REPRODUCTIVE HEALTH AND THE CONSERVATIVE STRATEGY OF ACCESS DENIAL: COMMENTS ON ALFI V. GARIN*

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ABSTRACT

The liberals who advocated for social justice in *Imbong v. Ochoa* successfully defended the legislative mandate of promoting reproductive health. However, this progression towards social welfare is presently threatened by illiberal conservatives who aim to delegitimize access to contraceptives through the legalization and judicialization of the Food and Drug Authority's certification process. This article deconstructs the case made against state subsidy on contraceptives and evaluates the Decision in the case of *ALFI v. Garin*, which acknowledged the standing of conservatives in questioning the scientific certification process made by a technical agency and which also applied the due process requisites in *Ang Tibay v. CIR*. The author argues that this judicial acknowledgement is erronous on technical, policy, and legal grounds.

I. INTRODUCTION

Revolutionary legal activities are best understood as processes that take time, come in stages, and complicated by setbacks before they are, if ever, finally accepted as settled paradigm.[1] This is perhaps the best psychological approach to the understanding of the movement of progressive causes such as social welfare, divorce, anti-discrimination, women's rights in general, and reproductive health, in particular. The resolution of contested issues rarely takes a linear progressive path, and incremental movements have a relatively unpredictable pace, gestating at

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[1] THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 93 (Vol. II, No. 2, 2nd ed. 1970).

specific phases or platforms before reaching the next. In the case of reproductive health in the Philippines, the first major platform for progress in the 21st century was the passage of Republic Act (R.A.) No. 10354 or the Reproductive Health (RH) Law.[2]

After having stayed in the legislative mill for 15 years, President Benigno Aquino III and his congressional allies fought with conservatives in Congress and the Catholic Church to ensure the passage of the RH Law in 2012. Consistent with Tocqueville's views about major political issues in the United States,[3] the RH Law was immediately challenged before the Supreme Court, setting the next stage for the fight over reproductive health rights.

In *Imbong v. Ochoa*,[4] the Supreme Court declared the RH Law as not unconstitutional in a Decision which sustained the law's general provisions and struck down certain specific provisos.[5] This is, by all indicators, a

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[2] The Responsible Parenthood and Reproductive Health Act of 2012 [hereinafter "RH Law"].

[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1840).

[4] G.R. No. 204819, 721 SCRA 146, Apr. 8, 2014.

[5] "WHEREFORE, the petitions are PARTIALLY GRANTED. Accordingly, the Court declares R.A. No. 10354 as NOT UNCONSTITUTIONAL except with respect to the following provisions which are declared UNCONSTITUTIONAL:

1) Section 7 and the corresponding provision in the RH-IRR insofar as they: a) require private health facilities and non-maternity specialty hospitals and hospitals owned and operated by a religious group to refer patients, not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to another health facility which is conveniently accessible; and b) allow minor-parents or minors who have suffered a miscarriage access to modern methods of family planning without written consent from their parents or guardian/s;
2) Section 23(a)(l) and the corresponding provision in the RH- IRR, particularly Section 5.24 thereof, insofar as they punish any healthcare service provider who fails and or refuses to disseminate information regarding programs and services on reproductive health regardless of his or her religious beliefs;
3) Section 23(a)(2)(i) and the corresponding provision in the RH-IRR insofar as they allow a married individual, not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to undergo reproductive health procedures without the consent of the spouse;
4) Section 23(a)(2)(ii) and the corresponding provision in the RH-IRR insofar as they limit the requirement of parental consent only to elective surgical procedures;
5) Section 23(a)(3) and the corresponding provision in the RH-IRR, particularly Section 5.24 thereof, insofar as they punish any healthcare service provider who fails and/or refuses to refer a patient not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to another health care service provider

compromise between conservatives and liberals in the Court. Thus, the general idea of a standing legislative mandate—as opposed to none—to fund and promote reproductive health rights subsists, minus the more aggressive penal provisions which a majority of the members of the Supreme Court thought was incompatible with the Constitution.

There are many ways to slice *Imbong* for analytical purposes, whether from the standpoint of doctrine or its practical consequences. The case speaks a lot about the general attitude of a majority of the members of the Supreme Court about the conflict between science and religion, generally privileging religious belief over the standards of science and the demands of professionalism.[6] Other portions of the Decision, while raising concerns

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within the same facility or one which is conveniently accessible regardless of his or her religious beliefs;

6) Section 23(b) and the corresponding provision in the RH-IRR, particularly Section 5.24 thereof, insofar as they punish any public officer who refuses to support reproductive health programs or shall do any act that hinders the full implementation of a reproductive health program, regardless of his or her religious beliefs;

7) Section 17 and the corresponding provision in the RH-IRR regarding the rendering of pro bono reproductive health service in so far as they affect the conscientious objector in securing PhilHealth accreditation; and

8) Section 3.01(a) and. Section 3.01(g) of the RH- IRR, which added the qualifier "primarily" in defining abortifacients and contraceptives, as they are *ultra vires* and, therefore, null and void for contravening Section 4(a) of the RH Law and violating Section 12, Article II of the Constitution.

