their prescribed powers and functions."[35]

The Court has explained that the power of supervision merely includes the act of overseeing, whereas the power of control includes the power to modify or alter the acts of a subordinate.[36] Moreover, in *Taule v. Santos*, the Court explained that the power of the executive is limited to determining whether LGUs are within the bounds of the law when they perform their duties.[37] As long as they act within their authority, the acts of LGUs cannot be impugned by the executive. The difference between the power of control and supervision was discussed by the Court in *Drilon v. Lim*:

> An officer in control lays down the rules in the doing of an act. If they are not followed, [he or she] may, in [his or her] discretion, order the act undone or re-done by [his or her] subordinate or [he or she] may even decide to do it [himself or herself]. Supervision does not cover such authority. The supervisor

[32] *Id.* at 217 (Emphasis supplied.)
[33] CONST., art. VII, § 17.
[34] CONST., art. X, § 4.
[35] LOCAL GOV'T CODE, § 25(a).
[36] Mondano v. Silvosa, G.R. No. L-7708, May 30, 1995.
[37] Taule v. Santos, G.R. No. 90336, 200 SCRA 512, 523, Aug. 12, 1991.

> or superintendent merely sees to it that the rules are followed, but [they themselves do] not lay down such rules, nor [does he or she] have the discretion to modify or replace them. If the rules are not observed, [he or she] may order the work done or re-done but only to conform to the prescribed rules. [He or she] may not prescribe [his or her] own manner for the doing of the act. [He or she] no judgment on this matter except to see to it that the rules are followed.[38]

The power of supervision is limited to determining compliance with *legal* standards and existing *laws*. This implies that, absent any basis on existing legal standards, the executive may not order to be "done or re-done" policy decisions of LGUs that may run against or may be in dissonance with policy directions forwarded by the national government. In the same way, assuming that the national government adopts policies based on scientific standards, the executive cannot require compliance with the said standards when LGUs pass measures permitted under existing laws.

II. THE CONCEPT OF SCIENTIFIC DECISION-MAKING

A. The concept of scientific decision-making

As used in this Note, scientific decision-making falls within the realm of policymaking. Legislators, both national and local, refer to all kinds of data, whether scientific or non-scientific, in crafting the laws and regulations. However, this paper focuses on scientific decision-making in particular. As used in this paper, "scientific decision-making" refers to the crafting and implementation of policies and legislation based on or influenced by scientific evidence or data. While (ideally) policies are formulated based on existing data, scientific decision-making applies in specific areas where data are based on scientific research and studies. Thus, while legislation pertaining to the grant of franchise to television companies may be based on available data (economic or otherwise), this does not fall within the realm of scientific decision-making. On the other hand, ordinances passed that mandate the wearing of face masks and face shields during the pandemic,[39] which are, or may be, affected by scientific studies pertaining to the effectivity of face shields on preventing the transmission of COVID-19, fall within scientific decision-making.

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[38] [Hereinafter "*Drilon*"], G.R. No. 112497, 235 SCRA 135, 142, Aug. 4, 1994.

[39] *See* Quezon City Ordinance No. SP-2965 (Aug. 24, 2020). Quezon City Face Shield Ordinance.

Scientific decision-making is not confined to legislators alone. Executive agencies may also refer to scientific data in crafting implementing rules and regulations, forming policy directions, and fulfilling their functions. For example, the DOH sets and implements the country's national health policy.[40] In doing so, DOH regulations state that it shall base its decision on scientific studies pertaining to health.[41] While other kinds of data, such as economic data or other non-scientific policy considerations, may be consulted, the formulation of the national health policy falls within the purview of scientific decision-making since it is influenced by or is based on scientific research and studies. Courts are also empowered to exercise scientific decision-making insofar as they consider evidence presented to them. To help judges on scientific matters that they may not be familiar with, expert witnesses are often called to testify to explain these concepts.[42]

One instance where the Supreme Court exercised scientific decision-making is in the 1936 case of *People v. Lopez*.[43] In this case, Jose Abad Lopez was convicted of violating Section 2694 of the Revised Administrative Code in effect at the time,[44] which required the presentation of children for vaccination through the scarification method. Lopez, a doctor, refused to do this and argued that vaccination can be accomplished by oral administration of drugs—the method he chose for his twin girls. The Court, nevertheless, found Lopez guilty as the term "vaccination" referred to the scarification method, resulting in his failure to vaccinate his children as required by law.

