G.R. No. 204819 – James M. Imbong, et al. v. Hon. Paquito N. Ochoa, Jr., *et al.* and G.R. No. 204934 – Alliance for the Family Foundation Philippines, Inc., *et al.* v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 204957 – Task Force for Family and Life Visayas, Inc. and Valeriano S. Avila v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 204988 – Serve Life Cagayan de Oro City, Inc., *et al.* v. Office of the President, *et al.*; G.R. No. 205003 – Expedito A. Bugarin v. Office of the President of the Republic of the Philippines, *et al.*; G.R. No. 205043 – Eduardo B. Olaguer and the Catholic Xyberspace Apostolate of the Philippines v. DOH Secretary Enrique T. Ona, *et al.*; G.R. No. 205138 – Philippine Alliance of Xseminarians, Inc., *et al.* v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 205478 – Reynaldo J. Echavez, M.D., *et al.* v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 205491 – Spouses Francisco S. Tatad and Maria Fenny C. Tatad, *et al.*; v. Office of the President of the Republic of the Philippines; G.R. No. 205720 – Pro-Life Philippines Foundation, Inc., *et al.* v. Office of the President, *et al.*; G.R. No. 205355 – Millennium Saint Foundation, Inc., *et al.* v. Office of the President, *et al.*; G.R. No. 207111 – John Walter B. Juat, *et al.* v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 207172 – Couples for Christ Foundation, Inc., *et al.* v. Hon. Paquito N. Ochoa, Jr., Executive Secretary, *et al.*; G.R. No. 207563 – Alamrim Centi Tillah and Abdulhussein M. Kashim v. Executive Secretary Paquito N. Ochoa, Jr., *et al.*

Promulgated:

April 8, 2014

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SEPARATE CONCURRING OPINION

BRION, *J.*:

I submit this Separate Concurring Opinion to reflect my views on selected constitutional issues submitted to the Court.

I agree with the *ponencia*'s conclusion that the petitions before the Court are ***ripe for judicial review***, but I do so under *a* ***fresh approach*** that meets head-on the recurring problems the Court has been meeting in handling cases involving constitutional issues. My discussions on this point are likewise submitted to reply to the position of Mr. Justice Marvic Leonen that the petitions are not appropriate for the exercise of the Court's power of judicial review.

I also agree with the *ponencia* that the Reproductive Health (*RH*) law protects and promotes the right to life by its continued prohibition on

abortion and distribution of abortifacients. I exclude from this concurrence ***Section 9 of the RH law and its Implementing Rules and Regulation (IRR)*** which, in my view, fail in their fidelity to the constitutional commands and to those of the RH Law itself; for one, they fail to adopt the principle of double effect under Section 12, Article II of the 1987 Constitution ("*Section 12*").

For these reasons, I cannot wholly agree that the RH Law is fully protective of the unborn from conception. I submit, too, that the Court should formulate **guidelines** on what the government can actually procure and distribute under the RH law, consistent with its authority under this law and Section 12, Article II to achieve the full protection the Constitution envisions.

I also agree that the challenge to Section 14 of the RH Law is premature. However, I submit my own views regarding the mandatory sex education in light of the natural and primary right of parents to raise their children according to their religious beliefs. My discussion on this topic also responds to the position of Mr. Justice Bienvenido Reyes that the challenge to the constitutionality is ripe and that the government has a compelling interest in enacting a mandatory sex education program.

Lastly, I find the RH law's Section 23(a)(1), which penalizes healthcare providers who "knowingly withhold information or restrict the dissemination thereof, and/or intentionally provide incorrect information regarding programs and services on reproductive health" to be unconstitutional for violating the freedom of speech.

For easy reference and for convenience, this Opinion shall proceed under the following structure:

I. Preliminary Considerations

A. The petitions are **ripe for judicial review**: the fresh approach under the 1987 Constitution

a. The Historical Context of Judicial Power

b. Analysis of Section 1, Article VIII of the 1987 Constitution.

b.1. The Power of Judicial Review
b.2. The New and Expanded Power

B. The Three Types of Adjudicative Judicial Power

C. The Court is **duty bound** to resolve the present petitions, not merely dismiss them.

II. Substantive Discussions

A. The RH Law does not fully protect the right to life of the unborn child

a. Overview
   i. The primacy of life in the Philippine context

b. The 1987 Constitution
   i. The status of the unborn under the 1987 Constitution
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c. Section 12, Article II of the 1987 Constitution and *Roe v. Wade*

d. Abortion, abortifacients and the RH Law

e. The RH law's definition of abortifacient textually complies with Section 12, Article II, 1987 Constitution

f. The principle of double effect
   i. The role of the DOH
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B. Parental Rights

a. Parental rights in the Filipino context
b. Parental rights and the State's interest in the youth
c. The state has failed to show a compelling State interest to override parental rights in reproductive health education
d. The question on Section 14's constitutionality is premature

C. Disturbing observations and concerns: The Effects of Contraceptives on national, social and cultural values

D. Freedom of Expression of Health Practitioners and the RH Law

I. Preliminary Considerations

A. The petitions are ripe for judicial review: the fresh approach under the 1987 Constitution

I **submit that the petitions are ripe for judicial review**. My approach is anchored on a **"fresh" look at the 1987 Constitution** and the innovations it introduced on the Judicial Department, specifically, on the expansion of the Court's adjudicative "judicial power."

a. The Historical Context of Judicial Power.

The **1935 Constitution** mentioned the term "**judicial power**" but did not define it. The Constitution simply located the seat of this power *"in one Supreme Court and in such inferior courts as may be established by law."*

The **1973 Constitution**, for its part, did not substantially depart from the 1935 formulation; it merely repeated this same statement and incorporated part of what used to be another section in the 1935 Constitution into its Section 1. Thus, Section 1 of the Article on the Judicial Department of the 1973 Constitution provided:

> The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law. The National Assembly shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section five thereof.

The **1987 Constitution**, in contrast with the preceding Constitutions, substantially fleshed out the meaning of "judicial power," not only by confirming the meaning of the term as understood by jurisprudence up to that time, but by going beyond the accepted jurisprudential meaning of the term. The changes are readily apparent from a plain comparison of the provisions. The same Section 1 under Judicial Department (Article VIII) now reads:

> The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power **includes** ***the duty of the courts of justice*** to settle ***actual controversies*** involving ***rights which are legally demandable and enforceable***, AND to determine whether or not there has been ***a grave abuse of discretion*** amounting to lack or excess of jurisdiction on the part of ***any branch or instrumentality of the Government***. (emphasis and underscoring supplied)

b. <u>Analysis of Section 1, Article VIII of the 1987 Constitution.</u>

This simple comparison readily yields the reading – through the repetition of the sentence that both the 1935 and the 1973 Constitutions contained – that the 1987 Judiciary provisions retain the same "judicial power" that it enjoyed under the 1935 and the 1973 Constitutions.

In addition, the 1987 Constitution, through the 2nd paragraph of its Section 1, confirms that judicial power is wider than the power of adjudication that it traditionally carried (*by using the word "includes"*) and at the same time incorporated the *basic requirements for adjudication* in the traditional concept, namely, the presence of "*actual controversies*," based on "*rights which are legally demandable and enforceable*."

The confirmation expressly mentions that the power is granted to "***courts of justice***" and, aside from being a power, is imposed as a ***duty of the courts***. Thus, the Constitution now lays the courts open to the charge of failure to do their constitutional duty when and if they violate the obligations imposed in Section 1, Article VIII of the 1987 Constitution.

Section 5, Article VIII of the 1987 Constitution further fleshes out the irreducible "powers" of the Supreme Court[1] in terms of its ***original***, ***appellate***, and ***review adjudicative powers*** and its other non-adjudicative powers.[2] In so doing, Section 5 also confirmed the extent of the constitutionally-granted adjudicative power of the lower courts that Congress has the authority to create (by defining, prescribing and apportioning their jurisdictions[3]), as well as the grant of ***administrative***, ***executive and quasi-legislative powers*** to the Supreme Court, all within the sphere of its judicial operations.

Section 5 now provides:

> SECTION 5. The Supreme Court shall have the following powers:
>
> (1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.

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1 Section 2, Article VIII of the 1987 Constitution reads:
Section 2. The Congress shall have the power to define, prescribe, and apportion the jurisdiction of various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 hereof.

2 Section 6, Article VIII of the 1987 Constitution reads:
Section 6 provides that "The Supreme Court shall have administrative supervision over all courts and the personnel thereof."

3 Batas Pambansa Blg. 129.

> (2) Review, revise, reverse, modify, or affirm ***on appeal or certiorari***, as the ***law or the Rules of Court may provide***, final judgments and orders of ***lower courts*** in:
>
> (a) All cases in which the ***constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation*** is in question.
>
> (b) All cases involving the ***legality of any tax, impost, assessment, or toll***, or any penalty imposed in relation thereto.
>
> (c) All cases in which the ***jurisdiction of any lower court*** is in issue.
>
> (d) All ***criminal cases*** in which the penalty imposed is reclusion perpetua or higher.
>
> (e) All cases in which only an ***error or question of law*** is involved.
>
> (3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.
>
> (4) Order a change of venue or place of trial to avoid a miscarriage of justice.
>
> (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.
>
> (6) Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.

b.1. <u>The Power of Judicial Review.</u>

In the process of making "judicial power" more specific and in outlining the specific powers of the Supreme Court, the Constitution made express the ***power of "judicial review***," *i.e.*, the power to pass upon the ***constitutional validity*** of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation,[4] as the *"law or the Rules of Court may provide*."

This formulation recognizes that the Supreme Court, even before the 1987 Constitution came, already had workable rules of procedure in place for the courts. These rules cover ordinary actions, special civil actions, special proceedings, criminal proceedings, and the rules of evidence in these proceedings, all of which the 1987 Constitution recognized when it

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[4] This same power was only implied in the US Constitution and was expressly recognized only through jurisprudence (*Marbury v. Madison*, 5 US 137 [1803]). Our 1935 and the 1973 Constitutions followed this approach.

mentioned the Rules of Court, but subject to the Supreme Court's *power of amendment*.

b.2. <u>The New and Expanded Power.</u>

Still **another addition**, a completely new one, to the concept of judicial power under the 1987 Constitution is **the power "*to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.*"**[5] This new power is innovative since its recognition is separate from the traditional adjudicative power that Section 1 earlier confirms and which Section 5 in part fleshes out.

It is likewise a definitive expansion of judicial power as its exercise is not over the traditional justiciable cases handled by judicial and quasi-judicial tribunals. Notably, judicial power is extended **over the very *powers exercised by other branches or instrumentalities of government*** when grave abuse of discretion is present. In other words, the expansion empowers the judiciary, ***as a matter of duty***, to inquire into acts of lawmaking by the legislature and into law implementation by the executive when these other branches act with grave abuse of discretion.

This expansion takes on special meaning when read with the powers of the Court under Section 5, particularly in relation with the Court's power of ***judicial review***, *i.e., the power to declare a treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordination or regulation unconstitutional.*

Under the expanded judicial power, justiciability expressly depends ***only*** on the presence or absence of grave abuse of discretion, as distinguished from a situation where the issue of constitutional validity is raised within a traditionally justiciable case where the elements of actual controversy based on specific legal rights must exist. In fact, *even if the requirements for strict justiciability are applied*, these requisites can already be taken to be present once grave abuse of discretion is *prima facie* shown to be present.

