EN BANC

G.R. No. 204819 -- James M. Imbong, and Lovely-Ann C. Imbong, for themselves and in behalf of their minor children, Lucia Carlo Imbong and Bernadette Carlos Imbong and Magnificat Child Development Center, Inc., *Petitioners versus* Hon. Paquito N. Ochoa, Jr., Executive Secretary, et al., *Respondents.*

G.R. No. 204934 -- Alliance for the Family Foundation Philippines, Inc. [ALFI], represented by its President Maria Concepcion S. Noche, et al., *Petitioners versus* Paquito N. Ochoa, Executive Secretary, et al., *Respondents.*

G.R. No. 204957 -- Task Force for Family and Life Visayas, Inc. and Valeriano S. Avila, *Petitioners versus* Hon. Paquito N. Ochoa, Executive Secretary, et al., *Respondents.*

G.R. No. 204988 -- Serve Life Cagayan de Oro City, Inc. represented by Dr. Nestor B. Lumicao, M.D., as President and his capacity, et al., *Petitioners versus* Office of the President, et al., *Respondents.*

G.R. No. 205003 -- Expedito A. Bugarin, Jr., *Petitioner versus* Office of the President of the Republic of the Philippines, et al., *Respondents.*

G.R. No. 205043 -- Eduardo B. Olaguer and the Catholic Xyberspace Apostolate of the Philippines, *Petitioners versus* DOH Secretary Enrique T. Ona, FDA Director Suzette H. Lazo, DBM Secretary Florencio B. Abad, DILG Secretary Manuel A. Roxas II and DECS Secretary Armin A. Luistro, *Respondents.*

G.R. No. 205138 -- Philippine Alliance of XSeminarians, Inc. [PAX], et al., *Petitioners versus* Hon. Paquito N. Ochoa, Jr., Executive Secretary, et al., *Respondents.*

G.R. No. 205478 -- Reynaldo J. Echavez, M.D., et al., *Petitioners versus* Hon. Paquito N. Ochoa, Jr., Executive Secretary, et al., *Respondents.*

G.R. No. 205491 -- Sps. Francisco S. Tatad and Maria Fenny C. Tatad, et al., *Petitioners versus* Office of the President of the Republic of the Philippines, *Respondent.*

G.R. No. 205720 -- Pro-Life Philippines Foundation, Inc., et al., *Petitioners versus* Office of the President, et al., *Respondent.*

G.R. No. 206355 -- Millennium Saint Foundation, Inc., Atty. Ramon

Pedrosa, Atty. Cita Borromeo-Garcia, Stella Acedera, and Atty. Berteni Cataluña Causing, *Petitioners versus* Office of the President (OP), Office of the Executive Secretary (OES), Department of Health (DOH), and Department of Education (DEPED), *Respondents*.

G.R. No. 207111 -- John Walter B. Juat, et al., *Petitioners versus* Hon. Paquito N. Ochoa, Jr., et al., *Respondent*.

G.R. No. 207172 -- Couples for Christ Foundation, Inc., et al., *Petitioners versus* Hon. Paquito N. Ochoa, Jr., et al., *Respondent*.

G.R. No. 207563 -- Almarim Centi Tillah and Abdulhussein M. Kashim, *Petitioners versus* Exec. Sec. Paquito N. Ochoa, Sec. Enrique T. Ona of the Department of Health and Secretary Armin A. Luistro of the Department of Education, *Respondents*.

Promulgated:

April 8, 2014

x----------x

x

CONCURRING OPINION

ABAD, *J.*:

I concur with the majority.

Remarkably, Republic Act 10354 or the Responsible Parenthood and Reproductive Health Act of 2012, the RH Law for short, repeatedly extols the principles of gender equality, sustainable human development, health, education, information, the sanctity of human life and the family, improved quality of life, freedom of religious convictions, ethics, and cultural beliefs, freedom from poverty, and other ennobled principles. But these are already part of existing laws and no one can object to them. What they do is apparently embellish what the RH Law seeks to accomplish.

Stripped of euphemisms and the echoes of these principles, what the law really wants is to limit population growth with an eye to "sound replacement rate" [1] through massive birth control, sex education, and neutralization of opposing views. It seems not to matter that population growth has, according to a United Nations (UN) study, persistently declined in the Philippines from 7.42 per couple in 1950 to 3.27 in 2005-2010[2] which

---

[1] Section 3(c), Republic Act 10354.

[2] World Population Prospects: 2008 revision. (n.d.) United Nations, Department of Economics and Social

means that couples today have fewer children even without the RH law.

According to the same UN study, neighboring Asian countries like Japan, Singapore, Taiwan, South Korea, and even China which rigidly implemented birth control programs in the past now have worrisome far-below replacement levels. Having developed a mind-set that children are a burden to the family and to the nation, young couples refuse to have them despite government incentives and awards. This prompted former Singapore Prime Minister Lee Kwan Yew to admit in a 2011 speech that "At these low birth rates we will rapidly age and shrink."

Yet children are not such a burden. Columnist Anne Marie Pamintuan, quoted World Bank's Vice President for East Asia and Pacific, Axel Von Trotsenberg, as saying that "the ultimate asset of the Philippines are its people."[3]

Facial Challenge

The *ponencia* is right that the procedural challenges to the petitions are unmeritorious. In particular, respondents claim that the Court should dismiss these actions since they are a mere facial challenge on the constitutionality of the RH Law as opposed to an actual breach of its provisions and the filing of a case in court on account of such breach. The petitions should not be allowed, they add, since this challenge is not about the exercise of the freedom of expression, an exception to such limitation.