In a scathing dissenting opinion, Justice Recto criticized the rigid treatment by the majority of the mandatory vaccination requirement. He explained that "the accused is not punished for failure to attain the end proposed by the law[,] which is immunity from smallpox, but for failure to employ a method suggested by it — vaccination by means of scarification — in order to attain said end,"[45] despite the fact that medical studies have shown that the method chosen by Lopez was scientifically sound.[46] He then proceeded to conclude by saying:

> I am afraid that the majority opinion will result in sanctioning intolerance on the part of official science by punishing those who

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[40] REV. ADM. CODE, bk. IV, tit. IX, § 3.

[41] *See* DOH Adm. Order No. 2020-0015 (2020), ¶ V.B.2.a. Guidelines on the Risk-Based Public Health Standards for COVID-19 Mitigation.

[42] *See* RULES OF COURT, Rule 133, § 5, for the weight that judges give to expert testimony.

[43] 62 Phil. 835 (1936).

[44] Act No. 2711 (1917).

[45] People v. Lopez, 62 Phil. at 839. (Recto, *J.*, *dissenting*).

[46] *Id.*

> employ methods which, although scientific, depart from those prescribed or approved by it. I reiterate that the purpose of the law has been served in this case. The only question is of method, and this inexplicable dogmatism of the Government reminds us of the time of Galileo when official science, unable to conceive that the earth was round, used to drown out the voice of the dissenters by means of the bonfire, the rack and the wheel.[47]

Emphasis should be given on Justice Recto's opinion that the law should not punish the accused for the method he chose to attain the objective pursued by the law precisely because this method was based on scientifically established methods. This implies that Justice Recto's opinion could have been different if the method chosen by Lopez was not scientifically sound. He also highlighted the need of law to be based on official science—law should not breed the intolerance of science but change according to developments and new evidence.

Hence, this emphasizes the importance of evidence-based policies. Laws should be created, implemented, and interpreted to reflect current scientific evidence and accommodate new scientific innovation and discoveries. This is more pressing in light of the overlap between legal and scientific developments, and the fact that scientific development shapes both the national and international landscape.[48]

Despite the importance of policies being based on sound scientific evidence, the reality is far from this ideal. The examples presented in this paper[49] show that LGU officials enact policies which, while legally sound, are not based on scientific evidence. Worse, some policies enacted even go against establish scientific findings. The continuous proliferation of these kinds of policies would not only "sanction intolerance of official science"—to use the language of Justice Recto in *Lopez*—but would openly welcome ignorance and deviation from well-established scientific findings. To countenance this development would adversely impact the Philippine society. As such, the executive, as main implementing body and as the holder of the power of control and supervision, has a duty to ensure that laws are crafted with scientific evidence as basis, when needed.

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[47] *Id.* at 840.

[48] *See* Jowi Tsidkenu Cruz & Jocelyn Cruz, *When the Law meets Science: The supposed prospective nature of the Law when dealing with scientific and technological developments* (2018), *at* https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/ditech/proceedings/volume-3/paper-8.pdf

[49] *See supra* Part I.

B. The options of the executive

Since scientific decision-making is a form of policymaking by the LGUs, it remains that the executive cannot supplant the decision of LGUs. The executive only has the power of supervision, not control, over LGUs. Hence, any policy implemented by the LGU that goes against scientific data and studies cannot be interfered with by the executive; otherwise, it would be overstepping its boundaries outlined in the Constitution. However, what the executive can do is exercise its power of supervision.

