G.R. No. 184535 – SR. PILAR VERSOZA, *Petitioner* v. PEOPLE OF THE PHILIPPINES, MICHELINA S. AGUIRRE-OLONDREZ, PEDRO AGUIRRE, AND DR. MARISSA PASCUAL, *Respondents*.

Promulgated:

September 3, 2019

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SEPARATE OPINION

JARDELEZA, *J.*:

I CONCUR with the majority that the petition should be dismissed.

I submit this Opinion, however, to respond to the following views offered by Associate Justice Marvic Leonen in his Separate Opinion: (1) a person with intellectual disability[1] has a fundamental right to procreation and parenthood; (2) sterilization[2] performed on the individual, at the instance of his/her parents or guardian without the individual's express consent, violates this right; and (3) sterilization under such circumstances is punishable as a crime of cruelty or child abuse under Section 10(a) of Republic Act No. 7610 (RA 7610).[3]

I also submit this Opinion to clarify the concept of fundamental rights under constitutional law.

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[1] The United States Supreme Court first used the term "intellectual disability" in lieu of "mental retardation" in *Hall v. Florida*, 572 U.S. ___ (2014), concluding that both terms refer to the same identical phenomenon. Earlier, in *Atkins v. Virginia*, 536 U.S. 304 (2002), using the term "mental retardation," the Court held that the constitutional guarantee against cruel and unusual punishment renders unconstitutional the execution of a mentally retarded person. In *Hall*, the Court voided a Florida law that defines "intellectual disability" to require an intelligence quotient (IQ) test score of 70 or less, such that if a prisoner is deemed to have an IQ below 70, all further exploration of intellectual disability is foreclosed. The Court noted that the change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts, and that the manual is often referred to by its initials "DSM," followed by its edition number, *e.g.*, "DSM-5." The Court also noted that a federal statute (Public Law 111-256), otherwise known as Rosa's Law, replaced the term "mental retardation" with "intellectual disability." See *People v. Quintos*, G.R. No. 199402, November 12, 2014, 740 SCRA 179, 201-202 where *J.* Leonen referred to, and defined, the term "intellectually disabled," citing the earlier case of *People v. Butiong*, G.R. No. 168932, October 19, 2011, 659 SCRA 557, 571-572.

[2] Vasectomy is the medical term to describe the reversible procedure involved in this case to prevent procreation in men, and salpingectomy (tubal ligation) for women. I use the generic term "sterilization" as the underlying medical and constitutional issues involved in the petition apply to both genders.

[3] Special Protection of Children Against Abuse, Exploitation and Discrimination Act. See also *J.* Leonen Separate Opinion, pp. 18, 22.

I

The following facts[4] of this case are not disputed:

Larry was a charge of the Heart of Mary Villa. In June 1980, he was formally taken in as a ward by respondents Pedro Aguirre and the latter's spouse Lourdes S. Aguirre (Aguirres) by virtue of an Affidavit of Consent to Legal Guardianship executed by Sister Mary Concepta Bellosillo, Superior of the Heart of Mary Villa. Several years later, or on June 19, 1980, the Regional Trial Court (RTC), Balanga, Bataan, granted the Aguirres joint guardianship of Larry's person and property. In 1989, when Larry was eleven years old, and given his "somewhat slow mental development,"[5] he was taken to specialists for neurological and psychological evaluations which revealed that he had mild mental deficiency. In 2001, when Larry was 21 years old, the Aguirres approached respondent Dr. Juvido Agatep (Dr. Agatep), a urologist/surgeon, concerning their intention to have Larry vasectomized. Dr. Agatep, however, required that Larry first be evaluated by a psychiatrist to determine whether Larry is able, given his mental deficiency, to give consent to the requested medical procedure. In a psychiatric report dated January 21, 2002, respondent psychiatrist Dr. Marissa Pascual (Dr. Pascual) confirmed Larry's mental deficiency, finding that he is "very much dependent on his family for his needs, adaptive functioning, direction and in making major life decisions."[6] According to Dr. Pascual, Larry, "[a]t his capacity, x x x may never understand the nature, the foreseeable risks and benefits, and consequences of the procedure (vasectomy) that his family wants for his protection. Thus, the responsibility of decision making may be given to his parent or guardian."[7] On January 31, 2002, and with respondent Pedro's written consent, respondent Dr. Agatep performed bilateral vasectomy on Larry.[8]