The Status Quo Ante Order issued by the Court on March 19, 2013 as extended by its Order, dated July 16, 2013, is hereby LIFTED, insofar as the provisions of R.A. No. 10354 which have been herein declared as constitutional." *Id.* at 375-6.

[6] For instance, one of the provisions struck down was § 23(a)(3) of Rep. Act No. 10354, which imposes the duty of a health care service provider, who is a conscientious objector, to refer a patient to another health care service provider, *viz:*

SEC. 23. *Prohibited Acts.* – The following acts are prohibited:

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(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: Provided, further, that the person is not in an emergency condition or serious case as defined in Republic Act No. 8344, which penalizes the refusal of hospitals and medical clinics to administer appropriate initial medical treatment

about the priorities of the Court, have little to no effect on the ability of the Department of Health to proceed with its intended program.[7]

Another way of viewing *Imbong* is that it paves the way towards the institutionalization of pro-reproductive health processes at the national level, specifically at the Department of Health. This bureaucratic impetus is important to ensure that reproductive health policies will not be *ad hoc*, and that the Department of Health will have continuing legislative license to execute and implement reproductive health programs.

This notwithstanding, one must accept the reality that the successful implementation of the RH Law depends on the President's level of commitment to its enforcement. This is generally signalled by the appointment of a pro-reproductive health rights Secretary of Health. On the part of Congress, its commitment to comply with the law is reflected in its continued support for reproductive health-specific items in the budget of the Department of Health. But the bottom line is still this: if we want the progressive goals of reproductive health to affect the lives of individuals, couples, and families, then we must look at the National Expenditure Program[8] of the government.

II. PUBLIC FUNDING FOR CONTRACEPTIVES

Given that the RH Law's financial costs are not specifically fixed,[9] the debate over state subsidy for contraceptives is likely to persist. This is unfortunate.

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and support in emergency and serious cases; (Emphasis supplied.)

[7] Section 7 of the RH Law imposes on conscientious objector healthcare providers the duty to refer patients to another healthcare provider. Section 23(a)(2)(i), on the other hand, allows a married individual to undergo reproductive health procedures without the consent of the spouse. That these conscientious objector and spousal consent provisions of the RH Law were declared unconstitutional has little to no effect on the ability of the Department of Health to proceed with the implementation of the RH program.

[8] The National Expenditure Program is submitted by the Department of Budget and Management to Congress. It is the basis of the General Appropriations Bill, which eventually becomes the General Appropriations Law.

[9] "*Appropriations.* – The amounts appropriated in the current annual General Appropriations Act (GAA) for reproductive health and natural and artificial family planning and responsible parenthood under the DOH and other concerned agencies shall be allocated and utilized for the implementation of this Act. Such additional sums necessary to provide for the upgrading of faculties necessary to meet BEMONC and CEMONC standards; the training and deployment of skilled health providers; natural and artificial family planning commodity requirements as outlined in Section 10, and for other reproductive health and responsible parenthood services, shall be included in the subsequent years' general

From a logical standpoint, the legality of state subsidy for contraceptives ought to be non-controversial in the first place. Contraceptives are not contraband. As was argued by the Government in *Imbong*, the legal basis for the buying and selling of contraceptives goes back to a law passed in the 1960s, Republic Act (R.A.) No. 4729,[10] the constitutionality of which was never contested by the petitioners. Petitioners agreed with this framing of the issue. Thus, as noted by the Court, "[t]he petition does not question contraception and contraceptives per se."[11]

The strategic position taken by the petitioners was to attack state funding for contraceptives, not to question the legality of contraceptives. Even the Court in *Imbong* recognized the continuing force of R.A. 4729, and various portions of the Decision repeatedly invoked the law's existence.[12]

One of the government's core arguments in *Imbong* attempted to take advantage of this framing by pointing out the logical consequence of petitioners' stand of not questioning the legality of contraceptives *per se* even as they argued that contraceptives violate the so-called right to life of the unborn. The basic takeaway was this: what was legal in the private sphere

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appropriations. The Gender and Development (GAD) funds of LGUs and national agencies may be a source of funding for the implementation of this Act." Rep. Act No. 10354 (RH Law), § 25.

[10] An Act to Regulate the Sale, Dispensation, and/or Distribution of Contraceptive Drugs and Devices (1966).