To recapitulate, the power of supervision of the executive is limited to overseeing the acts of LGUs to determine whether they comply with existing laws; it cannot alter or modify the acts of LGUs to conform to its discretion.[50] For the executive to exercise its power of supervision over LGUs, it necessarily follows that there must be some legal standard that can be used as a yardstick for the evaluation of an LGU's acts.

One example of this is the Bayanihan to Heal as One Act ("*Bayanihan I*"),[51] which became one of the main responses of the national government to the COVID-19 pandemic. *Bayanihan I* granted emergency powers to the President under Article VI, Section 23(2) of the Constitution. With regard to LGUs, Section 4(g) of the law provides:

> SECTION 4. Authorized Powers. — Pursuant to Article VI, Section 23 (2) of the Constitution, the President is hereby authorized to exercise powers that are necessary and proper to carry out the declared national policy. The President shall have the power to adopt the following temporary emergency measures to respond to crisis brought by the pandemic:
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> (g) *Ensure that all Local Government Units (LGUs) are acting within the letter and spirit of all the rules, regulations and directives issued by the National Government pursuant to this Act*; are implementing standards of Community Quarantine consistent with what the National Government has laid down for the subject area, while allowing LGUs to continue exercising their autonomy in matters undefined by the National Government or are within the parameters it has set; and are fully cooperating towards a unified, cohesive and orderly implementation of the national policy to address COVID-19[.][52]

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[50] *See supra* Part II.
[51] Rep. Act No. 11469 (2020).
[52] Emphasis supplied.

Necessarily, this would include making sure that LGUs are following the standards established for the different quarantine levels by the Inter-Agency Task Force for the Management of Emerging Infectious Diseases and the DOH, while keeping in mind the principle of local autonomy.[53] There is still no power of control, merely supervision. Thus, for the period of its effectivity,[54] *Bayanihan I* may serve as basis for allowing the executive to set aside policies of LGUs that go against established scientific findings regarding the COVID-19 pandemic.

DOH Administrative Order 2020-0015 mandates that policy development and decision-making should be based on evidence, with policymakers tasked to recalibrate their policies according to scientific developments.[55] As a result, LGUs are mandated to ensure that their policy decisions have sound scientific basis.

Nevertheless, there is some confusion in this provision:

> First, the Bayanihan Act does not provide a procedure or a standard that determines if the LGU has been complying. A closer look at Section 4(g) supports this assertion. Section 4(g) gives the impression that it is the Executive that determines non–compliance—with the word "ensures"— before the appropriate penalty is then levied by the Executive on the LGU officer. It seems Congress has left the determination of non-compliance with the Executive, aided by the Department of Interior and Local Government (DILG). However, this must be read with Section 6, which provides that it is a court that determines whether there is non-compliance, and if it merits imprisonment or a fine. From this, "ensures" in Section 4(g) cannot refer to a determination of non-compliance by the President and then the imposition of a penalty; that function is delegated to the courts. Instead, it perhaps refers to how the President can ensure compliance from the LGUs. The President has a proactive—not punitive—temporary power.

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[53] Kent Almadro Alonzo, *The Executive & Local Governments versus COVID-19: A Cycle of Blame and Burden*, 93 (Special Online Feature) PHIL. L.J. 24, 30 (2020).

[54] Section 9 of Rep. Act No. 11469 states that *Bayanihan I* "shall be in full force and effect only for three (3) months, unless extended by Congress." Under Article VI, Section 23(2) of the Constitution, emergency powers "shall cease upon the next adjournment" of Congress

[55] DOH Adm. Order No. 2020-0015 (2020), ¶ V.B.2. Guidelines on the Risk-Based Public Health Standards for COVID-19 Mitigation.