In two complaint-affidavits dated September 9, 2002, Gloria Pilar S. Aguirre and Sister Pilar Versoza (Versoza) charged respondents Pedro, his daughter Michelina Aguirre-Olondriz, Dr. Agatep, and Dr. Pascual of falsification and mutilation under Articles 172 and 262, respectively, of the Revised Penal Code (RPC) and/or Child Abuse under Sections 3 and 10 of RA 7610. The complaints for falsification and mutilation were dismissed by the Office of the City Prosecutor (OCP) for insufficiency of evidence.[9]

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[4] *Rollo*, pp. 12-13. See also *Aguirre v. Secretary, Department of Justice*, G.R. No. 170723, March 3, 2008, 547 SCRA 431, a case which arose from the same set of facts, involving the same parties, albeit concerning only the criminal complaints for mutilation and falsification.

[5] *Rollo*, p. 12.

[6] *Id.* at 126.

[7] *Id.*

[8] *Id.*

[9] This finding was affirmed by the Department of Justice (DOJ) in its twin Resolutions dated February 11, 2004 and November 12, 2004. It was ultimately sustained by both the Court of Appeals (CA) and this Court. In holding that the CA correctly found no grave abuse of discretion on the part of the DOJ, this Court held, among others, that a vasectomy procedure does not deprive a man, whether totally or partially, of some essential organ of reproduction as to make its perpetrator liable for the crime of mutilation under the RPC. (See *Rollo*, pp. 25-26. See also *Aguirre v. Secretary, Department of Justice*, G.R. No. 170723, March 3, 2008, 547 SCRA 431.)

It appears, however, that the OCP reconsidered its earlier resolution and ordered the filing of criminal Informations against respondents with the RTC *for violation of RA 7610*. Upon respondents' motions, the RTC, in an Order[10] dated November 8, 2005, nevertheless dismissed the case for lack of probable cause. Petitioner thus elevated the matter to the Court of Appeals (CA). In its Decision[11] dated May 16, 2008, the CA held that the bilateral vasectomy performed on Larry is neither child abuse nor cruelty punishable under RA 7610. It also held that then appellant (now petitioner) Versoza is neither Larry's parent, adopter, or legal guardian, and therefore had no legal personality to institute the complaint against respondents. Aggrieved, petitioner filed this action before the Court.

In the meantime, respondents Michelina S. Aguirre-Olondriz and Pedro B. Aguirre, in a motion to dismiss, informed this Court that petitioner died on September 9, 2012, three days after suffering from a brain aneurysm.[12] This was not denied by petitioner's counsel, who also maintained that, given the "transcendent importance" of the issue at hand, the case survives petitioner Versoza's death.[13]

II

In my view, RA 7610 does not criminalize vasectomy. There is no showing of any clear legislative intent to make sterilization of intellectually-disabled individuals, conducted with the consent of their parents or legally-constituted guardians, a criminal act.[14] In fact, and contrary to what Justice Leonen suggests,[15] legislative deliberations would appear to define acts of cruelty as "unreasonable infliction of physical injury or inhuman treatment on the physical being of a child"[16] citing physical maltreatment and beatings, as examples.[17] Basic rules of statutory construction would therefore instruct against such reading, especially when, as pointed out by the Office of the Solicitor General, such procedure, a "recognized" and "medically accepted"[18] method of contraception, was conducted with the consent of Larry's legally-appointed guardian, after much deliberation and in consultation with a psychiatrist.[19]

Existing laws also militate against Justice Leonen's proposed reading of RA 7610. The Congress, through several legislative enactments, has identified *other* equally important interests, including those of parents and

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[10] *Rollo*, pp. 48-55.
[11] *Id.* at 24-39.
[12] *Id.* at 210.
[13] *Id.* at 215-216.
[14] I concede that I may have a different view on the matter had the sterilization procedure been conducted on Larry after RA 11036 had been passed and the procedure provided therein not strictly followed. This, however, is not the case here.
[15] *J.* Leonen Separate Opinion, pp. 11, 18.
[16] III RECORD, SENATE, 1189 (March 19, 1991).
[17] IV RECORD, SENATE, 192 (April 29, 1991).
[18] *Rollo*, p. 186.
[19] *Id.* at 188.

the State, which arguably have a direct bearing on the asserted liberty interest to procreation and parenthood. These should be properly taken into account.