[11] "The instant Petition does not question contraception and contraceptives per se. As provided under Republic Act No. 5921 and Republic Act No. 4729, the sale and distribution of contraceptives are prohibited unless dispensed by a prescription duly licensed by a physician. What the Petitioners find deplorable and repugnant under the RH Law is the role that the State and its agencies - the entire bureaucracy, from the cabinet secretaries down to the barangay officials in the remotest areas of the country - is made to play in the implementation of the contraception program to the fullest extent possible using taxpayers' money. The State then will be the funder and provider of all forms of family planning methods and the implementer of the program by ensuring the widespread dissemination of, and universal access to, a full range of family planning methods, devices and supplies." Imbong v. Ochoa [hereinafter "*Imbong*"], G.R. No. 204819, 721 SCRA 146, 273 Apr. 8, 2014. (Citation omitted.)

[12] The Court in fact makes reference to Rep. Act No. 4279 11 times. For example, the Court said: "The legislative intent in the enactment of the RH Law in this regard is to leave intact the provisions of R.A. No. 4729. There is no intention at all to do away with it. It is still a good law and its requirements are still in to be complied with. Thus, the Court agrees with the observation of respondent Lagman that the effectivity of the RH Law will not lead to the unmitigated proliferation of contraceptives since the sale, distribution and dispensation of contraceptive drugs and devices will still require the prescription of a licensed physician. With R.A. No. 4729 in place, there exists adequate safeguards to ensure the public that only contraceptives that are safe are made available to the public." *Id.* at 315-6.

should also be legal in the public sphere; what could be bought with private funds could also be bought with public funds.[13]

If a person bought contraceptives at any drugstore, that buyer is not in danger of having committed an abortion and the seller is not considered as having traded in abortifacients—no one is accused of having violated anybody's "right to life." This is still true today. Nothing ought to change that analysis just because it happened to be the government that bought the contraceptives and gave it away for free to economically-challenged individuals or couples. In other words, the source of the funding for contraceptives ought to have no bearing on the legality of contraceptives.

The strategy here was to make the petitioners pay for the way they framed the issue: legality of the subsidy as opposed to legality of access. In other words, unless petitioners questioned the legality of contraception, whatever argument they make about "right to life" should be applicable in both the public and private spheres. With such framing of the issue, the government hoped that the debate would be focused less on "right to life" questions, and more on the legality of state subsidy for contraceptives.

To be sure, social welfare in the area of reproductive health has firm constitutional anchor:

> The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health, and other social services available to all the people at affordable cost. There shall be priority for the needs of the under-privileged, sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.[14]

The power of Congress to promote reproductive health is therefore not simply grounded on its plenary powers. It exists by specific

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[13] "The RH Law, at its core, is a government subsidy designed to make what used to be privately accessible reproductive health devices publicly available. Thus, in the same way that the power of Congress to subsidize access to education, public utilities and food cannot lightly be questioned on constitutional grounds, so also should the power of Congress to subsidize access to reproductive health devices and services be impervious to similar constitutional attacks." Office of the Solicitor General (OSG) Consolidated Comment on Imbong v. Ochoa, May 9, 2013.

"This notwithstanding, it bears mentioning that the petitioners, particularly ALFI, do not question contraception and contraceptives *per se*. In fact, ALFI prays that the status quo - under R.A. No. 5921 and R.A. No. 4729, the sale and distribution of contraceptives are not prohibited when they are dispensed by a prescription of a duly licensed by a physician - be maintained." *Imbong*, 721 SCRA 146 at 315-6.

[14] CONST. art. XIII, § 11.

constitutional command. In the language of doctrine, there is a *textually demonstrable constitutional commitment*[15] to Congress of the power to promote the health of women and the poor through a social welfare system. This is not to say that any act of Congress related to the matter is immune from judicial inquiry, or is a political question. Instead, the goal was to inform the court that, given the clear constitutional grounding of the power of Congress, the Court's power to check must necessarily be weak in this area.

III. THE IRRELEVANCE OF THE QUESTION "WHEN LIFE BEGINS"

Oddly enough, the Court did not respond to this core argument. Instead, the *ponente*, Justice Jose Mendoza, attempted to go straight to the question "when life begins," a matter that should not even have been an issue considering no constitutional question was raised in the first place over the sale of contraceptives in regular drugstores. Furthermore, the certification of product registration of the various contraceptives available in the market was never at issue notwithstanding the status quo ante order (SQAO) issued by the Court on the implementation of the law.[16] This meant that the Court saw nothing problematic with the continued distribution and sale of contraceptives in the market.