> Second, in what way can the President ensure compliance under Section 4(g) after a determination by the Court that there is a violation under Section 6? To illustrate this possible void, assume that LGU Official B is found in violation of "national government policies or directives in imposing quarantines" after authorizing an ordinance applicable to LGU A. LGU Official B may now be suffering the penalty under Section 6, but at this point, there is in LGU A an ordinance in effect contrary to the national directive of the government. This will potentially result in a disjointed and uncoordinated effort in handling COVID–19 for that LGU. Is the President empowered to act under the Bayanihan Act to remedy this situation? The law is clear that LGU Official B is liable, but what about the ordinances enacted? Are these ordinances—conflicting with the national policy—automatically deemed void? Assuming they are void, it will now result in a situation where LGU A has no local ordinance enacting the national policy specifically addressing the circumstances of the LGU. Is the local Sanggunian authorized to pass curative legislation to correct the initial ordinances or resolutions by the LGU that are inconsistent with the national effort? In the extreme, can the President pass local legislation, temporary in nature, to address the void while the local Sanggunian drafts another one anew? These questions lead to this conclusion: the Bayanihan Act is not instructive under Section 4(g) if it grants any power to the President to remedy the conflict resulting from the non–compliance of LGUs.[56]

The argument regarding the executive having a proactive, not punitive, power seems to have been addressed by the passage of the Bayanihan to Recover as One Act (*Bayanihan II*).[57] In *Bayanihan II*, the Congress did not include a penalty provision similar to Section 6 of *Bayanihan I*.[58] Given this, it may be implied that the President now has the power to determine whether an LGU complied with the national health policy.

Despite this, there still remains the issue of the effect of a finding of non-compliance. In resolving this matter, it is helpful to remember how the Court defined the power of supervision in *Drilon*. According to the Court, the power of supervision includes "order[ing] the work done or re-done but only

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[56] Alonzo, *supra* note 53, at 30-32. (Citations omitted.)

[57] Rep. Act No. 11494 (2020).

[58] Section 6 of Rep. Act No. 11469 provides that "LGU officials disobeying national government policies or directives in imposing quarantines" shall be punished with imprisonment of two months or a fine of not less than PHP10,000.00 and not more than PHP1,000,000.00, or both.

to conform to the prescribed rules."[59] Thus, under the current legal framework, the executive may not pass any curative legislation on its own to remedy the non-compliant ordinance. Rather, it may authorize the local *sanggunian* to pass an ordinance that would be in line with the national health policy. Hence, in that way, the LGU would still have a local ordinance enacting the national policy, albeit one in line with scientific findings as mandated by the national health policy.

A caveat must be stated: This situation contemplates the existence of a law mandating compliance with the national health policy. With the enactment of *Bayanihan II*, the effectivity *Bayanihan I* has ended.[60] Furthermore, the effectivity of *Bayanihan II* is only until December 19, 2020.[61] Currently, neither of the two laws are in effect. Thus, the discussion regarding the powers given by both laws seems to be moot and academic. Two points may be raised: *First*, the power of supervision is inherent in the executive as granted by the Constitution, so there is no need for an enabling law to allow it to exercise this power; *Second*, DOH Administrative Order No. 2020-0015 can still serve as the basis for mandating policies to be based on scientific studies and findings. Unlike the *Bayanihan* laws, there is no sunset clause in the DOH Administrative Order. Furthermore, the said Order covers "all entities involved in COVID-19 response […] including all […] local government units[.]"[62]

However, this highlights one crucial limitation of the power of the supervision: There needs to be existing legal standards that can be used to support the need for policies and ordinances to be based on scientific findings. In the absence of such law, the executive cannot set aside an ordinance on the mere reason that it goes against established science.

III. SCIENTIFIC DECISION-MAKING IN FOREIGN JURISDICTIONS

The COVID-19 pandemic has not only affected the Philippines, making it relevant to examine how foreign jurisdictions tackled the issue of scientific decision-making of their national and local governments within their respective legal frameworks.

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[59] *Drilon*, G.R. No. 112497, 235 SCRA 135, 142, Aug. 4, 1994.
[60] Rep. Act No. 11494 (2020), § 18.
[61] § 18.
[62] DOH Adm. Order No. 2020-0015 (2020), ¶ II.