But the right to life of the unborn child, which is at the center of these controversies, cannot be compared with rights that are best examined in cases of actual violations. Obviously, the Court cannot wait for the actual extermination of an unborn child before assessing the constitutional validity of the law that petitioners claim to permit such action. A law claimed to threaten a child's right to live sufficiently justifies a constitutional facial challenge.

Constitutional Barrier

There is no question of course that every couple planning their family and every woman of ample discernment has the right to use natural or artificial methods to avoid pregnancy. This much is clear. But, in seeking to promote the exercise of this right, the RH Law must hurdle certain constitutional barriers: 1) the right to life of the unborn child that outlaws abortion; 2) the right to health; 3) the free exercise of religion; 4) the right to due process of law; and 4) the freedom of expression.

Affairs.

[3] The Philippine Star, July 15, 2013.

Section 9 and the Right to Life of the Unborn

Section 12, Article II (Declaration of Principles and State Policies), of the 1987 Constitution makes it the duty of the State to protect the right to life of the unborn from conception. Thus

> Sec. 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. x x x

1. When Life Begins

When the man's sperm is ejected into the woman's uterus, it travels inward towards the ovary through the fallopian tube. If the ovary has produced and released an ovum, the sperm will meet and fertilize it, producing a zygote, which is a new cell formed by that union. The zygote then travels outward through the fallopian tube towards the uterus, meantime growing into a fleshed embryo, and implants itself on the uterine wall where it will further grow into a fetus and eventually into a full-grown child ready for delivery by its mother at the appropriate time.[4]

Some people believe that the conception of the child begins only from the moment the fleshed embryo implants itself on the mother's uterine wall where it will draw the food and nutrition it needs to survive and grow into a fetus. It is the termination of the embryo or the fetus at this stage, painful, bloody, and depressing, that some are quick to condemn as abortion. Preventing implantation by quietly slaying the zygote or the embryo with little or no blood before it reaches the uterine wall is to them not abortion.

But they are wrong. The 1987 Constitution is clear: the life of a child begins "from conception" and the dictionary, which is the final arbiter of the common meaning of words, states that "conception" is "the act of being pregnant," specifically, the "formation of a viable zygote."[5] Science has proved that a new individual comes into being from the moment the zygote is formed. Indeed, the zygote already has a genome (DNA to others) that identifies it as a human being and determines its sex.[6] The union of man and woman in the fertilized ovum is the beginning of another person's life.

With the Constitution, the Filipino people have in effect covenanted that the fertilized ovum or zygote is a person. And it is a covenant that binds. Indeed, the RH Law accepts this inviolable principle and precisely prohibits the use of abortifacient that induces "the prevention of the fertilized ovum to

---

[4] Conception & Pregnancy: Ovulation, Fertilization, and More, http:/webmd.com/baby/guide/understanding-conception, last uploaded 8/1/2013 12:05 pm.
[5] Webster's Third New International Dictionary. 1993 Edition.
[6] Sadler, T.W. Langman's Medical Embryology 11th Ed 2010, Lippincott Williams and Wilkins.

reach and be implanted in the mother's womb." Ambushing the fertilized ovum as it travels down the fallopian tube to prevent its implantation on the uterine wall is abortion.

2. Preventing Fertilization

Since the conception of a child begins from the fertilization of the ovum, it is evident that merely preventing the woman from ovulating to produce ovum or preventing the sperm from fertilizing it does not constitute abortion. Contraception in this sense does not violate the Constitutional right to life since the unborn has not as yet been conceived. The law may authorize or even encourage this kind of contraception since it merely prevents conception. The life of an unborn child is not at stake.

3. Free Access to Contraceptives

Barriers like condoms, diaphragms, and contraceptive sponges as well as the natural rhythm method prevent the meeting of the sperm and the ovum. These methods have not been seriously assailed as abortifacient. But birth control pills and intrauterine devices (IUDs) are another matter. A sector of society led by petitioners vehemently assails them as unsafe and abortifacient, meaning weapons of abortion. And here lies the central issue in this case that will not go away unless resolved.

Birth control pills are essentially "hormonal" contraceptives that, according to the World Health Organization (WHO), will avoid conception in two ways: 1) they will prevent the ovary from producing ova or eggs and 2) they will generate thick cervix mucus that would prevent the sperm from reaching and fertilizing the ovum if one is produced. These hormonal contraceptives also come in the forms of injectables with effects that last for about three months; patches that last seven days; or implants on women's upper arms that continuously release drugs from 3 to 5 years.

IUDs, on the other hand, are small objects that are implanted into the woman's womb, releases chemical substances, and hinders the fertilization of the ovum as its primary function. The IUDs in current use are about the size and shape of a small pendant cross. They prevent conception for 5 or 10 years. One kind is made of copper that releases toxic particles that supposedly kill sperm cells which enter the womb. Another kind releases synthetic hormones into the womb, inducing thick mucus that makes it difficult for the sperm to reach the ovum.[7]

The Food and Drug Administration (FDA) has been routinely allowing public access to hormonal contraceptives and IUDs even before the

---

[7] WebMD Medical Reference from Healthwise, citing Grimes DA (2007). Intrauterine devices (IUDs). In RA Hatcher et al., eds., Contraceptive Technology, 19th ed., pp. 117-143. New York: Ardent Media.

passage of the RH Law. The outcry for the law's passage to make these things available to whoever wants them is the lament of the unenlightened.

In reality, the government senses a strong resistance to their use, borne of beliefs that they are unsafe and abortifacient. The RH Law precisely aims to put an end to this resistance by imposing certain sanctions against hospitals, physicians, nurses, midwives, and other health care providers who communicate to others the view that contraceptives and IUDs are unsafe and abortifacient, refuse to prescribe them, or decline to perform the required procedures for their use.