Not surprisingly, though, the members of the Court could not agree on the question when life begins. As declared by Justice Mendoza:

> Majority of the Members of the Court are of the position that the question of when life begins is a scientific and medical issue that should not be decided, at this stage, without proper hearing and evidence. During the deliberation, however, it was agreed upon that the individual members of the Court could express their own views on this matter.
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> In this regard, the *ponente*, is of the strong view that life begins at fertilization.[17]

Justice Mendoza then continued with his personal views:

> At any rate, it bears pointing out that not a single contraceptive has yet been submitted to the FDA pursuant to the RH Law. It behooves the Court to await its determination which drugs or devices are declared by the FDA as safe, it being the agency tasked

[15] Baker v. Carr, 369 U.S. 217 (1962).
[16] *Imbong*, 721 SCRA 146 at 267.
[17] *Id.* at 293.

> to ensure that food and medicines available to the public are safe for public consumption. Consequently, the Court finds that, at this point, the attack on the RH Law on this ground is premature. Indeed, the various kinds of contraceptives must first be measured up to the constitutional yardstick as expounded herein, to be determined as the case presents itself.
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> At this point, the Court is of the strong view that Congress cannot legislate that hormonal contraceptives and intrauterine devices are safe and non-abortifacient. The first sentence of Section 9 that ordains their inclusion by the National Drug Formulary in the EDL by using the mandatory "shall" is to be construed as operative only after they have been tested, evaluated, and approved by the FDA. The FDA, not Congress, has the expertise to determine whether a particular hormonal contraceptive or intrauterine device is safe and non-abortifacient. The provision of the third sentence concerning the requirements for the inclusion or removal of a particular family planning supply from the EDL supports this construction.[18]

The value of these personal views is questionable, at best. Such personal statements do not even rise to the level of an *obiter*, a statement of principle or rule that is unnecessary to the outcome of the case which, in certain cases, could ripen into a binding rule if subsequently adopted.[19] An *obiter*, while not dispositive of the outcome of a case, is nonetheless agreed upon by a majority of the members of the Court.[20] Justice Mendoza's statements about when life begins remain his personal views.

Even then, these paragraphs have since been picked up by the Alliance for the Family Foundation Philippines, Inc. as the trigger for the second round of litigation related to the law and as strategic foundation of its attempt to de-legitimize access to contraceptives. This process, if left unchecked, will lead to an unnecessary legalization and judicialization of the FDA's certification process for contraceptives.

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[18] *Id* at 318-9. (Emphasis omitted.)

[19] "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." BLACK'S LAW DICTIONARY 1240 (10th ed. 2014).

[20] "An *obiter dictum* is an opinion uttered by the way, not upon the point or question pending, as if turning aside from the main topic of the case to collateral subjects [...] or the *opinion of the court* upon any point or principle which it is not required to decide, or an opinion *of the court* which does not embody its determination and is made without argument or full consideration of the point[.]" *See* People v. Macadaeg, et al., 91 Phil. 410, May 28, 1952. (Emphasis supplied.) *See also* Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 184 n.118 (2011).

Furthermore, far from being a theoretical concern, this process is already underway. The platform for this process is *ALFI v. Garin*.[21] As I shall explain, this movement is anti-science, detrimental to the progress of reproductive health in the Philippines and, if unabated, threatens to bring us back further than prior to R.A. 10354 and even R.A. 4729.

IV. THE ILLIBERAL CONSERVATIVE OPPOSITION

The core of the opposition to the RH Law reflects a clash between the opposing goals of "social justice in a liberal state"[22] and illiberal conservative values.

To the extent that the RH Law aims to provide public subsidy for contraceptives, it liberalizes access to reproductive health—it does not legalize contraceptives which are already legally available, and only makes the effective exercise of rights possible. From a tragic regime of forced pregnancy occasioned by poverty, the law aims to move towards a regime of pregnancy by choice. This is akin to state subsidy for public education through the Department of Education or universal health care as envisioned by government institutions such as PhilHealth.

The social welfare mechanism envisioned by the RH Law is also liberal insofar as conservative individuals and families retain the option to reject the government subsidy being offered. From a constitutional perspective, this ought to be seen as both compassionate, non-invasive, and respectful of individual rights. It strikes a balance between the need to address poverty and its debilitating effects on persons and the society, on one hand, and the autonomy of the citizen, on the other. This is the gold standard for a Rawlsian just arrangement.[23]

On the other side of the spectrum is illiberal conservatism. One can

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[21] ALFI v. Garin [hereinafter "*ALFI*"], G.R. No. 217872, Aug. 24, 2016. This refers to the copy published by the Court on its website.

[22] BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[23] Rawls formulated his two principles of justice in the following manner:

> FIRST PRINCIPLE
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
> SECOND PRINCIPLE
> Social and economic inequalities are to be arranged so that they are both:
> (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity. JOHN RAWLS, A THEORY OF JUSTICE § 46 (1971).

define liberalism as inward-looking and private when the goal is to ensure simply the freedom to do as one wishes without government intervention. Illiberalism, by this measure, is the desire to use public power to impose one's views. Illiberal conservatism is therefore the imposition of conservative values on others, especially the politically weak.