A. The United States

In the United States, local government law is largely a state matter. Under the Tenth Amendment to the US Constitution, all powers not delegated to the federal government by the Constitution are reserved to the states.[63] Notably, nowhere in the US Constitution is there any provision governing local governments. Moreover, under the Tenth Amendment, the states would also be in charge of health policies as this matter is not provided for in the Constitution.[64]

A consequence of this framework is that the power of local governments is largely dependent on the governing state. This is exemplified in the doctrine known as Dillon's Rule, named after Judge John F. Dillon of Iowa.[65] Dillon's Rule provides that local governments may only exercise the power explicitly granted to them by their respective states.[66] It implies that a state may exercise control over local governments by placing restrictions upon their powers, even going so far as to include the possibility of reversing the acts of local governments. To temper this limitation, some states have adopted "home rule" provisions in their charters. These provisions provide for local autonomy by delegating some powers of the states to local governments.[67] Hence, different states may have different kinds of relationships with their local governments.

As a result, states are the primary actors when it comes to enacting health policies and programs. While the federal government has "broad powers under the constitution to protect the public's health and safety[,]"[68] it nevertheless falls upon the state to undertake regulatory activities and promote specific programs and policies to enact a national policy given by the federal government. On the other hand, given the difference among state constitutions, the power of local governments—specifically those of local public health agencies—vary. In some states, the state government or state public health agency has direct control over its local counterparts;[69] in others,

[63] U.S. CONST. amend. X.

[64] COMMITTEE ON ASSURING THE HEALTH OF THE PUBLIC IN THE 21ST CENTURY, THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY [hereinafter "The Future of the Public's Health"] 102 (2002).

[65] *See* Mandanas v. Ochoa, G.R. No. 199802, July 3, 2018; *Cities 101- Delegation of Power*, NLC NATIONAL LEAGUE OF CITIES WEBSITE, *at* https://www.nlc.org/resource/cities-101-delegation-of-power/.

[66] *Id.*

[67] *Id.*

[68] The Future of the Public's Health, *supra* note 64, at 103.

[69] *Id.* at 108.

the local agencies retain independence and only have cooperative relationships with their state counterparts.

Given that the United States has a federal government, it is no surprise that the different states enjoy autonomy from the federal government. Even when it comes to public health, the role of the federal government is merely to "set health goals, policies, and standards[.]"[70] However, the primary bulk of scientific decision-making seems to rest on the state. Given the traditional notion of Dillon's Rule still being present in some states, states have no limitations in reversing the actions of local governments that may not conform to scientific evidence. On the other hand, states with home rule provisions do not have the same unfettered discretion. As the local governments enjoy autonomy, states would have to find other ways to invalidate such policies or actions.

B. The United Kingdom

No constitutional provision governs the relationship between the parliamentary government and local governments in the United Kingdom, primarily because it does not have a written constitution.[71] Nevertheless, local governments in the United Kingdom are governed by different laws per country, with Scotland, Wales, and Northern Ireland having a "unitary, single-tier system of local government"[72] and England having both single-tier and two-tier local governments. The relations between national and local government officials are established through partnership agreements, such as the Partnership Council in Wales.[73]

When it comes to control and supervision over scientific decision-making of the local governments, particularly in the area of public health, the Health and Social Care Act of 2012 governs.[74] Under this law, local authorities take on several responsibilities in promoting public health. However, these functions all fall within the regulatory power of the Secretary of State.[75]

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[70] *Id.*

[71] Commonwealth Local Government Forum, *The Local Government System in UK*, *available at* http://www.clgf.org.uk/default/assets/File/Country_profiles/United_Kingdom.pdf.

[72] *Id.* at 265.

[73] *Id.* at 268.

[74] *See* U.K. Department of Health, *The new public health role of local authorities* (2012), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/213009/Public-health-role-of-local-authorities-factsheet.pdf.

[75] *Id.*

Section 31 of the law provides that the Secretary has the power to set standards that the local authorities should adhere to.[76] Thus, in performing public health functions, local authorities are subject to the control of Secretary of State. The law allows the Secretary to "prescribe aspects of *how* local authorities carry out their health improvement functions[,]"[77] implying the exercise of the power of control. Hence, if local authorities enact policies or measures against scientific evidence, then the Secretary may reverse these acts.