4. Legislative Attempt to Settle the Issues against Birth Control Pills and IUDs.

By their nature, hormonal contraceptives and IUDs interfere with the woman's normal reproductive system. Consequently, the FDA, which has the required technical competence and skills, need to evaluate, test, and approve their use. The RH Law acknowledges this need in its policy statements in Section 2, in its guidelines for implementation in Section 3, and in its definition of terms in Section 4(a). It is consistent with the FDA law and no one can object to it.

Apparently, however, the FDA's seals of approval have not sufficiently spurred the use of hormonal contraceptives and IUDs. To remedy this and no doubt to quell the belief that they are unsafe and abortifacient, Section 9 of the RH law categorically declares hormonal contraceptives and IUDs "safe" and "non-abortifacient" like other family planning products and supplies. It also ordains their inclusion in the National Drug Formulary which is also the Essential Drugs List. The first sentence of Section 9 provides:

> Section 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. x x x
>
> x x x x

The above apparently elevates into the status of a law the proposition that hormonal contraceptives and IUDs belong to the class of safe and non-abortifacient family planning products and supplies. Indeed, it ordains their inclusion in the National Drug Formulary or Essential Drug List (EDL) to join government approved drugs and devices.

The second sentence of section 9 of course speaks of inclusion or removal of family planning supplies from the EDL based on existing

practice and in consultation with reputable medical associations, thus:

> x x x 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. x x x

But the above evidently refers to products and supplies other than the hormonal contraceptives and IUDs mentioned in the preceding sentence. This is how it should be understood since that preceding sentence already declares these two products as safe and non-abortifacient and must by law be included in that List.

If the Court were to treat the first sentence of Section 9 above as a legislative mandate that hormonal contraceptives and IUDS are safe and non-abortifacient, then the FDA's former authority to determine whether or not hormonal contraceptives and IUDs are safe and non-abortifacient would be circumscribed. The law would already have made the determination for the FDA.

The real question before the Court is whether or not Congress can elevate to the status of a law the medical and scientific proposition that hormonal contraceptives and IUDs are safe and non-abortifacient and order their inclusion in the National Drug Formulary without violating the Constitution. Respondents claim that Congress can; petitioners claim otherwise.

The issue of whether or not hormonal contraceptives and IUDS are safe and non-abortifacient is so central to the aims of the RH Law that the OSG has as a matter of fact been quick to defend the authority of Congress to convert such factual finding into law. The OSG insists that everyone, including the Court, has to defer to this finding considering that the legislature is better equipped to make it. Specifically, the OSG said:

> The Congress, employing its vast fact-finding and investigative resources, received voluminous testimony and evidence on whether contraceptives and contraceptive devices are abortifacients. It thereafter made a finding that the used of current reproductive devices is not abortifacient. Such finding of legislative fact, which became the basis for the enactment of the RH Law, should be entitled to great weight and cannot be equated with grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the Congress.

To support this view, the OSG claims that scientific evidence of the highest standards support the legislative determination in Section 9. It rests on the opinions of a group of Philippine medical experts called the Universal

Health Care Study Group (UHC) and the World Health Organization (WHO). The OSG even submits copies of these opinions as part of its comment and discusses them extensively.

5. UHC Study Group Opinion

But the UHC Study Group based its conclusion that hormonal contraceptives and IUDs are not abortifacient on the belief that abortion refers only to a viable fetus; the death of a mere fertilized ovum in the hand of these contraceptives do not in the mind of this group amount to abortion. Its paper thus states:

> 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).

The UHC Study Group seems to live in another planet. Its understanding of when the life of the unborn child begins essentially differs from what the Constitution states, i.e., from the time of conception, something that the RH law itself concedes. Consequently, the group's study fails to connect to the issue of when contraceptives act as abortifacients.

Besides, the UHC Study Group's findings cannot be seriously regarded as near undeniable truth. The UHC group is not a recognized medical or scientific society like the International Union against Cancer or a renowned medical research center like the Mayo Clinic that have reputations for sound medical and scientific studies. The paper it submitted to Congress has not been subjected to any credible and independent peer review. Indeed, the group has never published a paper or study in some reputable scientific or medical journal. Its members met one day in August 2011 and in one sitting found and concluded that existing contraceptives and IUDs are safe and non-abortifacient.

6. WHO Opinions

Congress, according to the OSG relied heavily on WHO's documented opinions regarding the legality and merit of contraceptives. But, firstly, that organization cannot be considered an impartial authority on the use of contraceptives since it has always been a strong advocate of birth control. Its Media Centre Fact Sheet on Family Planning dated May 2013, reads:

> WHO is working to promote family planning by producing evidence-based guidelines on safety and service delivery of contraceptive methods, developing quality standards and providing pre-qualification of contraceptive commodities, and helping countries introduce, adapt, and implement these tools to meet their needs. x x x

Secondly, the cited WHO studies are either inconclusive or constitute proof that hormonal contraceptives and IUDs are indeed abortifacient. For instance, the WHO said that "[w]hen used appropriately and in doses/ways recommended, none of these methods have been shown to cause abortion of an implanted fetus." [8] That needs repetition: "abortion of an implanted fetus."

In other words, the only assurance the WHO can give based on its studies is that, when the contraceptive pill has been properly taken, it will not cause "abortion of an implanted fetus." This is of course based on the WHO mind-set that the life of the unborn begins only from the time of the implantation of the fetus on the uterine wall—the same mind-set as the UHC Study Group. But, as repeatedly stated, this contravenes what the Constitution says: the life of the unborn begins "from conception,"[9] which is from the time of the fertilization of the ovum as the RH law itself acknowledges.[10] The WHO opinions do not, therefore, connect.