For the longest time, "state neutrality" on the question of public funding for contraceptives effectively meant that reproductive health rights were acknowledged in the abstract but unimplemented in practice, to the detriment of women, poor families, and society in general.[24] It was also a political excuse for administrations fearful of the Catholic Church. This situation was naturally acceptable to conservatives, as poverty translates to an economic bar to access to contraceptives the result of which is a lack of choice. In practice, this is an illiberal partnership between the State and conservatives.

This changed with the RH Law, a popular and populist law. At the political level, the predictable effect of the statute was to convert illiberal conservatives into opponents of government. This new relationship required a different strategy to get to the same previous result of barring choice or access denial. From a strategy of partnership with government, conservatives have now shifted to creating legal roadblocks to choice and access.

The standard basic argument against contraception is grounded on a constitutional policy[25] and an opinion about the "life of the unborn."[26] The point repeatedly raised by conservatives is that the Constitution itself protects "the life of the unborn from conception"[27] and that the RH Law, at least impliedly, equates conception with fertilization. This view is expressed in Justice Mendoza's personal opinion in *Imbong*.[28] The other part of the

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[24] *Imposing Misery: The Impact of Manila's Contraception Ban on Women and Families*, CENTER FOR REPRODUCTIVE RIGHTS, *available at* https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Imposing%20Misery%20Updated.pdf (last visited April 22, 2017).

[25] "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." CONST. art. II, § 12.

[26] *See, generally*, Florin Hilbay, *Constitutional Law Issues*, *in* PRIMER ON LEGAL ISSUES IN REPRODUCTIVE HEALTH 1-6 (2011), *available at* https://philippinenewsonline.files.wordpress.com/2012/07/rh-primer-online.pdf. *See, e.g. ALFI Rollo*, at 116.

[27] CONST. art. II, § 12.

[28] "Contrary to the assertions made by the petitioners, the Court finds that the RH Law, consistent with the Constitution, *recognizes that the fertilized ovum already has life and that the State has a bounden duty to protect it.* The conclusion becomes clear because the RH Law, *first*,

argument is that contraceptives have a second mechanism of action, one that prevents the implantation of the fertilized ovum. The conclusion is then made that such mechanism of action makes contraceptives abortifacient, as they destroy "life" already recognized by the Constitution.

One can thus immediately see that, far from being just a legal opposition to state funding for contraceptives which, by itself, is already an aggressive conservative stance, such argument is broadly insidious considering that it generally attacks all contraceptives on the ground that they are abortifacients. Of course, whatever worth there may be to this argument flies in the face of two facts. *First*, when the Constitution was drafted in 1986 and ratified in 1987, R.A. 4729 was already in the books and has since remained good law. Contraceptives are legal. The constitutional debate was focused on the kind of abortion that was allowed by the United States Supreme Court in *Roe v. Wade*,[29] not access to contraception.[30] One will search in vain the records of the Constitutional Commission for an express intention to bar contraceptives or to repeal R.A. 4729. The Constitution has since survived 30 years and no one has ever raised any questions about the constitutionality of access to contraceptives.

Second, the RH Law was meant to be a progressive tool to liberalize access to contraceptives through state subsidy. The text, history, and

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prohibits any drug or device that induces abortion (first kind), which, as discussed exhaustively above, refers to that which induces the killing or the destruction of the fertilized ovum, and, *second,* prohibits any drug or device the fertilized ovum to reach and be implanted in the mother's womb (third kind).

By expressly declaring that any drug or device that prevents the fertilized ovum to reach and be implanted in the mother's womb is an abortifacient (third kind), the RH Law does not intend to mean at all that life only begins only at implantation, as Hon. Lagman suggests. It also does not declare either that protection will only be given upon implantation, as the petitioners likewise suggest. *Rather, it recognizes that: one, there is a need to protect the fertilized ovum which already has life, and two, the fertilized ovum must be protected the moment it becomes existent - all the way until it reaches and implants in the mother's womb.* After all, if life is only recognized and afforded protection from the moment the fertilized ovum implants - there is nothing to prevent any drug or device from killing or destroying the fertilized ovum prior to implantation.

From the foregoing, the Court finds that inasmuch as it affords protection to the fertilized ovum, the RH Law does not sanction abortion. To repeat, it is the Court's position that life begins at fertilization, not at implantation. When a fertilized ovum is implanted in the uterine wall, its viability is sustained but that instance of implantation is not the point of beginning of life. It started earlier. And as defined by the RH Law, *any drug or device that induces abortion, that is, which kills or destroys the fertilized ovum or prevents the fertilized ovum to reach and be implanted in the mother's womb, is an abortifacient.*" *Imbong,* 712 SCRA at 307-8. (Emphases in the original.)