C. Indonesia

The local government structure of Indonesia is primarily governed by its constitution and its local government law.[78] Three different levels of local governments exist, namely, the province, district, and sub-district.[79] However, these levels do not follow a hierarchical structure but are all subordinate only to the central government.[80] Moreover, compared to the United States, the United Kingdom, and even the Philippines, the devolution of powers in Indonesia is more nuanced. Indonesia's local government law provides for three kinds of government affairs, namely, absolute government affairs, government affairs concurrent, and general government affairs.[81] Absolute government affairs are those wholly under the authority of the central government, whereas local governments work together with the central government in matters under concurrent government affairs.[82] Health is one of the areas under concurrent government affairs.[83]

The matter of Indonesia's health policy-making was comprehensively discussed in Taufik Hanafi's paper entitled *Towards Sustainable Health Care Development in Indonesia*. Hanafi explained that the process of formulating health policies in the country involved two processes, namely, a top-down approach and a bottom-up approach. The latter includes consultations and drafting of proposals submitted by the lowest government level and submission to the next level, which will then be discussed by sub-district or district representatives.[84] The proposals are discussed both at the sub-district

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[76] *Id.* at 2.

[77] *Id.* Emphasis supplied.

[78] Indon. Law No. 23/2014 (2014). Law No. 23 of 2014 on Local Government.

[79] Taufik Hanafi, *Towards Sustainable Health Care Development in Indonesia*, UNIVERSITY OF MICHIGAN WEBSITE, *available at* http://www.umich.edu/~csfound/545/1998/topik/chap04.htm.

[80] *See* Richmoune Sy, *LocGov Indonesia Report* (Apr. 22, 2021), *at* https://drive.google.com/file/d/1JrVdePCcUudzOLzItPHKmdGDfa0g3w2H/view.

[81] Indon. Law No. 23/2014 (2014), art. 9 (1).

[82] Arts. 9(2)-9(3).

[83] Art. 12(1)b.

[84] Hanafi, *supra* note 79.

and district level and are then submitted to the provincial government. These are presented by each provincial governor during a national meeting attended by various central government representatives, allowing central officials to "understand and discuss the views of the regional governments."[85] On the other hand, the top-down approach includes developing proposals that consider national targets and budget. This process does not involve the local governments, but merely requires approval by Indonesia's People's Representative Council.[86]

Under the local government law, the central government is authorized to set norms and standards for the implementation of health programs as this is classified as a concurrent government affair.[87] These norms and standards would have the same effect as a law, which must be followed. Hence, similar to the Philippine legal framework, there seems to be a need for an explicit provision in the health standards that health policies must follow scientific evidence. This would, in turn, limit the scientific decision-making of local governments and subject them to the powers of "guidance and supervision" of the central government.[88]

D. Conclusion

The three foreign jurisdictions discussed all point to different structures and relationships existing between national and local governments when it comes to their power relations. In the first example, the presence of the "home rule" provisions grant local governments autonomy and limit the power of the state to intervene in policy-making matters. Hence, theoretically, there can be unlimited discretion in the scientific decision-making of the local government. The second example presents the opposite case: The national government has full control over the acts of the local government pertaining to public health policy-making, and hence, can reverse health policies enacted by local governments. The third example is somewhat similar to that found in the Philippine legal framework, wherein the ability of the central government is dependent on the existence of a law—or other legally binding document—which mandates policies to be based on scientific evidence. Hence, scientific decision-making can only be interfered with if there are existing standards for such.

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[85] *Id.*

[86] *Id.*

[87] Indon. Law No. 23/2014 (2014), art. 16(1).

[88] Art. 7(1).

IV. PROPOSED RECOMMENDATIONS

The current Philippine legal framework limits the power of the executive to modify or reverse policies that result from the scientific decision-making of LGUs. However, as seen from the experiences of the country during the COVID-19 pandemic, there are instances when such power is needed.