In the process of lawmaking or rulemaking, for example, an *actual controversy* is already present when the law or rule is shown to have been attended by grave abuse of discretion because it was passed; it operates; or its substantive contents fall, outside the contemplation of the Constitution.[6] This should be contrasted with allegations of constitutional invalidity in the traditional justiciable cases where, by express constitutional requirement, the elements of (1) actual controversy involving (2) demandable and enforceable

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[5] Constitution, Article VIII, Section 1.

[6] *Pimentel v. Aguirre*, G.R. No. 132988, July 19, 2000; and *Tanada v. Angara*, G.R. No. 118295 May 2, 1997.

rights, must be present because what essentially comes to court is the traditional justiciable case, interwoven with constitutional validity questions.

In the expanded judicial power, any citizen of the Philippines to whom the assailed law or rule is shown to apply necessarily has ***locus standi*** since a constitutional violation constitutes an affront or injury to the affected citizens of the country. If at all, a less stringent requirement of *locus standi* only needs to be shown to differentiate a justiciable case of this type from the pure or mere opinion that the courts cannot render.

Necessarily, too, ***a matter is ripe*** for adjudication if the assailed law or rule is already in effect. The traditional rules on ***hierarchy of courts*** and ***transcendental importance***, far from being grounds for the dismissal of the petition raising the question of unconstitutionality, may be reduced to rules on the level of court that should handle the controversy, as directed by the Supreme Court.

Thus, when grave abuse of discretion amounting to a clear constitutional violation is alleged and preliminarily shown, the Supreme Court is duty-bound to take cognizance of the case, or at least to remand it to the appropriate lower court, based on its consideration of the urgency, importance or evidentiary requirements of the case.

B. The three types of Adjudicative Judicial Powers.

In sum, judicial power, as now provided under the 1987 Constitution, involves three types of controversies, namely:

(1) the **traditional justiciable cases** involving actual disputes and controversies based *purely* on demandable and enforceable rights;

(2) the **traditional justiciable cases** as understood in (1), but ***additionally involving*** **jurisdictional and constitutional issues**;

(3) **pure constitutional disputes** attended by **grave abuse of discretion** in the process involved or in their result/s.

The **first two types** are already covered by the Rules of Court that, as recognized by Section 5, are already in place, subject to the amendments that the Supreme Court may promulgate.

The **third type** may inferentially be covered by the *current* provisions of the Rules of Court, specifically by the rules on *certiorari, prohibition* and *mandamus* but, strictly speaking, requires special rules that the current Rules of Court do not provide since the third type does not involve disputes arising as traditionally justiciable cases. Most importantly, the third type *does not involve judicial or quasi-judicial exercise of adjudicative power* that the

Supreme Court has traditionally exercised over lower tribunals[7] to ensure that they stay within the confines of their adjudicative jurisdiction.

In the petitions now before us, these new realities on judicial power necessarily must be considered as the petitions allege actions by the legislature and by the executive that lie outside the contemplation of the Constitution. Specifically, they involve the constitutionally infirm provisions of the RH Law passed by Congress and of the IRR of the law that the executive promulgated through the Department of Health.

To be sure, the absence of specifically applicable rules cannot be a judicial excuse for simply bodily lifting the rules for the traditional justiciable cases which the present cases are not. In fact, the Court should not even be heard to give an excuse as it is not undertaking a power that it may exercise at its discretion; the Court is discharging an express duty imposed by the Constitution itself.

In providing for procedural parameters, the Court may not simply hark back to jurisprudence ***before*** the 1987 Constitution as they will not obviously apply, nor to jurisprudence ***after*** the 1987 Constitution that failed to recognize the third type of justiciable controversy for what it is.

Thus, in the present case, the Court must be guided strictly by the express constitutional command. If past jurisprudence will be made to apply at all, they should be closely read and adjusted to the reality of the third or new type of judicial adjudicative power.

C. The Court is duty bound to resolve the present petitions, not simply dismiss them.

The consolidated petitions before the Court raise several ***constitutional challenges*** against the RH Law, ranging from violations of the right to life of the unborn (and, concomitantly, of the constitutional prohibition against abortion); violations of the freedom of religion and of speech; violations of the rights of parents and protected familial interests; down to the mostly benign allegations of violation of natural law.

An important and insightful approach is the petitioners' attack on the RH law by considering it as a ***population control measure*** that is beyond the power of the government to carry out. The respondents parry this attack by arguing that whatever impact the RH law would have on the population would only be incidental, as the main target of the law is to recognize and enhance the reproductive health rights of women. **I agree with the**

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[7] Through the writs of certiorari, prohibition and mandamus over lower courts and quasi-judicial bodies in the exercise of their adjudicative functions.

***ponencia's* analysis of what the RH Law really is, and adopt this analysis and conclusion for purposes of my own discussions in this Opinion.**

This snapshot of the petitions strongly shows how the economic, social, cultural and religious dimensions of the RH law cut a swath through the traditional legal and constitutional realm of adjudication. It is no surprise that it took the RH bill fourteen years in Congress before it was enacted into law.

The sharp divide between the law's proponents' and opponents' views and beliefs on the propriety of the RH law, within and outside its legal and constitutional dimensions, reflect the law's encompassing impact: its ***implementation*** could, quite possibly, change the face of Philippine society as we know it today. In fact, in this Separate Opinion, I add my own nagging concerns and observations although I know that these may go into the wisdom of the law and are not appropriate for adjudication. I do this, however, in the name of *judicial license* that should allow me, as a citizen, to express my own personal observations on the dispute at hand.

Indeed, if the RH law seeks to bring about strong, socio-political and economic changes even at the price of our historical identity, culture and traditions, then so be it, ***but the affected public should know the impact of the issues that soon enough will confront the nation***. It is important, too, that changes should not come at the expense of the provisions of the Constitution – the only document that holds the nation together "during times of social disquietude or political excitement," as in the present case. This should not be lost on us, as a Court, and should be a primary consideration in our present task.

At the core of the petitions is the RH law's alleged violation of the right to life of the unborn. I view the unborn's right to life within the much broader context of Article II, Section 12 of the 1987 Constitution *recognizing* the sanctity and autonomy of familial relations and the natural and primary parental right in child-rearing, on the one hand, and Article XV, Sections 1 and 3, recognizing the key role of the family, on the other.

These constitutional provisions serve as the compass guiding this Opinion and should in fact serve as well for the Court's own decision-making. Even those in the political departments of government should pay them heed, separately from the political and economic considerations that, from the terms of the RH law and its IRR, obviously served as the political departments' driving force.

Under our constitutional regime, the judicial department is the only organ of government tasked to guard and enforce the boundaries and limitations that the people had put in place in governing themselves. This constitutional duty of the Court has been ***expanded*** by the additional power

of judicial review under the 1987 Constitution to "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

These are awesome powers carrying deep and far-ranging duties that we can only discharge while fully aware of their accompanying responsibilities and pre-ordained limits. The present Court, I am sure, is fully aware of the extent of these duties and the limitations, particularly of the rule that we cannot set new polices nor seek to implement current ones as these involve roles that are not constitutionally ours to undertake.

I am aware, too, that the RH Law now before us carries multi-dimensional repercussion, not all of them within the legal and constitutional realms. These realities, however, should not leave us timid in undertaking our tasks; for as long as we act within the confines of our constitutionally-defined roles, we cannot go wrong.

A sure measure to best ensure proper action is to consider the petitions ***under the third type of judicial adjudications power (defined above) that we first consciously utilize under the present Constitution***. In this way, we give full respect to the separation of powers; we step in only when the legislative and the executive step out of the bounds defined for them by the Constitution.

For all these reasons, I join the *ponencia's* result in its ruling that a controversy exists appropriate for this Court's *initial consideration* of the presence of grave abuse of discretion, and *consequent adjudication* if the legislative and executive actions can be so characterized.

II. Substantive Discussions

A. The RH Law does not fully protect the right to life of the unborn child.

a. Overview

The 1987 Constitution has implicitly recognized the right to life of the unborn child under its Section 12 when it gave the mandate, under the Section's second sentence, to protect the unborn life from its conception, equally with the life of mother.

I agree with the *ponencia*'s conclusion that under Section 12, the conception that the Constitution expressly speaks of, occurs upon fertilizations of the ovum. Thus, the RH law cannot be faulted in its definition of an ***abortifacient*** to be *any drug or device that kills or destroys the fertilized ovum or prevents its implantation in the uterus*.

I ***slightly*** differ, however, from the way the *ponencia* arrived at its conclusion. To me, the Constitution never raised the question of "when life

begins";[8] in fact, this is a question that the framers of the Constitution sensibly avoided by simply adopting the formulation "*the life of the unborn from conception.*" Interestingly, they even dropped the term "*moment of conception*" since this precise moment cannot be determined with certainty. The answer the framers decided upon (reinforced by undisputed medical authorities) and which they hope future constitutional leaders and decision-makers will grasp and respect is that ***once the sperm cell and the egg cell unite (resulting in the combination of their genetic materials to form the fertilized egg or the zygote),[9] the protection intended for the unborn should be triggered with full force.*** I write this Opinion with full respect for this hope.

Thus, I agree with the *ponencia* that the RH law protects and promotes the right to life of the unborn by its continued prohibition on abortion and distribution of abortifacients. I do recognize, however, that while the RH law generally protects and promotes the unborn's right to life, its ***Section 9 and its IRR fail in their fidelity to the Constitution and to the very terms of the RH Law itself. For one, it fails to adopt the principle of double effect under Section 12, Article II of the 1987 Constitution***, as more fully discussed below.

For these reasons, I cannot wholly concur that the ***RH law and its IRR***, as they came to this Court, were fully protective of the right to life of the unborn. In fact, the Court should lay down guidelines, culled from a constitutionally-valid RH Law, of what the government can actually procure and distribute under the RH law, consistent with its authority under this law and Section 12, Article II of the Constitution.

i. The primacy of life in the Philippine context

The primacy of life from its earliest inception is a constitutional ideal *unique* to the 1987 Philippine Constitution. While our system of government of tripartite allocation of powers (Articles VI to VIII), the concept of our Bill of Rights (Article III) and even the traditional concept of judicial review (Section 1, Article VIII) may have been of American origin, the idea of life itself as a fundamental constitutional value from its earliest inception carries deep roots in the Philippine legal system.

The idea of life as a fundamental constitutional value from its earliest inception is not of recent vintage although our previous constitutions did not have a provision equivalent to the present Section 12, Article II. Our legal

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[8] As petitioner Alliance for Family Foundation Inc, states, "the question of when life begins is neither metaphysical nor theological – it is scientific;" (Memorandum, pp. 48) and unless the scientific community has become unanimous on a question that transcends every culture, race, and religion, this Court cannot consider itself adequate to answer the question. Indeed, the question of "when life begins?" is not simply a question of law that this Court can conclusively answer; it is not also simply a question of policy that Congress can conclusively determine. What the Court does know is that it is question that is as old as humanity itself.