[29] 410 U.S. 113 (1973).

[30] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 85 (2003 ed.).

structure of the law all point to a progressive move towards eliminating barriers to access to reproductive health devices, products, and information. It was seen as a stinging defeat for conservatives. It would therefore take an undue stretch of legal interpretation and unwarranted judicial legislation to require an *en masse* re-certification of all contraceptives coupled with the possible danger that even those that have long been available in the market may now be pulled out. Amazingly, this seems to be where the Supreme Court is heading given its recent pronouncements.

V. LEGALIZATION OF THE FDA CERTIFICATION PROCESS

Consistent with Justice Mendoza's personal pronouncement that no contraceptives have as yet been certified by the FDA pursuant to the RH Law, the agency proceeded with a re-certification process. As stated in the factual narration in *ALFI v. Garin:*

> Controversy began in September 2014, when petitioner Rosie B. Luistro chanced upon the FDA's Notice inviting Marketing Authorization Holders (MAH) of fifty (50) contraceptive drugs to apply for re- evaluation/re-certification of their contraceptive products and directed "all concerned to give their written comments to, said applications on or before October 8, 2014."
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> Petitioner Alliance for the Family Foundation, Inc. (ALFI) believed that the contraceptives enumerated in the Notice fell within the definition of "abortifacient" under Section 4(a) of the RH Law because of their "secondary mechanism of action which induces abortion or destruction of the fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb." For said reason, ALFI, through its president, Maria Concepcion S: Noche (Noche), filed its preliminary opposition, dated October 8, 2014, to all 50 applications with the FDA. The same opposition also questioned some twenty-seven (27) other contraceptive drugs and devices that had existing FDA registrations that were not subjects of any application for re-evaluation/re-certification.
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> On November 24, 2014, ALFI filed its main opposition to all seventy-seven (77) contraceptive drugs.[31]

As is apparent from the global opposition of ALFI "to all seventy-

[31] *ALFI*, at 4. (Citations omitted.)

seven (77) contraceptive drugs," the strategic goal of the organization is two-fold—to place a monkey wrench on the certification process (delay) and set the stage for an appeal (further delay). This is a rather efficient and effective form of making the bureaucratic process grind to a halt, if given judicial sanction.

The essence of the global opposition is that all contraceptives have a "secondary mechanism of action which induces abortion or destruction of the fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb"[32] and is therefore noncompliant with the RH Law. The conservatives have won a major victory in *ALFI*, not by winning the argument, but by obtaining judicial acknowledgment that this sort of claim can be made before a scientific government organization such as the FDA.

In *ALFI*, the court made several important procedural findings.

First, that the petitioners have standing to sue:

> Considering that the Court in *Imbong* already declared that the issues of contraception and reproductive health in relation to the right to life of the unborn child were indeed of transcendental importance, and considering also that the petitioners averred that the respondents unjustly caused the allocation of public funds for the purchase of alleged abortifacients which would deprive the unborn of its the right to life, the Court finds that the petitioners have locus standi to file these petitions.[33]

Second, that the FDA violated the due process rights of petitioners:

> After an assessment of the undisputed facts, the Court finds that the FDA certified, procured and administered such contraceptive drugs and devices, *without the observance of the basic tenets of due process, without notice and without public hearing*, despite the constant opposition from the petitioners. From the records, it appears that other than the notice inviting stakeholders to apply for certification/re-certification of their reproductive health products, there was no showing that the respondents notified the oppositors and conducted a hearing on the applications and oppositions submitted.
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> Rather than provide concrete evidence to meet the petitioners' opposition, the respondents simply relied on their

[32] *Id.*

[33] *Id.* at 12.

> challenge questioning the propriety of the subject petition on technical and procedural grounds. The Court notes that even the letters submitted by the petitioners to the FDA and the DOH seeking information on the actions taken by the agencies regarding their opposition were left unanswered as if they did not exist at all. The mere fact that the RH Law was declared as not unconstitutional does not permit the respondents to run roughshod over the constitutional rights, substantive and procedural, of the petitioners.
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> Indeed, although the law tasks the FDA as the primary agency to determine whether a contraceptive drug or certain device has no abortifacient effects, its findings and conclusion should be allowed to be questioned and those who oppose the same must be given a genuine opportunity to be heard in their stance. After all, under Section 4(k) of R.A. No. 3720, as amended by R.A. No. 9711, the FDA is mandated to order the ban, recall and/or withdrawal of any health product found to have caused death, serious illness or serious injury to a consumer or patient, or found to be imminently injurious, unsafe, dangerous, or grossly deceptive, after due process.
>
> Due to the failure of the respondents to observe and comply with the basic requirements of due process, the Court is of the view that the certifications/re-certifications and the distribution of the questioned contraceptive drugs by the respondents should be struck down as *violative of the constitutional right to due process*.[34]

Though the language is apparently innocuous, the Court's decision on these issues is deeply problematic and raises several doctrinal and pragmatic concerns. The Decision misconstrues the purpose of the rules on standing and the nature of the administrative process conducted by the FDA.