As a remedy, this paper makes the following recommendations, namely, *first*, a liberal interpretation of the power of supervision given to the executive; *second*, the institutionalization of legal standards for evidenced-based policies; and *third*, the adoption of Indonesia's bottom-up and top-down approaches in health policy-making.

A. Liberal interpretation of the power of supervision

As discussed,[89] the power of supervision of the executive is derived from the constitutional grant in Article X, Sec. 4 of the Constitution. The exact phrasing is as follows:

> Section 4. The President of the Philippines shall exercise general supervision over local governments. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays, shall ensure that the acts of their component units are within the scope of their prescribed powers and functions.

The LGC also provides for the exercise of "national supervision over local government units" as follows:

> Section 25. *National Supervision over Local Government Units.* – (a) Consistent with the basic policy on local autonomy, the President shall exercise general supervision over local government units to ensure that their acts are within the scope of their prescribed powers and functions.
>
> The President shall exercise supervisory authority directly over provinces, highly urbanized cities, and independent component cities; through the province with respect to component cities and municipalities; and through the city and municipality with respect to barangays.

[89] *See supra* Part II.B.

Both provisions state that the limit of the power of supervision extends to ensuring that LGUs are acting "within the scope of their prescribed powers and functions." The Court has consistently interpreted this to mean that the power of supervision is limited to ensuring that LGUs are acting within the scope of prescribed *legal* standards.[90] This leads to the current gap in the legal framework regarding measures contrary to scientific standards.

A broader interpretation of the power of supervision may solve this problem. One of the powers of the LGU is to enact policies and measures for the protection and promotion of health and safety.[91] LGUs also have the power to provide for basic services, such as health services, to their constituents.[92] Concomitant with this power is that the measures taken by the LGU should actively promote health and safety. If a measure is passed and later found to be scientifically harmful, then the LGU is no longer within the bounds of its power to promote "health and safety." Thus, the executive, in exercise of its power of supervision, may direct the LGU to revisit its policies. Even if the measure was legally sound, the fact that it went against scientifically established evidence already constitutes a violation of the LGU's "prescribed powers and functions" that can be corrected through the power of supervision.

While this interpretation may fill the existing gaps, the Court should clearly and explicitly delineate the bounds of the executive in exercising this power. Giving unfettered discretion to the executive may result in abrogating the principle of local autonomy. As a nation once faced with the horrors of tyranny and dictatorship, the possibility and threat of the national government exercising too much power over local governments should be avoided.

B. The institutionalization of legal standards for evidenced-based measures

Currently, DOH Administrative Order No. 2020-015 is the legal basis mandating the use of evidenced-based strategies to curb the COVID-19 pandemic.[93] While this may be used by the executive as basis for reversing measures made specifically for the COVID-19 pandemic, this does not extend to other public health measures. Republic Act No. 11332 or the "Mandatory

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[90] *See* Mondano v. Silvosa, 97 Phil. 143, 147 (1955); *Drilon*, 235 SCRA 135, 142; Province of Negros Occidental v. COA, G.R. No. 182574, 631 SCRA 431, 441-442, Sept. 28, 2010.

[91] LOCAL GOV'T CODE, § 16.

[92] §§ 17(b)(1)(ii), 17(b)(2)(iii), and 17(b)(3)(iv).

[93] *See supra* Part I, p.2.

Reporting of Notifiable Diseases and Health Events of Public Health Concern Act" only requires scientific evidence when local health offices declare a disease outbreak within their territories.[94] However, there is no mention of requiring scientific evidence for the response of the local government to the disease outbreak.

A simple remedy to the existing gaps in the legal framework would be for the Congress to enact a law mandating the use of evidenced-based measures in the scientific decision-making of LGUs. It cannot be said that this law would violate the local autonomy of LGUs; they are still left with the power to choose which measures to implement. The only requirement is that these measures are limited to those supported by scientific evidence. This would ensure that the measure chosen has been proven to achieve the goal it was enacted for.