[9] http://psychology.about.com/od/developmentalpsychology/a/prenataldevelop.htm.

history shows that abortion laws have been in existence even during the Spanish regime when the Spanish Penal Code was made applicable in the Philippines. When the Revised Penal Code was enacted in 1930, the life of the unborn was also considered by suspending the execution of the death sentence[10] on a *pregnant* woman. Under the New Civil Code of 1950, an unborn child is granted ***presumptive personality*** from the time of its conception for civil purposes that are favorable to it, although subject to the condition that it be born later.[11] To a certain extent, this presumptive personality is already recognized under our penal laws. Under Title I (Crimes Against Persons), Chapter 8 (Destruction of Life) of the Revised Penal Code, the killing of viable, and even non-viable, fetuses may result in criminal liability.[12]

The continued efficacy of these statutory provisions evidences our society's high regard for the life of the unborn; thus, our present Constitution allows us to disregard it only for the equally paramount necessity of saving the life of the unborn's mother. It also reflects not only our society's recognition of and respect for the life of the unborn as a Filipino ideal to be pursued under the 1987 Philippine Constitution, but of the country's own cultural values as a people.[13]

That this same respect is now *expressly* provided under the 1987 Constitution is not so much for the purpose of creating a right, but for the purpose of strengthening the protection we extend to the unborn life against varied external threats to it.[14] It would indeed be ***very ironic*** if the threat would come from our own government *via* the abortifacients it hopes to distribute under the RH Law's IRR.

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10 Article 83 of the Revised Penal Code.

11 See also Presidential Decree (*PD*) No. 603. The effect of this grant of presumptive personality is illustrated in *Geluz v. Velez* (G.R. No. L-16439, July 20, 1961) where the Court, denied recovery of damages for the death of an unborn because it is not yet "endowed with personality." Nevertheless, the Court recognized that an unborn fetus has a "**right to life and physical integrity**." Similarly in *Quimiging v. Icao* (G.R. No. 26795, July 31, 1970), the Court ruled an unborn child is entitled to receive support from its progenitors.

12 See Arts. 255-259 of the Revised Penal Code.

13 The Preamble of the 1987 Constitution reads:

> We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.

14 This conclusion is reached by a reading of Section 12, Article II in relation with the other provisions in the 1987 Constitution. Unlike the US Constitution, the idea of respect for life and for human dignity permeates the Philippine Constitution, *viz*: Section 5, Article II on the protection of life under a democracy; Section 9, Article II on a social order that ensures quality life for all; Article II in relation to Article XIII on its special regard for the youth, women, health, and ecology as factors affecting the life of the people; Section 1, Article III on the protection of life through the observance of due process; Section 1, Article XII on national economy that fosters equality of life for all.

b. The 1987 Constitution

i. The status of the unborn under the 1987 Constitution

Although the framers of the Constitution expressly recognized the unborn's right to life from conception, they did not intend to give the unborn the status of a person under the law.

Instead, the framers distinguished between the unborn's right to life and the rights resulting from the acquisition of legal personality upon birth in accordance with law. Unlike the rights emanating from personhood, the right to life granted to the unborn is in itself complete from conception, unqualified by any condition.

Although Section 12, Article II of the Constitution does not consider the unborn a person, its terms reflect the framers' clear intent to convey an utmost respect for human life[15] that is not merely co-extensive with civil personality.[16] This intent requires the extension of **State protection** to the life of the unborn from conception. To be precise, Section 12, Article II of the 1987 Constitution provides:

> Section 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall **equally protect the life of the mother and the life of the unborn from conception**. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

ii. The constitutional meaning of conception and to whom is this right to life extended

Unlike the *ponencia*, I take the view that the question of *when the life of the unborn begins* cannot strictly be answered with reference to time, *i.e.*, the exact time the sperm cell fertilized the egg cell. But other than this uncertainty, the germinal stage[17] of prenatal development[18] that transpires (after the union of the sperm cell and the egg cell and the combination of their genetic material materialized to form the fertilized egg or the zygote) is not debatable.

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15 Records of the Constitutional Commission (*RCC*), July 17, 1986, p. 56.

16 A heated and prolonged debated ensued on the question of whether a provision protecting the life of the unborn should ever be written in the Constitution.

17 There are three basic stage of prenatal development: germinal stage, embryonic stage and fetal stage (http://psychology.about.com/od/developmentalpsychology/a/prenataldevelop.htm.) last accessed March 20, 2014.

18 The process of growth and development within the womb in which a zygote (the cell formed by the combination of a sperm and an egg) becomes an embryo, a fetus, and then a baby (http://www.medterms.com/script/main/art.asp?articlekey=11899).

Upon fertilization, a complex sequence of events is initiated by the zygote to establish the molecular conditions required for continued embryonic development. **The behavior of the zygote** at this point is radically unlike that of either sperm or egg separately; it exhibits signs of independent life **characteristic of a human organism.**[19]

Since the constitutional intent is to protect the life of the unborn, and the fertilized egg (or the zygote) already exhibits signs and characteristics of life, then this fertilized egg is already entitled to constitutional protection. I say this *even if* this fertilized egg may not always naturally develop into a baby or a person.

I submit that for purposes of constitutional interpretation, every doubt should be resolved in favor of life, as this is the rule of life, anywhere, everywhere; any doubt should be resolved in favor of its protection following a deeper law that came before all of us – the law commanding the preservation of the human specie. This must have been the subconscious reason why even those who voted against the inclusion of the second sentence of Section 12 in Article II of the Constitution conceded that a fertilized ovum - the word originally used prior to its substitution by the word "unborn" - is possessed of human life although they disagreed that a *right* to life itself should be extended to it in the Constitution.[20]

It is in these lights that I dispute the Solicitor General's argument that Congress' determination (that contraceptives are not abortifacients) is entitled to the highest respect from this Court since it was arrived at after receiving, over the years, evidence, expert testimonies and position papers on the distinction between contraceptives and abortifacients.

The Solicitor General argues that even assuming medical uncertainty on the mechanisms of contraceptives and Intrauterine Devises in view of the contrary opinions of other medical experts, this uncertainty does not prevent Congress from passing the RH law because legislative options "in areas fraught with medical and scientific uncertainties" must be "especially broad" and calls for judicial deference until an actual case exists.

I cannot agree with the implied assertion that Congress' determination that contraceptives are not abortifacients is binding on the Court.

First, the nature of a particular contraceptive to be distributed by the government under the RH law still has to be determined by the FDA and any advance recognition by Congress of its abortifacient or non-abortifacient character would be premature.

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[19] (http://psychology.about.com/od/developmentalpsychology/a/prenataldevelop.htm.) last accessed March 20, 2014.

[20] RCC, July 17, 1986.

Second, as will be discussed shortly, the statutory meaning of "abortifacient," on which the constitutional acceptability of a contraceptive depends, must depend in the first place on the extent of the prohibition defined in the Constitution, not as defined by Congress.[21]

Third, and more importantly, while US case law has established Congress' broad discretion in areas where medical uncertainty exists, none of these cases[22] involved a challenge on congressional discretion and its collision with a specific constitutional provision protecting the life of the unborn from conception. This aspect of the present cases uniquely distinguishes them from the cases cited by the respondents. In the same vein, the specific provisions unique to the 1987 Constitution limit the applicability of parallel US jurisprudence in resolving issues through solutions consistent with our own "aspirations and ideals" as a nation and our own tradition and cultural identity as a people.

Fourth and last, this Court cannot be deferential to any official, institution or entity, in the discharge of the Court's duty to interpret the Constitution, most specially when the existence of the most important physical and spiritual being on earth – humankind – is at stake. Let it not be said hereafter that this Court did not exert its all in this task. When – *God forbid!* – fetuses begin dying because abortifacients have been improvidently distributed by government, let not the blame be lain at the door of this Court.

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[21] While the US Supreme Court recently reversed the trend of reviewing congressional findings of fact in *Gonzales v. Carhart* (550 US 124 [2007]) it formally disavowed judicial deference on the US Congress's findings:

> Although we review congressional fact finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See Crowell v. Benson, 285 U. S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function")

[22] See *Gonzales v. Carhart*, 550 U.S. 124, (2007); *Kansas v. Hendricks*, 521 US 346 (1997); *Jones v. United States*, 463 U.S. 354 (1983).

In *Gonzales v. Carhart*, the Court was confronted with a medical disagreement whether the law's prohibition on a particular abortion procedure would ever impose significant health risks on women seeking abortion. The Court upheld the prohibition as being consistent with the State's interest in promoting respect for human life at all stages in the pregnancy. "The medical uncertainty provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." In *US v. Marshall*, 414 U.S. 417 (1974), which the public respondents cited, after Robert Edward Marshall pleaded guilty to an indictment charging him with entering a bank with intent to commit a felony, he requested that he be considered for treatment as a narcotic addict pursuant to law. The court denied his request because his prior two felony convictions statutorily excluded him from the discretionary commitment provision of the law. Marshall questioned the denial on due process grounds. The Court denied the challenge. After considering the limited resources to fund the program and the lack of "generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts," the Court said that Congress simply made "a policy choice in an experimental program" that it deems more beneficial to the society.

iii. Section 12, Article II of the 1987 Constitution as a self-executing provision

The respondents argue that the recognition of a right under the Constitution does not automatically bestow a right enforceable through adjudication. Thus, they claim that Section 12, Article II of the 1987 Constitution is not a self-executing provision; while this Section recognizes the right to life of the unborn child, it leaves to Congress the discretion on how it is to be implemented. The RH law actually embodies the exercise of Congress' prerogative in this area when it prohibited abortion and access to abortifacients.

I submit that the mandate to equally protect the life of the mother and the life of the unborn child from conception under Section 12, Article II of the Constitution is ***self-executing to prevent and prohibit the state from enacting legislation that threatens the right to life of the unborn child***.

To my mind, Section 12, Article II should not be read narrowly as a mere policy declaration lest the actual intent of the provision be effectively negated. While it is indeed a directive to the State to equally protect the life of the mother and the unborn child, this command cannot be accomplished without the corollary and indirect ***mandate to the State to inhibit itself*** from enacting programs that contradict protection for the life of the unborn.

Read closely, the second paragraph of Section 12, Article II contains two mandates for the State to comply with:

First, it contains a ***positive command*** for the State to enact legislation that, in line with the broader context of protecting and strengthening the Filipino family, recognizes and protects equally the life of the unborn child and the mother. It is within this context that Congress enacted the RH Law's provisions,[23] as well as prior laws[24] that provide healthcare measures for the mother and her child during and after pregnancy.

Second, Section 12, Article II provides a ***negative command*** against the State to refrain from implementing programs that threaten the life of the

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[23] Section 3(c); Section 4 (c), (d), (q)2; and Section 5, Republic Act (*RA*) No. 10354.

[24] Under Section 17 a(1) and (3) of RA No. 9710 (An Act Providing for the Magna Carta of Women), women are granted, among others, access to maternal care which includes access to pre-natal and post-natal services to address pregnancy and infant health and nutrition and legal, safe and effective methods of family planning. Under Section 3(f) of RA No. 6972 (An Act Establishing a Daycare Center in Every Barangay, Instituting therein a Total Development and Protection of Children Program, Appropriating Funds therefor, and For Other Purposes) the total development and protection of children program at the barangay level include a referral and support system for pregnant mothers for prenatal and neonatal care. Under Section 3(a) of RA No. 8980 (An Act Promulgating a Comprehensive Policy and a National System for Early Childhood Care and Development Providing Funds therefor and For Other Purposes), the early childhood and development system under the law aims to make adequate health and nutrition programs accessible to mothers as early as the pre-natal period.

unborn child or that of the mother. This is a constitutional directive to the Executive Department.

By commanding the State to equally protect the life of the unborn child and the life of the mother, the Constitution not only recognizes these rights, but provides a minimum level of protection in the case of the unborn child. In effect, the Constitution prohibits the State from implementing programs that are contrary to its avowed policies; in the case of the unborn child, the State cannot go lower than the minimum level of protection demanded by the Constitution.