A

Republic Act No. 10354 (RA 10354), otherwise known as the "Responsible Parenthood and Reproductive Health Act of 2012," and which the Separate Opinion makes fleeting reference to,[20] provides for, and lays down, a "national policy" on "responsible parenthood and reproductive health." Examination of the provisions of RA 10354 in its entirety shows how the Congress struck a balance between the demands of responsible parenthood and reproductive rights, resting on the fulcrum of free, informed consent.

RA 10354 declares as national policy the recognition of human rights and the right to non-discrimination. It declares that the right to health includes reproductive health which, in turn, refers to the rights of individuals to decide freely and responsibly whether or not to have children.[21] It recognizes a *mental health aspect* to reproductive health[22] and, in fact, defines the latter to refer to a state of, among others, *mental* well-being as to imply that people have the capability to reproduce and the freedom to decide if, when, and how often to do so.[23] RA 10354 also defines responsible parenthood as follows:

> Sec. 4. *Definition of Terms.* – For the purpose of this Act, the following terms shall be defined as follows:
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> x x x x
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> (v) *Responsible parenthood* refers to the **will and ability** of a parent to respond to the needs and aspirations of the family and children. It is likewise a **shared responsibility between parents** to determine and achieve the desired number of children, spacing and timing of their children according to their own family life aspirations, taking into account **psychological preparedness**, health status,

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[20] *J.* Leonen Separate Opinion, p. 20.

[21] Republic Act No. 10354, Sec. 4(s) states:

> *Reproductive health rights* refers to the rights of individuals and couples, **to decide freely and responsibly whether or not to have children;** the number, spacing and timing of their children; to make other decisions concerning reproduction, free of discrimination, coercion and violence; to have the information and means to do so; and to attain the highest standard of sexual health and reproductive health: *Provided, however*, That reproductive health rights do not include abortion, and access to abortifacients. (Emphasis supplied.)

[22] Republic Act No. 10354, Sec. 4(q)(12).

[23] Republic Act No. 10354, Sec. 4(p) states:

> *Reproductive Health (RH)* refers to the state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. This implies that people are able to have a responsible, safe, consensual and satisfying sex life, that they have the capability to reproduce and the freedom to decide if, when, and how often to do so. This further implies that women and men attain equal relationships in matters related to sexual relations and reproduction.

> sociocultural and economic concerns consistent with their religious convictions. (Emphasis supplied.)

It also provides that all individuals shall have access to family planning, which is the full range of safe, affordable, effective, non-abortifacient modern methods of planning pregnancy.[24]

RA 10354 recognizes the parents' shared responsibility to decide when to have children, their number and spacing, and to make the decision in light of their family life aspirations, health, and economic circumstances. Arguably, this same responsibility applies to parents of the intellectually-disabled child, over whom they owe the duty to determine, using the same guidelines, whether to beget children. This responsibility springs from the fundamental right and interest of parents over children under their care.

In the United States (US), this interest of parents in the "care, custody, and control of their children" has been held by the US Supreme Court in *Troxel v. Granville*[25] as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[26] Similarly, this Court, in *Imbong v. Ochoa, Jr.*,[27] upheld the primacy of parental authority over their children when it struck down a provision in RA 10354 which does away with the consent of parents for the conduct of a family planning procedure on their child in cases where said child is already a parent or has had a miscarriage:

> It is precisely in such situations when a minor parent needs the comfort, care, advice, and guidance of her own parents. **The State cannot replace her natural mother and father when it comes to providing her needs and comfort**. To say that their consent is no longer relevant is clearly anti-family. It does not promote unity in the family. It is an affront to the constitutional mandate to protect and strengthen the family as an inviolable social institution.
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> More alarmingly, it disregards and disobeys the constitutional mandate that "the natural and primary right and duty of parents in the rearing of the youth for civic

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[24] Republic Act No. 10354, Sec. 4(e) states:

> *Family planning* refers to a program which enables couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so, and to have access to a full range of safe, affordable, effective, non-abortifacient modern natural and artificial methods of planning pregnancy.