Furthermore, the passage of such a law would serve to create legal standards that would operate as the basis for the exercise of the executive's power of supervision. Requiring LGUs to craft their measures in line with scientific evidence would be a matter falling squarely within the power of supervision since it would now involve meeting legal standards.

C. Adoption of bottom-up and top-down approaches in healthy policy development

To forestall the need to apply the power of supervision, which would necessitate the replacement of existing measures and possibly give rise to conflict and tension between the national and local governments, it would be wise for both parties to arrive at a mutually acceptable measure in the first place. Currently, health policies and measures are developed through a top-down approach: The DOH is in charge of making the health policies,[95] and LGUs comply with the national policy as set by the DOH. The DOH implements its policies in different LGUs through its regional and provincial health offices.[96] Notably, the power of these regional offices is limited only to the implementation of already existing policies and plans of the central DOH. They do not have the power to create their own measures and policies that do not fall within the scope of the national policy. On the other hand, the power of local health boards in LGUs is limited only to administrative matters,

[94] Rep. Act No. 11332 (2018), § 7.
[95] REV. ADM. CODE, bk. IV, tit. IX, § 3.
[96] §§ 18-21.

such as budgetary allocations, maintenance of facilities, and personnel selection.[97]

The weakness of this current framework is that the policymakers at the national level may not be attuned to the local circumstances. On the other hand, LGUs do not seem to have the avenue to express their concerns to policymakers at the national level. This gap in communication may lead LGUs to enact measures that they consider fit to their own circumstances, albeit such measures going against scientific studies.

Thus, there is a need to adopt a bottom-up approach in policymaking, particularly when it comes to health policies. Local health boards and DOH regional or local offices may have representatives to meet with policymakers to come up with a national health policy acceptable to all parties concerned. This would lessen the possibility of having different measures, thereby lessening the possibility of LGUs enacting measures not based on scientific evidence. It would also serve to make the health response more efficient by giving space to both macro- and micro-level responses to problems, such as the COVID-19 pandemic.

CONCLUSION

The COVID-19 pandemic has undoubtedly changed the world and called into question what many consider as the norm. If the Philippines is to successfully overcome this pandemic, it is important for both the national and local governments to enact policies and measures proven to have worked in the past through established scientific evidence. However, the reality is that there are instances where LGUs adopt measures that go against these studies, possibly endangering their constituents. Despite this, the executive is powerless to remove and modify these measures given its limited power of supervision and the principle of local autonomy. The executive can act only if there are existing legal bases providing the need for evidenced-based scientific decision-making.

This paper presented possible solutions as to how this conflict may be resolved: *first*, a liberal interpretation of the power of supervision; *second*, institutionalization of legal standards mandating evidence-based measures; and *finally*, adoption of a bottom-up approach in policymaking. Nevertheless, while these may serve to remedy the existing gaps in the current legal

[97] LOCAL GOV'T CODE, § 102(b).

framework, it must be emphasized that there is a need to define the exact limits and boundaries of the power of the executive. Caution must be taken to strike a balance between the need for evidence-based measures and local autonomy.

Nonetheless, there are still unresolved questions on the issue of scientific decision-making. Science is continuously changing and evolving, and it is rare that scientific studies agree with one another. At best, the science regarding a particular matter may be inconclusive and there may be diametrically opposing views. In these cases, what would happen if the national government and the LGU were to adopt opposing sides, both being supported by scientific studies? Furthermore, how would the executive determine whether a certain measure is based on scientific evidence? To what extent should the measure adopt scientific evidence? Should the determination of a measure being "evidence-based" be left to courts?

These questions highlight the nuances and intricacies in the realm of scientific decision-making by both the national and local governments. However, one thing remains clear—as said by Isaac Asimov, "scientific truth is beyond loyalty and disloyalty." The government should focus on truth, especially scientific truth, to successfully get through the COVID-19 pandemic and prepare for other public health emergencies that may arise in the future.

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