In concrete terms, the State cannot, ***in the guise of enacting social welfare legislation***, threaten the life of the unborn child after conception. The State recognizes the right to life of the unborn child from conception, and this should not be imperiled by the State itself in the course of reproductive health programs that promote and provide contraceptives with abortifacient properties. In more specific terms under the circumstances of this case, the State cannot, through the legislature, pass laws seemingly paying respect and rendering obedience to the Constitutional mandate while, through the executive, promulgating Implementing Rules and Regulations that deviously circumvent the Constitution and the law.

To recapitulate, the State, through Congress, exercises full authority in formulating programs that reflect the Constitution's policy directive to equally protect the life of the mother and the unborn child and strengthen the Filipino family while the Executive carries the role of implementing these programs and polices. This discretion, however, is limited by the flipside of Section 12, Article II's directive – *i.e.*, these programs cannot contradict the equal protection granted to the life of the unborn child from conception and the life of the mother.

I now proceed to my reading and appreciation of whether the right to protection, both of the mother and the unborn, are fully respected under the RH law.

At the outset, I note that both the petitioners and the respondents agree that Section 12, Article II of the 1987 Constitution prohibits abortion in the Philippines. This point of agreement not only strengthens my argument regarding the self-executing nature of the negative command implicit in the provision, but also sets the stage for the point of constitutional query in the present case.

To me, the question in the present case involves the scope of the level of protection that Section 12, Article II recognizes for the unborn child: to what extent does Section 12, Article II of the 1987 Constitution protect the unborn's right to life? And does the RH Law comply with the protection contemplated under this constitutional provision?

According to the OSG, the RH law does not violate the right to life provision under the Constitution because the law continues to prohibit abortion and excludes abortifacients from the provision of access to modern family planning products and device. By anti-abortion, the public respondents meant preventing the Supreme Court from creating a *Roe v. Wade* rule – a rule that granted women the right to terminate pregnancy under the trimestral rule.

c. Section 12, Article II of the 1987 Constitution and Roe v. Wade

I submit that the scope and level of protection that Section 12, Article II of the 1987 Constitution is deeper and more meaningful than the prohibition of abortion within the meaning of *Roe v. Wade*.

In the landmark case of *Roe v. Wade*, a Texas statute made it a crime to procure or attempt an abortion except when necessary to save the life of the mother. After discussing abortion from a historical perspective, the US Supreme Court noted the three reasons behind the enactment of criminal abortion laws in the different states in the United States, *viz*: *first*, the law sought to discourage illicit sexual conduct – a reason that has not been taken seriously; *second*, since the medical procedure involved *was* then hazardous to the woman, the law seeks to restrain her from submitting to a procedure that placed her life in serious jeopardy; *third*, the law advances the State's interest in protecting prenatal life[25] - a reason that is disputed because of the absence of legislative history that supports such interest. The Court said that "it is with these interests, and the weight to be attached to them, that this case is concerned." Unhesitatingly, the US Supreme Court struck down the law as unconstitutional and ruled that the right to privacy extends to a pregnant woman's decision whether to terminate her pregnancy.[26] It observed:

> This right of privacy, xxx is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. **The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent**. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

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25 On this third reason, the US Supreme Court added:

> Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

26 Roe challenged the constitutionality of a Texas criminal abortion law that proscribes procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life.

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Among the cases that *Roe* cited in support of its ruling, anchored on the right to privacy, are the cases of *Griswold v. Connecticut*[27] and *Eisenstadt v. Baird*.[28] In *Griswold*, the Court invalidated a Connecticut law that made it a crime to use and abet the use of contraceptives for violating a married couples' right to privacy. In *Eisenstadt,* the Court extended the protection of the right to privacy even to unmarried individuals by invalidating a Massachusetts law that penalized anyone who distributed contraceptives except if done by a physician to married couples.[29]

While *Roe* recognized the state's legitimate interest in protecting the pregnant woman's health and the potentiality of human life, it considered the pregnant woman's decision to terminate her pregnancy *prior* to the point of fetal viability (under a trimestral framework[30]) as a liberty interest that should *prevail* over the state interest.

Apart from the context in which the U.S. decision is written, a reading of the second sentence of Section 12, Article II, in light of the framers' intent in incorporating it in the Constitution, reveals more distinctions from *Roe* than what the public respondents claim.

The framers did not only intend to prevent the **Supreme Court** from having a Philippine equivalent of a *Roe v. Wade* decision,[31] they also

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27 381 US 479 (1965). The Court reversed the conviction of the appellants who prescribed contraceptives to married couples.

28 405 US 438 (1971).

29 The US Supreme Court said that "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

30 The following is Roe's trimester framework.

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

31 The cases (e.g.,*Griswold v. Connecticut*, 381 U.S. 479 [1965] and *Eisenstadt v. Baird*, 405 U.S. 438 [1971]) that set the stage for *Roe v. Wade* essentially reflect what the American constitutional law thinking is on the matter of pregnancy, abortion, and the State's intervention. The apprehension of the Framers of the constitution that this individualist American ideal of privacy to justify abortion might find their way in our statute books and jurisprudence must be understood in light of this apprehension. What is

unequivocally intended to deny Congress the power to determine that only at a certain stage of prenatal development can the constitutional protection intended for the life unborn be triggered.[32] In short, the clear intent of the Framers was to prevent both ***Congress and the Supreme Court*** from making abortion possible.

Indeed, in discussing the third reason for the enactment of a criminal abortion law, *Roe* avoided any reliance on the theory that life begins at conception, much less on the principle that accompanies the theory that there must be a protected right to life at that stage. Instead the U.S. Supreme Court merely deferred to the State's legitimate interest in potential life. In the 1987 Philippine Constitution, by inserting the second sentence of Section 12, Article II, the framers sought to make an express rejection of this view in *Roe*.

Thus, while this Court or Congress cannot conclusively answer the question of "when life begins" as in *Roe*, Philippine constitutional law rejects the right to privacy *as applied in Roe* by granting a right to life to the unborn (even as a fertilized egg or zygote) instead of gratuitously assuming that the State simply has an interest in a potential life that would be subject to a balancing of interest test other than the interest that the Constitution expressly recognizes.

Interestingly, in *Carey v. Population Services, Int'l.*,[33] in striking down a New York law criminalizing the sale, distribution[34] and advertisement of nonprescription contraceptives, the US Supreme Court clarified that they so rule "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to the exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." Accordingly, the State cannot pass a law impeding its distribution on pain of prosecution. *No such law is involved in the present case.*

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distinctly noticeable in these American cases that set it apart from the case before us is the reversal of roles between the exercise of governmental power and the assertion of fundamental rights. These American cases basically involved the government's assertion of its interest over potential life as opposed to a woman's privacy and liberty interest to terminate that potential life. In the case before us, it is the government which is accused of threatening a potential life through the RH law.

32 R.C.C., September 16, 1986.

33 431 U.S. 678 (1977). The Court struck down a New York law criminalizing the sale, distribution (except by a licensed pharmacist to a person sixteen years of age or over) and advertisement of nonprescription contraceptives because the limitation on the distribution imposed a significant burden on the right of the individuals to use contraceptives if they choose to do so. The Court ruled that since a decision on whether to bear or beget a child involves a fundamental right, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests - something which is absent in this case. The Court said:

> The Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions.

34 Except by a licensed pharmacist and only to a person sixteen years of age or over.

In *Planned Parenthood v. Casey*,[35] the US Supreme Court reaffirmed the "central holding" in *Roe v. Wade,* among others, that the State has legitimate interests *from the outset of the pregnancy* in protecting the health of the woman and the life of the fetus that may become a child.[36] In the Philippine jurisdiction, these legitimate interests rest on a higher and stronger ground not only because they are commanded by our Constitution but because these legitimate interests were made ***to extend to the life of the unborn from conception***. The mandatory command of the Constitution to protect the life of the unborn by itself limits the power of Congress in enacting reproductive health laws, ***particularly on subsidizing contraceptives***.

d. Abortion, abortifacients and the RH Law

As I earlier noted, both petitioners and the respondents agree that Section 12, Article II of the 1987 Constitution prohibits abortion. As to what abortion is and when pregnancy is established, the Medical Experts' Declaration cited by the respondents themselves is instructive:

> 1. xxx
> 2. xxx
> 3. All contraceptives, including hormonal contraceptives and IUDs, have been demonstrated by laboratory and clinical studies, to act primarily prior to fertilization. Hormonal contraceptives prevent ovulation and make cervical mucus impenetrable to sperm. Medicated IUDs act like hormonal contraceptives. Copper T IUDs incapacitate sperm and prevent fertilization.
> 4. The thickening or thinning of the endometrium (inner lining of the uterus) associated with the use of hormonal contraceptives has not been demonstrated to exert contraceptive action, i.e. if ovulation happens and there is fertilization**, the developing fertilized egg (blastocyst) will implant and result in a pregnancy (contraceptive failure)**. In fact, blastocysts have been shown to implant in inhospitable sites without an endometrium, such as in Fallopian tubes.
> 5. **Pregnancy can be detected and established** using currently available laboratory and clinical tests – e.g. blood and urine levels of HCG (Human Chorionic Gonadotrophin) and ultrasound – **only after implantation of the blastocyst**. While there are efforts to study chemical factors associated with fertilization, currently there is no test establishing if and when it occurs.

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35 505 US 833 (1992).

36 In this case, the constitutionality of a Pennsylvania statute which imposes certain requirements before and after an abortion was challenged. The US Supreme Court abandoned the trimester framework in *Roe* by replacing it with the "undue burden" standard - *i.e.*, maintaining the right of the pregnant woman to terminate her pregnancy subject to state regulations that does not amount to an "undue burden" for the exercise of the right. Nonetheless, the Court emphasized that it affirms *Roe*'s "central holding" which consists of three parts: *first*, a recognition of the right of the woman to choose to have an abortion before viability without undue interference from the State; second, a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health; third, the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

> 6. **Abortion is the termination of an established pregnancy** before fetal viability (the fetus' ability to exist independently of the mother). Aside from the 50% of zygotes that are naturally unable to implant, an additional wastage of about 20% of all fertilized eggs occurs due to spontaneous abortions (miscarriages).
> 7. Abortifacient drugs have different chemical properties and actions from contraceptives. **Abortifacients terminate an established pregnancy**, while contraceptives prevent pregnancy by preventing fertilization.
> 8. xxx

Based on paragraph number 6 of the Medical Experts' Declaration, abortion is the termination of established pregnancy and that abortifacients, logically, terminate this pregnancy. Under paragraph number 5, pregnancy is established only ***after*** the implantation of the blastocysts or the fertilized egg. From this **medical viewpoint,** it is clear that prior to implantation, it is premature to talk about abortion and abortifacient as there is nothing yet to abort.

If the constitutional framers simply intended to adopt this medical viewpoint in crafting Section 12, Article II, there would have been no real need to insert the phrase "from conception." **This should be obvious to a discerning reader**. Since conception was equated with fertilization, as borne out by Records of the Constitutional Commission, **a fertilized egg or zygote, even without being implanted in the uterus, is therefore already entitled to constitutional protection from the State.**

e. The RH law's definition of abortifacient textually complies with Section 12, Article II, 1987 Constitution; Section 9 negates this conclusion.