Notably, the WHO is reluctant to admit that most contraceptives perform three functions: they 1) suppress ovulation; 2) prevent fertilization of an ovum by a sperm; and 3) inhibit implantation of a fertilized ovum in the uterine lining.[11] When the first two functions fail and an ovum is nonetheless fertilized (a phenomenon called "breakthrough ovulation"), the contraceptives have the potential for functioning as abortifacient and terminating the fertilized ovum by inhibiting implantation.[12] This is abortion that the Constitution prohibits.

Despite its reluctance, however, the WHO implicitly acknowledges the fact in its several opinions given to Congress. For instance, the WHO admits in one of its opinion papers that hormonal contraceptives and IUDs "directly or indirectly have effect on the endometrium that may hypothetically prevent implantation" although "there is no scientific evidence supporting this possibility." [13] The endometrium is the inner lining of the womb where the embryo lodges, draws food, and develops into a full grown child.[14]

The WHO's stated opinion stands examination. A hypothesis is a proposition tentatively assumed in order to draw out its logical or empirical consequences and so test its accord with the facts that are known or may be determined.[15] This means in this case that the severe harm contraceptives and IUDs inflict on the endometrium, a known fact, will, given what science

---

[8] WHO Expert Opinion dated November 7, 2006, Annex 1 of OSG Comment, p. 4.
[9] Section 12, Article II, 1987 Constitution of the Philippines.
[10] Section 4, Republic Act 10354.
[11] The Guttmacher Institute (2005), citing the American College of Obstetricians and Gygnecologists.
[12] Textbook of Contraceptive Practice of Cambridge (Cambridge University Press).
[13] WHO October 27, 2010 position paper, Note 7, p. 3.
[14] Webster's New World Dictionary, 3rd Edition, pp. 448 (endometrium) and 1470 (uterus).
[15] Webster's Third New International Dictionary, p. 1117.

knows, logically or empirically prevent implantation and cause abortion. Indeed, the U.S. Physicians Drug Reference for 1978 and 1998 categorically state that an impaired endometrium prevents implantation.[16]

Not only this, the WHO further admits that, "[g]iven the high efficacy of combined oral contraceptives in preventing ovulation, it is very unlikely that 'interference with implantation' is a primary mechanism of contraceptive action."[17] The WHO repeats this point in another paper.[18] Both statements imply that "interference with implantation," while not a primary mechanism of contraceptives, is its secondary mechanism. This means that they also function as abortifacients.

More, the WHO also admits that progestin-only hormonal contraceptive can cause the endometrium, where fertilized eggs are implanted, to suffer injury. It said, "Progestin-only methods also cause changes in the endometrium. However, these changes show great variability among patients, from atrophy to normal secretory structures."[19] This means that If implantation of a fertilized ovum on the endometrium nonetheless succeeds, the fertilized ovum would still die. As the WHO said in a reply to Congress, a fertilized ovum is not viable unless it is able to implant on a healthy endometrium since there is "very limited amount of metabolic support in a fertilized human egg."[20] Hormonal contraceptives, like IUDs, have the potential for causing abortion.

The world is not in want of outstanding international research groups that do not get funding from pro-abortion organizations or states. But Congress had not tapped them. For instance, the International Agency for Research on Cancer (IARC) said in 2011 that "the progestogen component (of combined hormonal contraceptives) also...reduces the receptivity of the endometrium for implantation.[21]

7. Drug Manufacturers Evidence

Drug manufacturers themselves, whose products the FDA has approved, state in their inserts that their contraceptives perform the dual functions mentioned above. Although the Court is not a trier of facts, it can take judicial notice of facts that are self-evident or are capable of unquestionable demonstration. [22] All one needs to do is buy such contraceptives from the local drugstore and read the best that the manufacturers can say about their products. One of them, from a popular oral contraceptive Lynstrenol under the brand name of Daphne, was read into the record during the oral argument and had not been challenged. It says:

---

[16] U.S. Physicians Drug Reference, 1978, p. 1817; 1997, p. 2746.
[17] WHO November 7, 2006 Expert Opinion, Note 7, Annex __, p. 3.
[18] WHO position paper of October 27, 2010, Id., Annex __, p. 2.
[19] WHO Expert Opinion dated November 7, 2006, Note 7, Annex __, p. 3.
[20] WHO January 17, 2011 Response to Queries, Note 7, Annex __, p. 3.
[21] http://monographs.iarc.fr/ENG/Monographs/vol100A-19.pdf. Retrieved October 3, 2012.
[22] Section 2, Rule 129 of the Rules of Evidence.

> Pharmacology: mechanics of action:
>
> Effects on Endometrium: Lynestrenol (DAPHNE) impairs implantation, perhaps by altering its special receptors for hormones. It may also be indirectly impaired by interfering with the corpus lutein.
>
> Effects on tubal action: Lynestrenol (DAPHNE) affects tubal secretions and microvili, hence blastocyst and ovum transport are delayed.

Any unnatural delay in the transport of the zygote down through the fallopian tube to the uterine wall will of course prevent timely implantation and cause the fertilized ovum to be aborted. Since abortion is prohibited in the Philippines, this statement is against the manufacturer's interest and is admissible evidence against it.