A. The Scientific Nature of the Certification Process

The FDA is a scientific institution tasked with, among others, ensuring the safety of food and drugs in the country.[35] As cited by the Court, it "is mandated to order the ban, recall and/or withdrawal of any health product found to have caused death, serious illness or serious injury to a consumer or patient, or found to be imminently injurious, unsafe,

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[34] *Id.* at 15-6. (Emphases in the original, citations omitted.)

[35] Rep. Act No. 3720, Food, Drug, and Cosmetic Act, *amended by* Rep. Act No. 9711, Food and Drug Administration (FDA) Act of 2009.

dangerous, or grossly deceptive, after due process."[36]

This coercive tool of the FDA is only possible and justified because of its scientific competence to determine facts, which form the basis of a correlative determination of the safety and efficacy of a product. This technical scientific competence to determine facts is the foundation of its authority and acceptability. When the FDA determines a product unsafe or determines a fact, the only counter-check to that determination is falsification, itself a scientific process. Such a fact cannot be counter-checked by a conservative organization's opinion on a constitutional question. There is simply no parity between an empirical scientific fact and a normative political opinion. Ideological arguments presented as a constitutional claim are resolved somewhere else, in courts of law and not in laboratories.

What the Court therefore failed to appreciate in *ALFI* is the fundamental difference between courts "finding" facts and scientific institutions establishing facts. The technical determination of facts performed by scientific institutions such as the FDA is entirely different from the kind of fact-finding engaged in by judges and quasi-judicial bodies because of the different processes and assumptions of both disciplines. Judges determine facts through the lens of the rules of court; scientists, through the scientific process. The former determines facts for purposes of making a legal conclusion, the latter for purposes of making a scientific finding.

In other words, there is a difference between a social fact (such as a factual finding of "unjust dismissal") and a scientific fact (for example, that a drug is "unsafe"). There is also a difference between how judges determine objective facts (such as the fact of killing) and how scientists determine scientific facts (such as the existence of a black hole). A judge making a finding of fact relies on assumptions based on the rules of evidence, which are heavily reliant on experience distilled through the application of common sense. A scientist making a finding of fact relies on assumptions about the nature and processes of his or her discipline, which requires a type of rigor that may even be counter-intuitive and goes beyond common sense understandings.

It is also important to consider the difference between legal institutions (courts of law and quasi-judicial institutions like the National Labor Relations Commission) from non-legal institutions (such as the FDA) with some or incidental legal functions. When regular courts determine

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[36] *ALFI*, at 15-6.

questions of law, they speak with authority about legal interpretation. The situation is different when it comes to the specific determination by the FDA of the safety of a drug. This is a scientific, and not legal, issue even if such finding might have some legal implications. Whatever debate about the legal implications of findings of facts of such technical institutions will have to be resolved instead by courts of law, which are competent enough to deal with the intersection between social claims and scientific facts.

Scientific institutions such as the FDA are not equipped, and understandably so, to handle ideological objections to their determination of whether products are safe and effective. More importantly, with specific reference to contraceptives, scientists cannot interpret the Constitution's policy about the unborn. All they can do is attest to certain facts and processes for purposes of concluding a product is safe and effective—they cannot interpret those facts and purposes for determining constitutional compliance with a policy or principle.

B. Certification and Ideological Opposition

The scientific nature of the certification process by the FDA is a good occasion to place in context the Court's grant of standing to the petitioners in *ALFI*. Here, the Court recognized the right of ALFI to intervene in the re-certification process for contraceptives, using the famous case of *Ang Tibay v. CIR*[37] as the governing standard for due process in administrative proceedings. This is a grave misapplication of *Ang Tibay*.

The *Ang Tibay* rules[38] apply to administrative agencies that function as special courts for niche concerns such as, in that case, labor disputes. The National Labor Relations Commission (NLRC) performs core quasi-judicial, as opposed to incidental quasi-judicial, functions. The NLRC is no different from other special agencies with core quasi-judicial functions such as the Court of Tax Appeals.

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[37] G.R. No. L-46496, 69 Phil. 635, Feb. 27, 1940.

[38] The fundamental and essential requirements of due process in trials and investigations of an administrative character are as follows: (1) The right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof. (2) The tribunal must consider the evidence presented. (3) There be some evidence to support a finding or conclusion. (4) The evidence must be substantial. (5) The decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected. (6) The tribunal must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision. (7) The decision should be rendered in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered. *Id.* at 642.