[25] 530 U.S. 57 (2000).

[26] *Id.* at 65. *Troxel* involved a petition challenging a Washington statute which allows "any person" (in this case, the children's paternal grandparents) to petition for visitation rights "at any time" and authorizes the state superior courts to allow such visitation whenever, in its view, the same may serve the child's best interests, even in disregard of a fit custodial parent's decision. There, the US Court found that there was an absence of "special factors that might justify the State's interference with [the parent's] fundamental right to make decisions concerning the rearing of her two daughters" and declared that fit parents are presumed to act in the best interests of their children. It held:

> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. x x x (*Id.* at 68-69.)

[27] G.R. No. 204819, April 8, 2014, 721 SCRA 146.

> efficiency and the development of moral character shall receive the support of the Government." In this regard, Commissioner Bernas wrote:
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> > The 1987 provision has added the adjective "primary" to modify the right of parents. It imports the assertion that the right of parents is superior to that of the State.[28] (Emphasis supplied; citations omitted.)

Vasectomy is a legitimate modern family planning method under RA 10354.[29] As such, and consistent with *Imbong* where the Court recognized as constitutionally permissible family planning methods which work prior to fertilization, parents/legal guardians of an intellectually-disabled child can arguably claim a constitutional right and duty to decide whether vasectomy or tubal ligation would be in the latter's best interests. Whether the decision *is* in the best interest of said child in a particular case would, of course, be a triable question of fact to be resolved after the reception of evidence on the condition of the child and the situation of the parent/legal guardian.

Here, Justice Leonen cannot cite from the record sufficient scientific and medical evidence to show that Larry understands the nature and consequences of his sexuality, of his having a child, and of his being a parent. Dr. Pascual's conclusion that Larry may never understand the nature and consequences of vasectomy does not substitute for evidence that he understands the nature and consequences of bearing a child and being a parent. Neither is there evidence introduced below to show that Larry is possessed of the *will and ability* to respond to the "needs and aspirations" of children he may beget, taking into account his (Larry's) "psychological preparedness, health status" and attendant "sociocultural and economic concerns," according to the provisions of RA 10354 on responsible parenthood.

On the contrary, Dr. Pascual, after examining Larry, noted that he "still needs supervision in taking a bath," "cannot prepare his own meal" or run errands alone, and whose human figure "is comparable to a 7-8 year old."[30] Larry also does not appear to have a source of income independent from his family. These, it must be emphasized, were never controverted by petitioner.

Similarly, there is no medical or scientific evidence on record to support either Justice Leonen's claim that Larry's mental age will grow to be

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[28] *Id.* at 352.

[29] In *Imbong*, the Court held:

> Equally apparent, however, is that the Framers of the Constitution did not intend to ban all contraceptives for being unconstitutional. x x x From the discussions above, contraceptives that kill or destroy the fertilized ovum should be deemed an abortive and thus prohibited. Conversely, contraceptives that actually prevent the union of the male sperm and the female ovum, and those that similarly take action prior to fertilization should be deemed non-abortive, and thus, constitutionally permissible. (*Id.* at 299-300. Emphasis and citation omitted.)

[30] *Aguirre v. Secretary, Department of Justice*, G.R. No. 170723, March 3, 2008, 547 SCRA 431, 437.

18 years of age or beyond at some point in the future or its theory of "supported parenting." Given the advancing age and medical problems of Larry's guardians, and their financial standing, it is imperative that there must be some showing that they are (or will still be) possessed with the resources to meet the requirements of "supported parenting" for any of Larry's future children.