Another hormonal contraceptive is called Trust Pill but goes by the generic name Ethinyl Estradiol, Levonorgestrel, and Ferrous Fumarate, It is manufactured in Thailand by Ponds Chemical and imported by DKT Philippines of Libis, Quezon City. The packet does not bear the restriction that it must be prescribed by a physician. Its insert, also read during the oral argument, states:

> Prior to starting Ethinyl Estradiol + Levonorgestrel + Ferrous Fumarate (TRUST PILL) tablet, pregnancy must be ruled out. However, should a pregnancy occur while taking the tablet, the administration has to be withdrawn at once.

The pill is intended to prevent fertilization of the ovum. But if this is not achieved, it is implicit from the above statement that continued use will harm the fertilized ovum and cause abortion. The manufacturer is compelled to disclose this fact in the insert because abortifacient is illegal in the Philippines. This pill is a double barrelled pill. It shoots the ovum to prevent ovulation and shoots the zygote or little Junior if fertilization takes place—abortion.

But the irony of this is that women who use Trust Pill presumably do so because they believe that it will prevent conception. Consequently, it is not likely that they would undergo testing for pregnancy from day to day while taking the pill to enable them to decide when to stop using it and have their child.

Yasmin, a 3rd generation oral contraceptive, has this announcement for online distribution in the Philippines: Yasmin "prevents ovulation (the release of an egg from an ovary) and also causes changes in your cervical and uterine lining, making it harder for sperm to reach the uterus and harder for a fertilized egg to attach to the uterus."[23]

[23] Sulit.com.ph, 2012.

IUDs also serve as abortifacients. The WHO on whom Congress relied in writing the RH Law said that "During the use of copper-releasing IUDs the reaction is enhanced by the release of copper ions into the luminal fluids of the genital tract, which is toxic to sperm."[24] And how do these toxic ions affect the uterus where the fertilized ovum is supposed to implant itself? The WHO said in the same paper[25] that "[t]he major effect of all IUDs is to induce a local inflammatory reaction in the uterine cavity."

Inflammation is "a condition of some part of the body that is a reaction to injury, infection, irritation, etc. and is characterized by varied combination of redness, pain, heat, swelling, and loss of function."[26] In other words, the toxic chemicals from the IUD will cause injury to the uterine cavity, preventing the fertilized egg or embryo from being implanted or, if implanted, from surviving. That is abortion resulting from the use of IUDs.

8. Significance of FDA's "Don't-Use" Certification

Actually, Congress fears that hormonal contraceptives and IUDs perform a third function—disabling the endometrium of uterine lining—that enable them to serve as weapons of abortion, Proof of this is that the RH Law provides in the third sentence of Section 9 that these contraceptives and devices may, assuming that they also function as abortifacients, pass FDA approval provided the latter issues a certification that they are "not to be used as abortifacient." Thus:

> Sec. 9. x x x 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.

The above of course makes no sense since the two functions go together and the user has no way, after taking the contraceptive, of stopping the second function from running its course. The bad simply comes with the good. The certification requirement violates the RH Law's tenet that "reproductive health rights do not include...access to abortifacients."[27] It also contradicts the RH Law's stated policy of guaranteeing universal access to "non-abortifacient" contraceptives.[28] Above all, this position is in breach of the provision of the Constitution that outlaws abortion. In any event, I agree with the Court's ruling that the second sentence of Section 9 does not authorize the approval of family planning products and supplies that act as abortifacient.

This is not to say that all contraceptives and IUDs, present and future,

---

[24] WHO November 7, 2006 Expert Opinion, Id. Annex __, pp. 3-4.
[25] At p. 3.
[26] Webster's New World College Dictionary, 3rd edition, p. 692.
[27] Section 4 (s), Id.
[28] Section 2, RH Law.

double as abortifacients and are not to be allowed. Annulling Section 9 merely means that it is beyond the powers of Congress to legislate the safe and non-abortifacient status of certain forms of artificial contraceptives. That function must remain with the FDA which has the required scientific and technical skills for evaluating, testing, and approving each contraceptive before it is publicly made available. The manufacturers and distributors have their responsibilities, too. They have to warrant that their products do not function as abortifacients.

It is appalling, however, that Daphne, Trust Pill, and Yasmin that clearly function as abortifacient passed approval of the FDA. But this is a question that does not have to be answered here. The important thing is that the FDA is to assume as before the responsibility for preventing the violation of the law against abortion. It is of course difficult to be completely positive that a contraceptive primarily intended to prevent ovulation or fertilization of the ovum will absolutely not prevent implantation on the uterine wall and cause abortion. The lack of convincing empirical evidence that it is so may be an acceptable excuse. It is the certainty from the beginning, however, that a given contraceptive has the inherent and substantial potential for causing abortion that is not acceptable. It violates the constitutional right to life of the unborn.

Section 9 and the Right to Health

Section 15, Article II, of the 1987 Constitution makes it the duty of the State to "protect and promote the right to health of the people." Health means physical and mental well-being; freedom from disease, pain, or defect; health means normalcy of physical functions.[29] Maternal health according to Section 4 of the RH Law refers to the health of a woman of reproductive age including, but not limited to, during pregnancy, childbirth and the postpartum period.

This means that women have the right to be free from government-sponsored sickness, government-sponsored pain, and government-sponsored defect. Since healthy vital organs of the body form part of the right to health, women have the right to have normally functioning vital organs. They have the right to walk in the park or in the malls free from debilitating illnesses and free from worries and fears over contraceptives that the government assures them are safe. The government cannot promote family planning programs that violate the women's right to health. A law that misleads women and states that hormonal contraceptives and IUDs are safe violates their constitutional right to health.

1. Safe or Unsafe Use of Hormonal

[29] Note 2, p. 621.