In this regard, I find that despite the recognition of abortion only at a late stage from *the strict medical viewpoint*, the RH law's implied definition of abortion is broad enough to extend the prohibition against abortion to cover the fertilized egg or the zygote. Consistent with the constitutional protection of a fertilized egg or zygote, the RH Law defines an abortifacient as:

> any drug or device that induces abortion or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb upon determination of the FDA.

By considering a drug or device that prevents the fertilized ovum from reaching and implanting in the mother's womb as an abortifacient, the law protects the unborn at the earliest stage of its pre-natal development.

Thus, I agree with **the *ponencia* that the RH law's definition of abortifacient is constitutional**. The law, however, still leaves a nagging

and contentious question relating to the provision of its Section 9, which reads:

> **SEC. 9. The Philippine National Drug Formulary System and Family Planning Supplies.** – The National Drug Formulary shall include hormonal contraceptives, intrauterine devices, injectables and other safe, legal, **non-abortifacient** and effective family planning products and supplies. The Philippine National Drug Formulary System (PNDFS) shall be observed in selecting drugs including family planning supplies that will be included or removed from the Essential Drugs List (EDL) in accordance with existing practice and in consultation with reputable medical associations in the Philippines. For the purpose of this Act, **any product or supply included or to be included in the EDL must have a certification from the FDA that said product and supply is made available on the condition that it *is not to be used as an abortifacient***.
>
> These products and supplies shall also be included in the regular purchase of essential medicines and supplies of all national hospitals: Provided, further, That the foregoing offices **shall not purchase or acquire by any means emergency contraceptive pills, postcoital pills, abortifacients that will be used for such purpose** and their other forms or equivalent. [emphases ours]

Section 9 includes hormonal contraceptives, intrauterine devices and injectables (collectively, *contraceptives*) among the family planning products and supplies in the National Drug Formulary, and makes them part of the products and supplies included in the regular purchase of all national hospitals. While the FDA still has to determine whether a particular contraceptive is abortive in nature, the underscored portion of ***paragraph 2 of Section 9 strongly indicates that abortifacients will be available for procurement and distribution by the government.*** In short, the second paragraph of Section 9 itself confirms that the contraceptives to be distributed by the government are **abortifacient-capable** ***depending only on its "use."***[37]

That abortifacient-capable contraceptives will be procured and distributed by the government (necessarily using State funds) under Section 9 of the RH law is confirmed by the Implementing Rules and Regulations (*IRR*) of the RH law itself.

The IRR defines an *abortifacient* as "any drug or device that ***primarily*** induces abortion or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb upon determination of the Food and Drug Administration." It also defines a *contraceptive* as "any safe, legal, effective, and scientifically proven modern family planning method, device, or health product, whether natural or artificial, that prevents pregnancy but does not

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[37] Petitioner ALFI correctly pointed out that under the Implementing Rules and Regulations (*IRR*) of RA No. 10354 (Section 3.01a and 7.04a), a drug or device will be considered an abortifacient only if it "primarily" induces the abortion, destruction of fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the uterus (Memorandum, p. 168).

primarily destroy a fertilized ovum or prevent a fertilized ovum from being implanted in the mother's womb.[38]

By these definitions, the RH law's IRR has added a qualification to the definition of an abortifacient that is not found in the law. Under the IRR of the RH law, a drug or device is an abortifacient only if its *primary* mechanism - as opposed to *secondary* mechanism, which the petitioners have strongly asserted - is abortive in nature. This added qualification to the definition of an abortifacient is a strong argument in favor of the petitioners that the contraceptives to be distributed by the state are abortifacient-capable.

Thus, in one breath, Section 9 of the RH law allows the inclusion of non-abortifacients only in the National Drug Formulary and in another breath allows the distribution of abortifacients based solely on the FDA certification that these abortifacents should not be used as such. To address this conflict, the *ponencia* submits that the FDA's certification in the last sentence of paragraph 1 of Section 9 should mean that the contraceptives to be made available "*cannot*" – instead of "is not" - be used as abortifacient, following the no-abortion principle under the Constitution.

To my mind, this inconsistency within the provision of Section 9, as reinforced by the RH law's IRR, should be addressed by construing it in relation with the entirety of the RH law.

One of the guiding principles under the RH law is the primacy given to effective and quality reproductive health care services to ensure maternal and child health.[39] Towards this end, the RH law allows properly trained and certified midwives and nurses to administer "lifesaving drugs such as, but not limited to, oxytocin and magnesium sulfate, in accordance with the guidelines set by the DOH, under emergency conditions and when there are no physicians available."[40] Similarly, the RH law included in the definition of Basic Emergency Obstetric and Newborn Care (BEMONC) the administration of certain drugs as part of lifesaving services for emergency maternal and newborn conditions/complications. These provisions are

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38 Section 7.04 of the IRR also reads:
Section 7.04. *FDA Certification of Family Planning Supplies.* The FDA must certify that a family planning drug or device is not an abortifacient in dosages of its approved indication (for drugs) or intended use (for devices) prior to its inclusion in the EDL. The FDA shall observe the following guidelines in the determination of whether or not a drug or device is an abortifacient:

a) As defined in Section 3.01 (a) of these Rules, a drug or device is deemed to be an abortifacient if it is proven to *primarily* induce abortion or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb;

xxx

39 Section 2(c), RA No. 10354.

40 Section 5, RA No. 10354.

consistent with the State's commitment to reduce both maternal and infant mortality, and to ultimately save lives.[41]

The "life-saving" thrust of the law is complemented by the RH law's provisions that continues to prohibit abortion and prohibits the procurement and distribution of abortifacients. The RH law also limited the extent of the reproductive health rights it grants by excluding from its coverage abortion and access to abortifacients.[42] More specifically, it broadly defined abortifacients to include any drug or device that prevents the fertilized ovum from reaching and implanting in the womb. Thus, the RH law protects the fertilized ovum (zygote) consistent with Section 12, Article II of the 1987 Constitution.

Considering the "life-saving" thrust of the law, the procurement and distribution of abortifacients allowed under Section 9 should be interpreted with this "life-saving" thrust in mind. As an aid in understanding this approach, I quote respondent Senator Cayetano's explanation, cited by the public respondents:

> Allow me to explain. A careless phrase like "no drug known to be an abortifacient will be made available in the Philippines" sounds like a statement we could all support. But what most of us do not understand is the fact that many life-saving drugs are made available to an ailing mother to address her medical condition although there is a possibility that they may be harmful to a pregnant mother and her fetus. Thus, we have for instance, drugs for diseases of the heart, hypertension, seizures, ulcers and even acne, all of which are to be taken only under doctors' prescription and supervision precisely because of their harmful effects.
>
> **Making a blanket statement banning all medicines classified as abortifacients would put all these mothers and their children's lives in greater danger**. For decades, these mothers have relied on these medicines **to keep them alive**. I would like to give another example. A known abortifacient, misoprostol commonly known as cytotec, is one of the drugs that can **save a mother's life**. I am talking about a mother who just gave birth but has internal hemorrhage and in danger of bleeding to death. Her child has been born. Her child will live but she will die without this drug to stop her bleeding. Are we now to ban the use of this drug? Are we now to say that because it could possibly be used as an abortifacient, it could possibly be abused, this mother must now die despite giving birth to a healthy baby?
>
> Mr. President, we clearly need to make distinctions. These **life saving drugs** SHOULD NOT BE USED on any circumstances for purposes of carrying out an abortion. But under strict guidelines by the FDA, they can be used by a health practitioner to save a mother's life.

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41 Public Respondents' Comment, pp. 4-5.

42 Section 4(s), RA No. 10354.

In short, the law allows the procurement of abortifacients under Section 9 ***only*** for the equally compelling interest of the State to save the life of the mother on account of a medical necessity.

f. The principle of double effect

In situations where the life of the unborn and the life of the mother collide with each other, the principle of double effect under Section 12, Article II must be applied. The Sponsorship Speech of Constitutional Commissioner Villegas discussed the principle of double effect, as follows:

> What if a doctor has to choose between the life of the child and the life of the mother? Will the doctor be guilty of murder if the life of the child is lost? The doctor is morally obliged always to try to save both lives. However, he can act in favor of one when it is medically impossible to save both, provided that no direct harm is intended to the other. If the above principles are observed, the loss of the child's life is not intentional and, therefore, unavoidable. Hence, the doctor would not be guilty of abortion or murder.
>
> I am sure Commissioner Nolledo can give the jurisprudence on this case, the application of the moral principle called the principle of double effect. In a medical operation performed on the mother, the indirect sacrifice of the child's life is not murder because there is no direct intention to kill the child. The direct intention is to operate on the mother and, therefore, there is no dilemma. And let me say that medical science has progressed so much that those situations are very few and far between. If we can produce babies in test tubes I can assure you that those so-called dilemma situations are very rare, and if they should occur there is a moral principle, the principle of double effect, that can be applied.
>
> What would you say are the solutions to these hard cases? The most radical solution to these hard cases would be a caring and loving society that would provide services to support both the woman and the child physically and psychologically. This is the pro-life solution. The abortion solution, on the other hand, not only kills the fetus but also kills any care and love that society could have offered the aggrieved mother.
>
> Implicit in all these arguments is the petition for the Constitution, the arguments against Section 9, requiring the State to equally protect the life of the mother and the life of the unborn from the moment of conception. These arguments want the Constitution to be open to the possibility of legalized abortion. The arguments have been put on record for the reference of future legislation and jurisprudence. xxx

I wholly agree with this position. Thus, to me, the general rule is that both the life of the unborn and the life of the mother should be protected. However, in case of exceptional conflict situations, the life of one may be preferred over the life of the other where it becomes medically necessary to do so. The principle of double effect recognizes that in some instances, the ***use*** or administration of certain drugs that are abortifacient-capable are necessary in order to save the life of the mother. The use in administration

of these drugs in these instances is and should be allowed by Section 12, Article II of the Constitution since the policy is equal protection.

Justice Leonen argues in this regard that the principle of double effect is a Christian principle that may or may not be adopted by all of the medical community. He even claims that there are some who recommended its abandonment.

I submit that the religious roots of a principle adopted by the Constitution, is not a valid ground to ignore the principle altogether. While some parts of the Constitution were of foreign origin, some parts – including the entire text of Section 12, Article II – were uniquely Filipino, intended to be reflective of our own Filipino culture and tradition. I particularly refer to the primacy of life in our hierarchy of values. Not surprisingly, the public respondents do not dispute this principle of double effect and even allowed abortifacient to be used only for the purpose of equally safeguarding the life of the mother. The representatives of the people themselves recognized the primacy of life and the principle of double effect in Section 12, Article II when it gave a broad definition of an abortifacient to extend the protection to life to the fertilized ovum (zygote). These reasons effectively refute Justice Leone's positions.

k. The role of the DOH

As the lead agency in the implementation of the RH law, the Department of Health (*DOH*) is tasked to "[e]nsure people's access to medically safe, non-abortifacient, legal, quality and affordable reproductive health goods and services[.]"[43] This is consistent with the RH law's policy which "guarantees universal access [only] to medically-safe [and] non-abortifacient" contraceptives. The law also provides that these contraceptives "do not prevent the implantation of a fertilized ovum as determined by the" FDA.[44]

Accordingly, DOH is tasked to procure and distribute to local government units (*LGUs*) family planning supplies for the whole country and to monitor their usage.[45] Once delivered to the LGUs, the responsible health officials "shall assume responsibility for the supplies" and ensure their distribution in accordance with DOH guidelines.[46] For this purpose, a regional officer appointed by the DOH shall oversee the supply chain management of reproductive health supplies and/or health products in his or her respective area.[47] The RH law also authorizes LGUs to implement its own procurement, distribution and monitoring program "consistent with the overall provisions of this Act and the guidelines of the DOH."[48]

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43 Section 19, RA No. 10354.