The FDA, in contrast, is institutionally distinct from agencies such as the NLRC or the CTA because it is not a legal institution in either design or function. The structure of the NLRC and the CTA means that these institutions heavily invest in lawyers with specialization in labor or in tax cases. These bureaucracies are legal bureaucracies. This can hardly be said of the FDA, which remains a scientific institution.

In any case, the *Ang Tibay* rules presuppose opponents who are adversarial in the traditional sense of being real parties in interest[39] in litigation. In *Ang Tibay,* for instance, the conflict was between a labor union and the employer. As with any other case involving rights that are legally demandable and enforceable, courts and quasi-judicial agencies are required to preliminary determine the interest of a party to a proceeding.

Contrast this with the nature of the opposition by an organization such as ALFI, whose name, by itself, speaks a lot about why they insist on intervening. If one needs some more convincing, one might be interested in the argument they used as fundamental basis for their opposition to the re-certification—violation of the right of the unborn. The nature of the opposition is not scientific nor commercial—it is ideological.

Going back to the mandate of the FDA, the focus on safety and efficacy means that the regulatory scheme is to ensure that products that go through the FDA certification process are what they purport to be so that the public is protected against unsafe and ineffective products. One might therefore ask: what value would the recognition of ALFI's standing add to the scientific process of certification (or re-certification) being performed by the FDA? None.

This is why whatever quasi-judicial function the FDA performs is best done under a rivalrous or adversarial system, which enhances the regulatory function of the FDA and protects property rights. In legal parlance, the relevant comparison is not *Ang Tibay,* but *Kilosbayan v. Morato,*[40] where the Court distinguished between standing of a complainant to raise constitutional questions and the requirement of being a real party in interest.[41] Given that the FDA has no jurisdiction to settle constitutional

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[39] "A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest." RULES OF COURT. Rule 3, § 2.

[40] G.R. No. 118910, 246 SCRA 540, July 17, 1995.

[41] *Id.* at 562-5.

questions, it is only appropriate that only real parties in interest be allowed to participate in its proceedings. Adopting a lower standard for participating in the FDA's certification process also bears little relevance with its statutory objectives. In the case of the certification process for drugs and devices, the FDA's regulatory concerns are two-fold: on one hand, the public aspect of ensuring the drugs are safe and effective and, on the other, the private aspect of avoiding conflicts with existing property rights. These twin functions are within the technical expertise of the FDA, and intimately related to its regulatory function.

The decision in *ALFI,* recognizing the standing of a conservative organization for purposes of contesting the certification of contraceptives on ideological/constitutional grounds unnecessarily creates a third category of function for the FDA—the enforcer of the so-called "rights of the unborn." This is problematic from technical, policy, and legal standpoints.

It is important to keep in mind that *Imbong v. Ochoa* refused to decide the question when life begins, the necessary consequence of which is that there is currently no constitutional standard for determining when life begins and implementing whatever rights the unborn may have. One cannot expect such standard to emanate from the FDA.

In addition, given the ideological character of ALFI's opposition, the FDA is now placed at the mercy of lawyers who could insert layers upon layers of legalese on every administrative action seen as detrimental to the conservative cause. Such institution is ill-prepared for this eventuality. One can safely assume that every decision of the FDA, such as in *ALFI,* not to the liking of the organization will be appealed to the courts. The policy effect of this decision is to prevent the FDA from performing its core function of determining the safety and efficacy of products that are submitted for certification.

The ultimate practical effect of the Court's decision is to endanger the certification process for all contraceptives, old and new, the result of which will be that contraceptives cannot only not be bought by government for purposes of complying with and enforcing the objectives of the RH Law, but also that they will have to be withdrawn from the private market. This is an impending, realistic scenario given the Supreme Court's temporary restraining order on the re-certification process being conducted by the FDA.[42]

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[42] The Office of the Solicitor General filed a motion to lift the said temporary restraining order. It was subsequently denied in an Order dated Aug. 24, 2016. "[T]he Court resolves to [...] ISSUE, effective immediately and continuing until further orders from this

If this happens, conservatives will be able to achieve more than what they never even tried to secure in *Imbong*—a *de facto* total ban on contraceptives.

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Court a TEMPORARY RESTRAINING ORDER enjoining the respondents, their representatives, agents or other persons acting on their behalf from: [1] granting any and all pending applications for registration and/or recertification for reproductive products and supplies including contraceptive drugs and devices; and [2] procuring, selling, distributing, dispensing or administering, advertising and promoting the hormonal contraceptive 'Implanon' and 'Implanon NXT.'" *ALFI*, Resolution of June 17, 2015.