Contraceptives and IUDs

Since the law does not define the meaning of the term "safe," it is to be understood according to its common meaning: "free from harm, injury, or risk."[30] The RH Law itself recognizes that the use of contraceptives produces side effects or other harmful results. Thus, it directs the FDA in Section 19 to issue strict guidelines with respect to their use, acknowledging the need for abundant caution.

Do warnings of side effects and possible lasting harm make contraceptives and IUDs safe? The answer is of course no. For instance, a simple warning against pet snakes would say, "Look at this snake. It is a safe pet to keep in the house. But just don't keep it hungry. Don't forget to close the small door of the cage when you feed it. And watch those small kids."

It is the same with the warnings for hormonal contraceptives: "This is safe although you will have spotting, breakthrough bleeding, and prolonged periods. Don't worry. You will gain weight, loss your sexual urge, develop pimples, and breast tenderness. You may experience headache and dizziness as well as vaginal dryness. But that is quite alright. Incidentally, on occasions you may have liver disorders, clotting disorders, breast and cervical cancer, sickle-cell anemia, hormone-active tumors, hyperlipidemia, severe cardiovascular diseases, previous or existing thrombo embolic disease, and idiopathic jaundice. It is possible you will have a heart attack. I won't worry if I were you."

The dangers of those side effects are more worrisome since the RH Law fails to provide standards of safe use of contraceptives such as:

(a) a prescribed standard of tolerance for side effects.
(b) the service of a qualified physician who can advice the user, especially the poor, of the dangers of contraceptives, not just literature written in English so she can make intelligent choice;
(c) the service of a qualified physician who will, while she is under contraceptives, monitor their effects on her, treat her for adverse side effects and complications, and provide her with the right medicine; and
(d) the contraceptives she takes do not act at the same time as abortifacients in case an ovum is fertilized despite the use of such contraceptives.

The fact is that contraceptives interfere with normal body functions. Women have ovaries so these can produce ova or eggs that can be fertilized to ensure procreation and the continuation of the human race. Contraceptives prevent healthy ovaries from ovulating, which is the reason for their being ovaries. One cannot disable the woman's ovaries or monkey with its functions for long periods without affecting her health. Medical

[30] Note 10, p. 1998.

studies and reports show this to be the case.[31]

2. Drug's Side Effects Versus Benefits

The OSG of course points out that, on balance, the side effects mentioned are outweighed like most medicines by the benefits that their use will bring. But that is a false analogy. Medicine is intended to cure illness. Consequently, the doctor can balance the illness that it wants to cure against the illness that its side effects bring. They are on the same level of exchange: a minor illness weighed against a major illness. For instance, the fact that medicine X may cause manageable problems in the patient's liver is outweighed by the fact that it can, more than any other medicine, hinder a fatal heart attack.

Obviously, this kind of balancing cannot apply to artificial contraceptives since the harm or illness they can cause users, especially women, is not on the same level of exchange as the consequent benefit, namely, sexual pleasure without pregnancy. Besides, other methods that produce no side effects exist. A WHO 2013 report that such methods have good results when used properly. Their rates of success under correct and consistent use are: male condoms 98%; withdrawal 96%; fertility awareness method 95-97%; and abstinence: 100%

This is not to say that contraceptives and IUDs can pass approval by the FDA only if they are absolutely safe. This is unrealistic and the Court must trust married couples and mature women to have the proper discernment for deciding whether to take the risk of their side effects. But the FDA should not trust the manufacturers and distributors with unbridled authority to write their own guidelines to users. It must see to it that these guidelines disclose those side effects in clear and understandable terms from the layman's point of view.

3. Substantive Due Process

The legislature's attempt to elevate into law its arbitrary finding that hormonal contraceptives and IUDs are safe and non-abortifacient is irrational. The determination of what medicine is safe and useful to a person is a function of the science of medicine and pharmacy. It is not for the Court or the legislature to determine. Raising present-day scientific or medical views regarding contraceptives to the level of law, when contested by opposing scientific or medical views, is an arbitrary exercise of legislative power.

Medical and scientific findings are constantly changing. For example,

---

[31] Heinemann, Lothar A J; Lewis, Michael Aar_button.gif; Thorogood, margaret1_#$@%!#_ar_button gif; Spitzer, Walter O.; et al. British Medical Journal, International editionspacer.gif; 315.7121.1_#$@%#_spacer.gif; (December 6, 1997):1502-4.

the International Agency for Research on Cancer of the WHO reported that it was once believed that combined menopausal therapy was "possibly carcinogenic to humans." But the WHO cancer research organization said in 2005 that "The new evaluation concluded, based on an expanded study base, that it is carcinogenic to humans [not just possibly carcinogenic], increasing a woman's risk of breast cancer." In fact, this research organization places oral contraceptives in the highest grade of cancer-producing products. Still, Congress would declare by force of law that oral contraceptives are safe. God save this country if it must rely and stake the lives of its people on Congressional judgment regarding scientific and medical truths.

Fortunately, the Court rules in this case that Congress cannot elevate into law its view that hormonal contraceptives and intrauterine devices are safe and non-abortifacient. The first sentence of Section 9 should be construed as ordaining their inclusion in the National Drug Formulary only after they have been tested, evaluated, and approved by the FDA. Only the FDA is competent to determine whether a particular hormonal contraceptive or intrauterine device is safe and non-abortifacient. This finds support in the second sentence of Section 9 that provides a process for the inclusion or removal of family planning supplies from the National Drug Formulary.