44 Section 2, RA No. 10354; See also Section 3, RA No. 10354.

45 Section 10, RA No. 10354.

46 Section 8.08, IRR of RA No. 10354.

47 Section 8.08, IRR of RA No. 10354.

48 Section 10, RA No. 10354; Section 8.09 and Section 12.02k, IRR of RA No. 10354. To ensure the effective implementation of RA No. 10354, [See Section 3(i)], the DOH is required to "facilitate the

i. Guidelines

Under the RH law, the Food and Drug Administration (*FDA*) is tasked to determine whether a drug or device is abortifacient in nature. Once it determines that it is non-abortifacient, then the DOH may validly procure them.

However, if the FDA determines that the drug or device is abortifacient then ***as a rule***, the DOH may not validly procure, much less distribute, them. Consistent with the primacy of life under Section 12, Article II of the 1987 Constitution and the RH law's provisions prohibiting abortion and the distribution of abortifacients, the government cannot procure and distribute these abortifacients. By this, I refer to the definition of an abortifacient under the RH law, *i.e.*, without qualification on whether the nature of its action (to induce abortion, or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb) is primary or secondary.

As a matter of ***exception***, the government should be able to procure and distribute abortifacients or drugs with abortifacient properties but solely **for the purpose of saving the life of the mother**. Specifically, the procurement and distribution of these abortifacients may be allowed only in emergency cases and should thus be made under medical supervision.[49] The IRR of the RH law defines an "emergency" as a condition or state of a patient wherein based on the objective findings of a prudent medical officer

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involvement and participation of [non-government organization] and the private sector... in the production, distribution and delivery of quality reproductive health and family planning supplies and commodities [See Section 19b(2), RA No. 10354; Section 12.01k and Section 12.04 of the IRR of RA No. 10354]. Towards this end, the IRR of RA No. 10354 provides that "where practicable, the DOH or LGUs may engage [the services of] civil society organizations or private sector distributors [Section 8.08 of the IRR of RA No. 10354].

[49] See Section 5 of RA No. 10354. Section 4.11 to 4.13 of the IRR of RA No. 10354 reads:

Section 4.11 *Provision of Life-Saving Drugs During Maternal Care Emergencies.* Midwives and nurses shall be allowed to administer life-saving drugs, such as but not limited to oxytocin and magnesium sulfate, in accordance with the guidelines set by the DOH, under emergency conditions and when there are no physicians available: *Provided, That* they are properly trained and certified to administer these life-saving drugs.

Section 4.12 *Policies on Administration of Life-Saving Drugs.* Properly trained and certified midwives and nurses shall be allowed to administer intravenous fluids, oxytocin, magnesium sulfate, or other life-saving drugs in emergency situations and when there are no physicians available. The certification shall be issued by DOH-recognized training centers upon satisfactory completion of a training course. The curriculum for this training course shall be developed by the DOH in consultation with the relevant societies of skilled health professionals.

Within sixty (60) days from effectivity of these Rules, the DOH shall develop guidelines for the implementation of this provision. The guidelines shall include provisions for immediate referral and transport of the patient upon administration of these life-saving drugs.

Section 4.13 *Certification for LGU-Based Midwives and Nurses for the Administration of Life-Saving Drugs.* The LGUs, in coordination with the DOH, shall endeavor that all midwives and nurses assigned to public primary health care facilities such as Rural Health Units (RHUs) be given training and certification by a DOH-recognized training center to administer life-saving drugs within one (1) year from the effectivity of these Rules.

on duty for the day there is immediate danger and where delay in initial support and treatment may cause loss of life or cause permanent disability to the patient.[50]

In short, after the FDA's prior determination that the drug or device is abortifacient-capable,[51] the FDA will have to issue a certification that these drugs or devices are not to be used as abortifacients whether under the first or second paragraphs of Section 9. The DOH may (i) procure these contraceptives strictly following its (DOH) own guidelines that list the drugs or devices that are essentially used for life-saving purposes; if the drug certified by the FDA to be abortifacient is not essentially used for life saving purpose, then the DOH may not procure them; and (ii) distribute these based on DOH guidelines that limit its distribution strictly for life-saving, medically-supervised and, therefore, non-abortive purpose.

I note in this regard that under the **second paragraph of Section 9**, the procurement and distribution of emergency contraceptive pills, postcoital pills, abortifacients is subject to a similar condition that it "will not be used" for abortifacient purpose. This condition is also a recognition of the abortifacient-capable nature of "emergency contraceptive pills." Given this nature, their procurement and distribution must likewise involve emergency situation. However, the IRR's own definition of an "emergency contraceptive pills" does not contemplate an emergency situation that permits its procurement and distribution.

> l) *Emergency Contraceptive Pills*, also known as *Postcoital Pills* refers to methods of contraception that can be used to prevent pregnancy in the first few days after intercourse intended for emergency use following unprotected intercourse, contraceptive failure or misuse,x x x[52]

The "emergency" situation contemplated under the definition of an "emergency contraceptive pills" as quoted above is not the "emergency" situation under the principle of double effect in Section 12, Article II of the 1987 Constitution or the emergency as defined in the same IRR of the RH law. Should the FDA find, pursuant to its mandate under the RH law, that an emergency contraceptive pill or post-coital pill is abortifacient or is abortifacient-capable, then their distribution and procurement should follow the guideline under the exception.

If an abortifacient-capable drug essentially serves a purpose other than saving the life of the mother – and is, therefore, not included in the DOH guidelines that list what drugs or device are essentially used for life-saving purposes – then the general rule applies: ***the government may not procure and distribute it.***

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50 Section 3.01k of the IRR of RA No. 10354.

51 See Section 2, Section 3(e), and Section 4(a) of RA No. 10354.

52 Section 3.01(l) of the IRR of RA No. 10354.

Lastly, under Section 7.03 of the IRR of the RH law drugs, medicines, and health products for reproductive health services that are already included in the Essential Drug List as of the effectivity of the IRR shall remain in the EDL, pending ***FDA certification that these are not to be used as abortifacients***.

Since these are contraceptives that are already registered with the FDA[53] under RA No. 3720 as amended by RA No. 9711,[54] these contraceptives must undergo evaluation by the FDA under the provisions of the RH law to determine whether these are abortifacients - as defined by law and not by the IRR. In either case, the general rule and the exception I have laid down above should apply. On the one hand, if these products are non-abortifacients as defined under the RH law, then the government may procure and distribute them; on the other hand, if these products are abortifacients or are abortifacient-capable, the FDA may issue its certification under Section 7.03 of the IRR if the product is essentially used for life-saving purposes.

If the DOH determines that the product is essentially used for life-saving or emergency purposes, the DOH may (i) procure these contraceptives strictly following its (DOH) own guidelines that list the drugs or devices that are essentially used for life-saving purposes; and (ii) distribute these based on DOH guidelines that limit its distribution strictly for life-saving, medically-supervised and, therefore, non-abortive purpose. If the product is essentially for *other* therapeutic purpose, the FDA may not issue the certification under Section 7.03 of the IRR since the product may not be procured and distributed by the government in the first place.

B. Parental Rights

I also agree with the *ponencia* that an attack on Section 14 of the RH law is premature, but for my own reasons and qualifications.

Section 14 of the RH Law mandates the provision of "age-and-development-appropriate reproductive health education" in both the formal and non-formal education system in the country, and for its integration in relevant subjects in the curriculum, thus:

> SEC. 14. Age- and Development-Appropriate Reproductive Health Education. – The State shall provide age- and development-appropriate reproductive health education to adolescents which shall be taught by

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53 Section 3(l) of RA No. 10354 reads: "
(l) Modern methods of family planning refers to safe, effective, non-abortifacient and legal methods, whether natural or artificial, that are registered with the FDA, to plan pregnancy.

54 An Act Strengthening and Rationalizing the Regulatory Capacity of the Bureau of Food and Drugs by Establishing Adequate Testing Laboratories and Field Offices, Upgrading its Equipment, Augmenting its Human Resource Complement, Giving Authority to Retain its Income, Renaming the Food and Drug Administration, Amending Certain Sections of Republic Act No. 3720, as amended, and Appropriating Funds therefor.

> adequately trained teachers in formal and nonformal educational system and integrated in relevant subjects such as, but not limited to, values formation; knowledge and skills in self-protection against discrimination; sexual abuse and violence against women and children and other forms of gender based violence and teen pregnancy; physical, social and emotional changes in adolescents; women's rights and children's rights; responsible teenage behavior; gender and development; and responsible parenthood: Provided, That flexibility in the formulation and adoption of appropriate course content, scope and methodology in each educational level or group shall be allowed only after consultations with parents-teachers-community associations, school officials and other interest groups. The Department of Education (DepED) shall formulate a curriculum which shall be used by public schools and may be adopted by private schools.

According to the petitioners, the mandatory RH education in schools deprives parents of their natural and primary right to raise their children according to their religious beliefs, and should thus be held unconstitutional.

The *ponencia*, while recognizing the primacy of parental rights under the 1987 Constitution, holds that it is premature to rule on the constitutionality of the mandatory RH education program, as the Department of Education has yet to formulate the curriculum implementing it. The Court is thus not in the position to speculate on its contents and determine whether they adhere to the Constitution.

I agree with the *ponencia*'s observation that the lack of a curriculum renders the petitioners' allegations premature, and dispute Justice Reyes's position that the issue of Section 14's constitutionality is ripe for adjudication and that based on this, we can already rule with finality that Section 14 is constitutional.

We cannot, without first examining the actual contents of the curriculum and the religious beliefs and personal convictions of the parents that it could affect, declare that the mandatory RH education is consistent with the Constitution. In other words, we cannot declare that the mandatory RH education program does not violate parental rights when the curriculum that could possibly supplant it is not yet in existence. Given the primacy of the natural and fundamental rights of parents to raise their children, we should not pre-empt a constitutional challenge against its possible violation, especially since the scope and coercive nature of the RH mandatory education program could prevent the exercise of these rights.

Further, I am uneasy to join the *ponencia's* conclusion that, at any rate, Section 14 is constitutional. I express misgivings on the constitutionality of this provision, which does not on its face provide for an opt-out clause for parents whose religious beliefs conflict with the State's program.

a. Parental rights in the Filipino context

The 1987 Constitution introduced an entire section on the Family that, in essence, recognizes the Filipino family as the foundation of the nation and mandates the State to strengthen its solidarity and actively promote its total development.

Corollary to the importance that the Constitution gives the Filipino family is the State's mandate to protect and strengthen it. It is not by coincidence that the Constitution, in requiring the State to protect and strengthen the Filipino family, describes it as a **basic** and **autonomous** social institution.

This is a recognition of and deference to the decisional privacy inherent in every family, a recognition that is reflected and reinforced in other provisions of the Constitution: Article II, Section 12 recognizes the "natural and primary right and duty of parents" in rearing the youth; Article XV, Section 3 mandates the State to defend the "right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood" and "the right of families or family associations to participate in the planning and implementation of policies and programs that affect them."