Section 7, Section 23(a)(3),
Section 23(a)(2), Section 23(b).
and the Free Exercise of Religion

Section 7 of the RH Law requires all public health facilities to provide the full range of family planning services. This is also required of private health facilities, except in the case of non-maternity specialty hospitals and those operated by religious groups. The latter hospitals are, however, required to immediately refer the person seeking such services to the nearest health care facility that will do the task. Thus, Section 7 provides:

> Section 7. *Access to Family Planning.* – All accredited public health facilities shall provide a full range of modern family planning methods, which shall also include medical consultations, supplies and necessary and reasonable procedures for poor and marginalized couples having infertility issues who desire to have children: Provided, That family planning services shall likewise be extended by private health facilities to paying patients with the option to grant free care and services to indigents, except in the case of non-maternity specialty hospitals and hospitals owned and operated by a religious group, but they have the option to provide such full range of modern family planning methods: **Provided, further, That these hospitals shall immediately refer the person seeking such care and services to another health facility which is conveniently accessible:** Provided, finally, That the person is not in an emergency condition or serious case as defined in Republic Act No. 8344. (Emphasis supplied)

Related to the above is Section 23(a)(3) of the RH Law that makes it a crime for any health care service provider (hospital, clinic, doctor, nurse, midwife, and health worker),[32] whether public or private, to refuse to extend quality health care services and information on account of the person's marital status, gender, age, religious convictions, personal circumstances, or nature of work.

The law provides, however, that the health care service provider's objection based on his or her ethical or religious beliefs is to be respected. Thus, he or she is not to be compelled to render the services that would interfere with the natural human reproduction process if the same conflicts with his conscience. This is consistent with Section 5, Article III of the 1987 Constitution which provides that no law shall be made prohibiting a person's free exercise of his religion.

But the irony of it is that at the next breath the RH Law would require the conscientious objector to immediately refer the person, whose wants he declines to serve, to the nearest health care service provider who will do what he would not. The penalty for failing to do this is imprisonment for 1 to 6 months or payment of a fine of P10,000 to P100,000 or both imprisonment and fine. If the offender is a juridical person, the penalty shall be imposed on its president or responsible officer.[33]

Specifically, Section 23(a)(3) provides:

> Section 23. *Prohibited Acts.* – The following acts are prohibited: (a) Any health care service provider, whether public or private, who shall:
>
> x x x x
>
> (3) Refuse to extend quality health care services and information on account of the person's marital status, gender, age, religious convictions, personal circumstances, or nature of work: **Provided, That the conscientious objection of a health care service provider based on his/her ethical or religious beliefs shall be respected; however, the conscientious objector shall immediately refer the person seeking such care and services to another health care service provider within the same facility or one which is conveniently accessible**: x x x

Section 23(a)(3) makes no sense. It recognizes the constitutional right of the conscientious objector not to provide artificial contraceptives that he believes would kill the unborn after it has been conceived. Yet, he must help see it done by someone else. For instance, the Catholic religion might consider it a sin similar to murder to implant a copper IUD into a woman since it would kill the unborn by preventing it from attaching to a womb atrophied by poison from the IUD. The RH law respects the Catholic

---

[32] See Section 4 Definition of Terms; par. (n) meaning of term " public health care service provider."
[33] Section 24, RH Law.

doctor's right to refuse to do what his faith regards as murder. But he must hasten, at the pain of punishment, to refer the woman to another doctor who is willing to do it.

So if the law would excuse the Catholic doctor from committing what in his faith amounts to murder, would it be reasonable for the law to compel him to help the woman and show her how she can have her child murdered by another doctor? If so, the Catholic doctor would in effect say to the other doctor, "I can't murder this woman's child but please do it in my place." This definitely compels him to do something against his conscience in violation of his constitutional right to the free exercise of his religion.

The OSG cites the *Ebralinag* case[34] concerning students who were members of the Jehovah's witnesses. They refused to salute the flag and for this reason were expelled from school. But the Court said that compelling them to salute the flag would violate their religious belief that salutes are reserved to God. It is the same here in the sense that the RH law actually recognizes the right of a Catholic doctor not to be compelled to implant a copper IUD into a woman's womb because it amounts, according to his religious belief, to the murder of an unborn child. The Constitution and the law respect's the doctor's religious belief.

Of course, as the OSG points out, school authorities are not powerless to discipline Jehovah's witnesses' members if they commit breaches of the peace by disruptive actions that would prevent others, like their classmates and teachers, from peacefully saluting the flag and singing the national anthem. The OSG implies from this that while the RH Law can similarly respect the conscientious objector's right not to do what his religion forbids, it can compel him help the person get the declined service from another health care service provider.

But it is clear from *Ebralinag* that what is required of the Jehovah's witnesses is to respect the right of other students and their teachers by keeping quiet and not disrupting the flag ceremony. Keep quiet and let alone; that is the rule. In the case of the Catholic doctor, he should do nothing to impose his religious belief on the woman. He should do nothing that will deny the woman her right to get that copper IUD implantation elsewhere. Like the Jehovah's witnesses, the equivalent conduct for the Catholic doctor is to keep quiet and let alone.

Unfortunately, the RH Law requires him to take steps to ensure that the woman is pointed to another place where she could get the IUD implantation she wants. In effect, the law compels the doctor to do more than just keep quiet and let alone. It compels him at the pains of going to jail to get involved and help in the commission of what his religious belief regards as amounting to the murder of a child. And this is in order to satisfy

[34] *Ebralinag v. The Division Superintendent of School of Cebu*, G.R. No. 95770, 219 SCRA 256.

the need of the woman and her partner for sex without pregnancy. Remember, this is not the case of a bleeding woman needing immediate medical attention.

The Court has correctly decided to annul Section 23(a)(3) and the corresponding provision in the RH-IRR, particularly section 5.24, as unconstitutional insofar as they punish any health care provider who fails and/or refuses to refer a patient not, in an emergency or life-threatening case, to another health care service provider within the same facility or one which is conveniently accessible regardless of his or her religious beliefs.

Section 23(a)(1) and the Principle of Void for Vagueness

Due process demands that the terms of a penal statute must be sufficiently clear to inform those who may be subjected to it what conduct will render them liable to its penalties. A criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," is void for vagueness. A vague or indefinite statute is unconstitutional because it places the accused on trial for an offense, the nature of which he is given no fair warning.[35]

Section 23(a)(1) of the RH Law provides:

> Section 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;

The public health care service provider referred to are of course the hospitals, the doctors, the nurses, the midwives, and the other health workers described elsewhere in the law.[36] They will, if found guilty of the offense, suffer imprisonment of 1 to 6 months or a fine of P10,000 to P100,000 or both imprisonment and fine.[37]

Petitioners contend that Section 23(a)(1) above is void for vagueness. But some points out that the term "knowingly" used in the law, assailed by petitioners as vague, is sufficiently clear in that it means awareness or deliberateness that is intentional and connotes malice.

---

[35] *People v. dela Piedra*, G.R. No. 121777, January 24, 2001, 350 SCRA 163.
[36] See Section 4 Definition of Terms; par. (n) meaning of term "public health care service provider."
[37] Section 24, RH Law.

But "knowingly" and "maliciously" have meanings that set them apart. "Knowingly" means mere awareness or deliberateness. "Maliciously," on the other hand, connotes an "evil intention."[38] If the law meant to include malice as an ingredient of the offense described in Section 23(a)(1), it would have added the term "maliciously" to "knowingly." Nothing in the wordings of the law implies malice and the need for criminal intent. The crime as described is *malum prohibitum*.

The term "knowingly" is vague in the context of the law because it does not say how much information the offender must have regarding those programs and services as to charge with an obligation to impart it to others and be penalized if he "knowingly" fails to do so. The depth of a person's information about anything varies with the circumstances.

One who is running the programs or services would naturally have the kind of information that obligates him to disclose them to those who seek the same and be punished if he "knowingly" refuses to do so. Yet, this circumstance of direct involvement in the program or service is not required in Section 23(a)(1). On the other hand, one who merely reads about those programs and services, like a private hospital nurse who receives a letter offering free program on birth control, would know little of the detailed contents of that program and the competence of those who will run it. But since the law also fails to state what the term "information" means, that private nurse could be charged with "knowingly" withholding information about the birth control program she learned from reading mails if she does not disseminate it to others.

Another element of the offense is that the health care service provider must knowingly withhold or restrict dissemination of the information that he has. It fails to state, however, to whom he has an obligation to make a disclosure. It also gives him no discretion to decide to whom such information would be suitable and to whom not. Consequently, the health care service provider would be vulnerable to charges of violation of the law where he is denied the chance to know before hand when the obligation to disclose presents itself.

Section 23(a)(1) and the Freedom of Expression

Section 23(a)(1) also punishes any health care service provider who knowingly provides "incorrect" information regarding programs and services on reproductive health. But the RH Law does not define what is "correct" or "incorrect" information regarding such programs and services. And it does not require the publication of what information are "correct" and what are "incorrect" sufficient to put prospective offenders on guard.

[38] Webster's Third New International Dictionary, p. 1367.

Besides there is no final arbiter in the world over issues concerning correct or incorrect reproductive health science on which reproductive health programs and services must depend. For instance, while Section 9 regards as law the scientific proposition that hormonal contraceptives and IUDs are safe and non-abortifacient, there is abundant medical and scientific evidence, some from the WHO itself that they are not.

If the legislature can dictate what the truth is regarding medical and scientific issues of the day and send to jail those who disagree with it, this country would be in deep trouble. They threw Galileo into jail for saying that the earth was round when the authorities of his time believed that it was flat. Public health will be endangered if Congress can legislate a debatable scientific or medical proposition into a binding law and punish all dissenters, depriving them of their freedom of expression,

Most competent doctors read the latest in scientific and medical journals and reports. If these convince a doctor that oral pills and copper IUDs are not safe or work as abortifacient, he would be unable to tell his patients these until the law is repealed. Otherwise, he would be giving them "incorrect" information that would send him to jail. This places a health issue affecting public interest outside the scope of scientific and medical investigation.

The doctors who make up the Universal Health Care Study Group, on whose paper Congress relied on, hold the view that the life of the unborn child begins only from the moment of implantation of the embryo on the uterine wall, contrary to what the Constitution provides. This means that if they provide such "incorrect" information to their patients, they could go to jail for it. But no law should be passed outlawing medical or scientific views that take exceptions from current beliefs.

Moreover, the State guarantees under Section 2 of the RH Law the right of every woman to consider all available reproductive health options when making her decision. This implies that she has the right to seek advice from anyone she trusts. Consequently, if a woman wanting to space her pregnancy seeks the advice of a Catholic physician she trusts, the latter should not be sent to jail for expressing his belief that taking oral pills or using copper IUDs can cause abortion that her faith prohibits. This is valid even if others do not share the faith. Religious conscience is precisely a part of the consideration for free choice in family planning.

I concede, however, that my above views on Section 23(a)(1) could be better appreciated in actual cases involving its application rather than in the present case where I go by the bare provisions of the law. For now I am satisfied that Section 23(a)(1) has been declared void and unconstitutional insofar as it punishes any health care provider who fails or refuses to disseminate information regarding programs and services on reproductive

health regardless of his or her religious beliefs.

ROBERTO A. ABAD
Associate Justice