These constitutional provisions reflect the Filipino ideals and aspirations which the Constitution requires the government to promote and strengthen. Historically, these provisions show "a strong tradition of parental concern for the nurture and upbringing of their children"[55] that makes us, as a people, stand out from the rest of world's cultures and traditions. We stand out for the way we, as a family, care for our young and for the aged. To us, family ties extend from ***before the cradle and beyond the grave***. I do hope this remains a tradition and can stand *the tests of time and governmental intervention.*

The relationship created by and resulting from a family naturally extends to and involves other personal decisions that relate to child rearing and education. Parents have the natural right, as well as the moral and legal duty, to care for their children, see to their proper upbringing and safeguard their best interest and welfare.[56] These array of personal decisions are protected by the constitutional right to privacy ***to be free from*** **unwarranted governmental intrusion**. Pursuant to this natural right and duty of parents over the person of their minor children, parental authority and responsibility include the caring for and rearing them for civic consciousness and

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55 *Wisconsin v. Yoder*, 406 US 205.

56 *Silva v. CA*, G.R. No. 114742, July 17, 1997.

efficiency and the development of their moral, mental and physical character and well-being.[57]

b. Parental rights and the state's interest in the youth

The Constitution provides that the family's autonomy is not without limits since the State similarly has a role and interest in protecting children rights and advancing their welfare.

While parents are given a wide latitude of discretion and support in rearing their children, their well-being is of course a subject within the State's constitutional power to regulate.[58] Specifically, the Constitution tasked the State to promote and protect their moral, spiritual, intellectual and social development, and to recognize and support their vital role in nation-building.[59] In this undertaking, the State acts in its capacity as *parens patriae.*

Concededly, the State – as *parens patriae* – has the right and duty to minimize the risk of harm, arising from the acquisition of knowledge from polluted sources, to those who are as yet unable to take care of themselves fully.

In other words, the family itself and the rights of parenthood are not completely beyond regulation; parental freedom and authority in things affecting the child's welfare, including, to some extent, matters of conscience and religious conviction are not totally beyond State authority.[60] It is in this area that the parents' right to raise their children and the State's interest in rearing the youth clash.

In our jurisdiction, the case of *Ebralinag v. the Division Superintendent of Schools of Cebu*[61] presents the Court's resolution of the conflict between the parents' right to raise their children according to their religious beliefs, and the State's interest in inculcating civic consciousness among the youth and teaching them the duties of citizenship.

In *Ebralinag*, we annulled the expulsion orders issued by the respondent schools against students who refused to attend the flag ceremony on the ground that it violates their religious convictions. We said that while the State has the right and responsibility to teach the youth the values of patriotism and nationalism, this interest is subject to a "balancing process"

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57 Art. 209, Executive Order No. 209.

58 *Ginsberg v. New York*, 390 U.S. 629 (1968).

59 Article II, Section 13 of the 1987 Constitution reads:
Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

60 *Prince v. Massachusetts*, 321 US 158 (1944), citing *Reynolds v. United States*, 98 US 145; *Davis v. Beason*, 133 US 333.

61 G.R. No. 95770, December 29, 1995.

when it intrudes into other fundamental rights such as those specifically protected by the Free Exercise Clause, the constitutional right to education and the unassailable interest of parents to guide the religious upbringing of their children in accordance with the dictates of their conscience and their sincere religious beliefs.[62]

While we conducted a 'balancing process' in *Ebralinag*, we have yet to formally enunciate a doctrinal test regarding its operation. In the context of the present case, we might ask when does a State program unlawfully intrude upon the parents' right to raise their children according to their own religious convictions? Stated differently, how far can the State go in interfering with this right based on the State's "demands" for responsible parenthood?

Case law from the U.S., from where our Bill of Rights originated, has developed a body of jurisprudence regarding the resolution of clashes between parental rights and the State's *parens patriae* interests.

A survey of US jurisprudence shows that the custody, care and nurture of the child, including his preparation for civic obligations, reside first in the parents, and these functions and freedoms are accorded recognition and respect by the State. In the words of *Pierce v. Society Sisters*:[63]

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Thus, in *Meyer v. Nebraska*,[64] *Pierce v. Society of Sisters*[65] and *Wisconsin v. Yoder*,[66] the US Supreme Court struck down as unconstitutional various laws regarding the education of children in public schools. In these cases, the parents were compelled to follow state directives under pain of sanction; all of the assailed statutes had penal clauses for noncompliant parents and guardians. The State unlawfully intruded into the parents' natural right to raise their children because they were coerced into following a mandatory governmental action, without any opting out or excusal system provided for objecting parents.[67]

Indeed, several state courts in the US have upheld the validity of state-directed sex education programs because it gives parents the option to excuse their children from attending it.[68] The Supreme Court of Hawaii[69]

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62 G.R. No. 95770, December 29, 1995.
63 268 US 510 (1925).
64 262 U.S. 390 (1923).
65 268 U.S. 510 (1925).
66 406 U.S. 205 (1972).
67 See *Curtis v. School Comm.*, 420 Mass. 749 (1995).
68 See The Courts and Education, Volume 77, Part 1, Edited by Clifford P. Hooker, University of Chicago Press, 1978, pp. 157-158.

and the Court of Appeals of California,[70] for instance, have upheld similarly phrased laws mandating sex education in public schools. They both noted that the sex education program in their states allows the parents to first review the program's contents, and excuse their children's attendance should they find the program objectionable. The Michigan Court of Appeals[71] also upheld the validity of its State's sex education program, as it was completely voluntary and requires parental authorization. The Michigan law also permits parents to excuse their children from attending the sex education program, and categorically provides that unwilling parents would not be punished for opting out of the program.[72]

In these lights, **a mandatory reproductive health education program in public schools does not violate parental privacy if they allow parents to review and excuse their children from attending the program, or if the State shows a compelling state interest to override the parents' choice and compel them to allow their children to attend the program.**

c. The State has failed to show any compelling state interest to override parental rights in reproductive health education

I disagree with Justice Reyes's assertion that the mandatory reproductive health education program has already passed the compelling state interest test used to determine whether a governmental program may override familial privacy and the parents' rights to raise their children in accordance with their beliefs.

I submit that, for now, the government has not provided any sufficiently compelling state interest to override parental rights; neither has it proven that the mandatory RH education program has been narrowed down to the least intrusive means to achieve it.

I likewise disagree with Justice Reyes's argument that the rise of teenage pregnancies in the recent years, coupled with our ballooning population, is a compelling state interest – it is, at most a reasonable state interest, but not one compelling enough to override parental rights.

What constitutes compelling state interest is measured by the scale of rights and powers arrayed in the Constitution and calibrated by history. It is akin to the paramount interest of the State for which some individual liberties must give way, such as the public interest in safeguarding health or maintaining medical standards, or in maintaining access to information on

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69 *Medeiros v. Kiyosaki*, 478 P. 2d 314 (1970).
70 *Citizens for Parental Rights v. San Mateo County Bd. of Education*, 51 Cal. App. 3d 1 (1976).
71 *Hobolth v. Greenway*, 52 Mich. App. 682 (1974).
72 *Hobolth v. Greenway*, 52 Mich. App. 682, 684 (1974).

matters of public concern.[73] It essentially involves a public right or interest that, because of its primacy, overrides individual rights, and allows the former to take precedence over the latter.

The prevalence of teenage pregnancies, at most, constitutes a matter of public concern. That its impact to society and to the teenage mother is important cannot be denied, but that it is important enough to defeat privacy rights is another matter.

I take exception to the comparison between societal problems such as alcohol and drugs abuse with teenage pregnancies. Indeed, alcohol and drugs are societal evils that beget even more evils, such as increases in crime rates and familial discord. The same cannot be said of teenage pregnancies. I do not believe that begetting a child at a young age would have a direct correlation to crimes and the breaking up of families.

Neither can I agree that the consultations with parents and teachers associations prior to the curriculum's formulation make the mandatory RH education as the least intrusive means to address increases in teenage pregnancies. Consultations are informative, at least, and deliberative and suggestive, at most; they cannot, with certainty, immediately guarantee that parents' familial privacy rights would be respected.

Notable, too, is the all-encompassing penal clause that penalizes any violation of the RH Law. On its face, this penal clause, together with the wide scope of the mandatory RH education program, actually makes the program coercive for parents. It could be read as a compulsion on parents, under pain of fine and imprisonment, to allow their children to attend the RH education program. Even assuming that the penal clause will not apply to refusing parents, the scope of the RH education program gives them very little choice.

To my mind, the Solicitor's argument that the RH education program allows parents to exercise their preferences because they can choose to send their children to private schools is not sufficiently persuasive as it ignores the environment on which the Philippine education system operates. This choice is superficial for many families, as most of them rely on public schools for the education of their children.[74] For most parents, sending their children to private schools is a luxury that only a few can afford.

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[73] *Serrano v. Gallant Maritime Services*, G.R. No. 167614, March 24, 2009.

[74] As of the year 2000, only 7.76% of the total elementary school students and 22.67% of the total high school students are enrolled in private institutions. Andrabi, et. al., Private Schooling: Limits and Possibilities, October 2005, accessed from http://www.hks.harvard.edu/fs/akhwaja/papers/PrivateSchoold_Final_Nov5.pdf, citing Edstats, The World Bank, Washington, D.C.

d. *The question of Section 14's constitutional prematurity*

I do admit that some of the topics enumerated in the RH education program are, on their face, not objectionable, and are within the State's authority to include in the curriculum of public school education. But at this point, without the specifics of what would be taught under the RH education program, we cannot determine how it would exactly affect parental rights and the right of parents to raise their children according to their religious beliefs.

Too, we cannot determine whether the Department of Education will or will not provide parents the right to review the contents of the curriculum and opt to excuse their children from attending these subjects. This option allows the implementation of the RH education program while respecting parental rights, and saves it from questions of constitutionality.

In these lights, I agree with Justice Mendoza's conclusion that the challenge to the constitutionality of Section 14 of the RH Law is premature.

C. Disturbing observation and concerns: The effects on contraceptives on the national, social, cultural and religious values

As I earlier mentioned, the implementation of the RH law cannot but leave lasting imprints on Philippine society, some of them positive and some negative. I do not here question the wisdom of the law, as matters of wisdom and policy are outside judicial realm. I claim *judicial license* in this regard if I intrude into prohibited territory in the course of expressing disturbing concerns that come to mind.

The Philippines to be sure, is not the first country to use contraceptives and the mixed results from countries that have long travelled this road are, to my mind, not very encouraging. One obvious discouraging effect of controlled population growth is on the economy of some of these countries which now have to secure foreign labor to balance their finances. This development has been a boon for a country like the Philippines with a fast growing population; we are enjoying now the benefits of our fast-growing population through the returns our migrating Filipino workers bring back to the Philippines from their work in labor-starved countries. This has become possible because host countries like Japan and the more economically advanced European countries need workers to man their industries and supply their economies. Another economic effect is on retirement systems that have been burdened by predominantly aging populations. For this same reason,

some countries even face impending economic slowdown in the middle term[75] unless they can effectively remedy their manpower shortage.

But more than the political and economic consequences, I believe that the RH Law's implementation could usher in societal and individual behaviors and norms vastly different from the traditional. Already, some of our traditions are giving way, brought about alone by advances in computerization and communication. Factoring in contraceptives and birth control may immeasurably hasten the changes for the worse.

In the family front alone, the ideals expressed in our Constitution about the Filipino family may soon just be unreachable ideals that we can only long for. Access to modern methods of family planning, unless closely regulated, can shape individual preferences and behavior, that, when aggregated, could lead to entirely different societal perception on sex, marriage, family and parenthood.[76]

The effect of the RH law on parents' capacity to influence children about reproductive health could, in a couple of years, produce a generation with very different moral views and beliefs from the parents and the adults of this generation, resulting in a possible schism between the younger and elder members of the family. Their polarized views could lead to the deterioration of the strong ties that bind the Filipino family.

Contraceptives and birth control devices, distributed even among the young because of lack of stringent control, can lead to a generation of young Filipinos uncaring about the morality of instant sex and irresponsible in their view about pregnancies and the diseases that sexual promiscuity can bring. Even in the near term, this development can affect views about marriage and the rearing of the young.

For those already married, contraceptives and birth control devices of course offer greater opportunities for sex outside of marriage, both for the husband and the wife. The effects of these outside opportunities on marriage may already be with us. Perhaps, more than at any other time, we have a record number now of separated couples and wrecked marriages, to the prejudice of the family and the children caught in between.

In hindsight, the 1987 Constitution's painstaking efforts to include provisions on the family, parenthood and marriage reflect our cultural identity as a Filipino people.[77] I do not believe it to be disputable that the

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[75] *See* Peter G. Peterson, *Gray Dawn: The Global Aging Crisis, Foreign Affairs*, Vol. 78, No. 1 (Jan. - Feb., 1999), available at http://www.jstor.org; European Union Center of North Carolina, EU Briefings: *The EU's Demographic Crisis*, March 2008, at http://europe.unc.edu/wp-content/uploads/2013/08/Brief9-0803-demographic-crisis.pdf.

[76] Prolife petition, pp. 34-37.

[77] *See, for instance,* Article II, Section 12 and Article XV of the 1987 Constitution.

heart of the Filipino society is the family. Congress, in introducing innovations to reproductive health might have tried to respect this ideal but I have serious doubts and misgivings on whether we can succeed given the deterioration and erosion in familial values already becoming evident in our society. I hope that in this instance, history would prove me wrong.

D. Freedom of Expression of Health Practitioners and the RH Law

I submit that Section 23 (a)(1) of the RH law, which penalizes healthcare providers who "knowingly withhold information or restrict the dissemination thereof, and/or intentionally provide incorrect information regarding programs and services on reproductive health" is an unconstitutional subsequent punishment of speech.

Broken down to its elements, Section 23(a)(1)[78] of the RH law penalizes health care providers who (1) knowingly withhold information about programs and services on reproductive health; (2) knowingly restrict the dissemination of these programs and services; or (3) intentionally provide incorrect information regarding them.

These prohibited acts are, by themselves, communicative and expressive, and thus constitute speech. Intentionally providing incorrect information cannot be performed without uttering, verbally or otherwise, the information that the RH Law deems to be incorrect. The information that is illegal to withhold or restrict under Section 23 also constitutes speech, as it is an expression of data and opinions regarding reproductive health services and programs; thus, the prerogative to not utter these pieces of information also constitutes speech.[79]

By penalizing these expressive acts, Section 23 imposes a subsequent punishment on speech, which as a counterpart to the prohibition against prior restraint, is also generally prohibited under the constitutional guarantee of freedom of expression. Without an assurance that speech would not be subsequently penalized, people would hesitate to speak for fear of its consequences; there would be no need for prior restraints because the punishment itself would effectively serve as a chilling effect on speech.[80]

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[78] Section 23 of RA 10354 reads:
SEC. 23. Prohibited Acts. – The following acts are prohibited:
(a) Any health care service provider, whether public or private, who shall:
(1) Knowingly withhold information or restrict the dissemination thereof, and/or intentionally provide incorrect information regarding programs and services on reproductive health including the right to informed choice and access to a full range of legal, medically-safe, non-abortifacient and effective family planning methods;

[79] The right to speak includes the right not to speak, J. Cruz, Separate Opinion in *Ebralinag v. Division Schools Superintendent of Cebu*, G.R. No. 95770, March 1, 1993.

[80] *See* Todd F. Simon, *First Amendment in the Twentieth Century U.S. Supreme Court begins to define freedoms of speech and press*, in HISTORY OF MASS MEDIA IN THE UNITED STATES: AN ENCYCLOPEDIA (1999), p.223; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

While I am aware of the state's interest in regulating the practice of medicine and other health professions, including the communications made in the course of this practice, I believe that Section 23(a)(1) of the RH Law has overreached the permissible coverage of regulation on the speech of doctors and other health professionals.

Jurisprudence in the United States regarding the speech of medical practitioners has drawn a distinction between speech in the course of their practice of medicine, and speech in public.[81] When a doctor speaks to his patient, his speech may be subjected to reasonable regulation by the state to ensure the accuracy of the information he gives his patient and the quality of healthcare he provides.[82] But when the doctor speaks to the public, his speech becomes protected speech, and the guarantees against prior restraint and subsequent punishment applies to his expressions that involves medicine or any other topic.[83] This distinction is not provided in Section 23(a)(1) of the RH Law, and we cannot create a distinction in the law when it provides none. Thus, ***I submit that Section 23(a)(1) violates the right of health practitioners to speak in public about reproductive health and should simply be struck down.***

In particular, Section 23 (a)(1) of the RH Law fails to pass the balancing of interests test designed to determine the validity of subsequent punishments that do not involve the state's interests in national security crimes. Under this test, the Court is tasked to determine which of the competing legitimate interests that the law pits against each other demands the greater protection under particular circumstances.[84]

In the present case, Section 23(a)(1) of the RH law pits against each other the State's interest in promoting the health and welfare of women on the one hand, and the freedom of expression of health practitioners, on the other. The Solicitor General, in particular, emphasized the need for Section 23(a)(1) to fulfill the State's goal to secure the people's access to full, unbiased and accurate information about reproductive health services.

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[81] *See* Robert C. Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 3 Univ. of Illinois Law Rev. 939, 2007, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1169&context=fss_papers

[82] The practice of medicine, like all human behavior, transpires through the medium of speech, In regulating the practice, therefore, the state must necessarily also regulate professional speech, Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking, or for failing to speak. Doctors commit malpractice for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist. In all these contexts the regulation of professional speech is theoretically and practically inseparable from the regulation of medicine. *Id.* at 950 – 951.

[83] See *Bailey v. Huggins Diagnostic & Rehabilitation Center*, 952 P.2d 768 (Colo. Ct, App 1997), where the Colorado Supreme Court made a distinction between a dentists' speech made in the course of a dental treatment, and his speech in books and opinion articles; the former may be the subject of a malpractice suit; the latter, on the other hand, is not.

[84] *American Communications Assoc. v. Douds*, 339 US 282, as cited in *Gonzales v. COMELEC.*

While I do not wish to underestimate the State's interest in providing accurate information on reproductive health, I believe that the freedom of expression of medical health practitioners, particularly in their communications to the public, outweighs this State interest for the following reasons:

First, we must consider that the RH Law already puts the entire State machinery in providing an all-encompassing, comprehensive, and nationwide information dissemination program on family planning and other reproductive health programs and services. The RH law commands the State to have an official stand on reproductive health care and the full-range of family planning methods it supports, from natural to artificial contraceptives. It then requires the national government to take the lead in the implementation of the information dissemination campaign,[85] and local government units to toe the line that the national government draws.[86]

The RH Law even requires both public and private hospitals to provide a full-range of modern family planning services, including both natural and artificial means. This necessarily means that hospitals (where the health practitioners work) are required by law and under pain of penal punishment, to disseminate information about all available reproductive health services.

To my mind, this information dissemination program, along with the mandatory requirement for hospitals to provide a full range of family planning services, sufficiently cover the state's interest in providing accurate information about available reproductive health services and programs. If, corollary to the State's interest to promote accurate information about reproductive health, it intended to make health care practitioners accountable for any negligence they may commit in the course of their practice, I submit that, as my second argument will further expound, the existing regulatory framework for their practice already sufficiently protects against such negligence and malpractice.

Second, the existing regulatory framework for the practice of medicine sufficiently penalizes negligence and malpractice, to which the

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[85] It mandates the Department of Health and local government units to "initiate and sustain a heightened nationwide multimedia-campaign to raise the level of public awareness" on reproductive health, including family planning, and mandates local governments in highly-urbanized cities to operate mobile health care services, which shall, aside from providing health care goods and services, disseminate knowledge and information on reproductive health.

Aside from capacity-building, the DOH is also required to update local government units with appropriate information and resources to keep the latter updated on current studies and researches relating to family planning. These pieces of information shall, presumably, include information issued by the Food and Drugs Administration regarding the use of and safety of contraceptives.

[86] Further, the RH Law mandates the DOH to disseminate information and train local governments as regards its reproductive health care programs, and provide them with the necessary supplies and equipment. Local government units, in turn, are mandated to train their respective barangay health workers and other barangay volunteers on the promotion of reproductive health.

provision of inaccurate information or the withholding of relevant medical information belongs.

Under our laws, an erring health practitioner may be subjected to three separate proceedings. Depending on the act he or she has committed, the health practitioner may be held criminally and civilly liable by our courts,[87] and administratively liable by their professional regulation board.[88] For government employees, they can also be held administratively liable under civil service laws.[89]

Thus, I do not see any reason to add another penalty specific to speech that covers reproductive health, especially since, as pointed out earlier, state interests in providing accurate information about RH services are already fully covered.

Lastly, and what, to me, tips the balance overwhelmingly in favor of speech, the chilling effect that Section 23 (a)(1) creates against the expression of possible ideas, discussions and opinions could eventually hinder progress in the science and research on reproductive health. Health professionals are the most qualified to debate about the efficacy and side effects of reproductive health services, and the penalty against uttering incorrect information about reproductive health services could silence them. Even worse, the requirement for them to provide information on all reproductive health programs of the government could add to the chilling effect, as it sends a signal that the only information on reproductive health that should be considered as correct is that of the government.

In these lights, I concur with the *ponencia*'s conclusions, subject to the points I raised in this Separate Opinion.

ARTURO D. BRION
Associate Justice

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87 In this jurisdiction, however, such claims are most often brought as a civil action for damages under Article 2176 of the Civil Code, and in some instances, as a criminal case under Article 365 of the Revised Penal Code, *Cruz v. Court of Appeals*, G.R. No. 122445, November 18, 1997.

88 Under Presidential Decree No. 223, the Professional Regulation Commission exercises supervisory powers over professional boards; these professional boards exercise administrative, quasi-legislative, and quasi-judicial powers over their respective professions. This includes investigating and adjudicating administrative cases against professionals. Professional Regulation Commission, *Professional Regulatory Boards*, at http://www.prc.gov.ph/prb/. Doctors, for instance, follow the Code of Ethics of the Board of Medicine of the Philippine Regulatory Commission (PRC) and the Code of Ethics of Medical Profession of the Philippine Medical Association (PMA). Complaints regarding a violation of these codes may be taken cognizance by the Commission on Ethics of the PMA (Section 3A, PMA By-laws), or by the Board of Medical Examiners (Section 22, Rep. Act No. 2382).

89 Doctors who are public officials are subject to Civil Service Laws and the Code of Conduct and Ethical Standards for Public Officials and Employees. See, for instance, *Office of the Ombudsman v. Court of Appeals and Dr. Macabulos*, G.R. No. 159395, May 7, 2008.