Notably, Justice Leonen himself, in his Opinion holding curfew ordinances on minors unconstitutional, has characterized a parent's rights with respect to his/her family as no less "fundamental," "an integral aspect of liberty and privacy," which ought to "receive the support of Government," their interests being "superior" to the State whose decision can only substitute or supplement "when parental authority is established to be absent or grossly deficient."[31]

Here, Larry's guardians claim that they made the decision to sterilize him due to the following considerations: they "are already old and have medical problem and x x x could no longer monitor and take care of him like before,"[32] and "because of Larry's emerging sexuality and inability to take care of himself much less a child."[33] Absent any clear showing that this exercise of parental authority is absent or grossly deficient, it should be considered that respondent Pedro, as Larry's legally-constituted guardian with the obligation to ensure his well-being, has an equally important right to decide matters affecting the latter. Justice Leonen conspicuously fails to cite any basis on the record which would show how respondent Pedro's exercise of parental authority in this particular instance was absent or grossly deficient, much less that it actually operated to Larry's detriment.

With respect, I also take exception to Justice Leonen's insinuation that respondent Pedro "deprive[d] him of all the options [that] his life had to offer,"[34] even expressly characterizing their decision as "an act of selfishness; not one borne out of love."[35] First, and considering that there is simply no evidence on record to support these statements, I find Justice Leonen's conclusions to be unfounded and unfair. Furthermore, parents, probably more than anyone else, are the ones expected to love and care for their child, to do their best to ensure and look after their child's best interests. This is even acknowledged by the law which provides a father's diligence as the default standard of care required in the general performance of obligations.[36] Absent evidence to the contrary, respondent Pedro is

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[31] *J.* Leonen Separate Opinion, *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, G.R. No. 225442, August 8, 2017, 835 SCRA 350, 439-483.

[32] *Rollo*, p. 125.

[33] *Id.* at 143.

[34] *J.* Leonen Separate Opinion, p. 22.

[35] *J.* Leonen Separate Opinion, p. 22.

[36] Articles 1163 and 1173 of the Civil Code provide:

> Art. 1163. Every person obliged to give something is also obliged to take care of it with the **proper diligence of a good father of a family**, unless the law or the stipulation of the parties requires another standard of care.
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> x x x x

presumed to always act in Larry's best interests; he would never have been granted guardianship over Larry otherwise. Respondent Pedro has taken Larry, an orphan, into his house and, from all available indications, brought him up like one of his own. I thus hesitate to be so harsh as to question respondent Pedro's motivations and impute bad faith on his parenting on account of Justice Leonen's disagreement (with the decision to vasectomize) based on a still to be established legal "principle."

B

We should also consider the provisions of the Family Code which prohibits persons under the age of 18 from contracting marriage;[37] and allows the annulment of marriages contracted by parties between the ages of 18 and 21 when parental consent is not secured[38] or when either party was of unsound mind at the time of marriage.[39] These provisions evince a State interest to ensure that parties contracting a marriage know their enormous responsibilities as future parents. The Family Code is replete with provisions making up the bundle of duties and responsibilities imposed upon parents/guardians with respect to their children/wards,[40] including the duty to support, educate and provide for the child's upbringing. Pursuant thereto, should the State issue a marriage license in favor of an intellectually-disabled individual? A case can *arguably* be made that the same State interest (which allows the State to prohibit minors from contracting marriage) applies in cases of intellectually-disabled individuals who may wish to marry and have children. To my mind, an assertion of an unqualified right of an intellectually-disabled person to have children, because it

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Art. 1173. The fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place. When negligence shows bad faith, the provisions of Articles 1171 and 2201, paragraph 2, shall apply.

If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a **good father of a family** shall be required. (Emphasis supplied.)

See also *Troxel v. Granville*, *supra* note 25, which held that fit parents can be presumed to act in the best interests of their child.

[37] Articles 2 and 5 of the Family Code provide:

Art. 2. No marriage shall be valid, unless these essential requisites are present:

(1) Legal capacity of the contracting parties who must be a male and a female; and

(2) Consent freely given in the presence of the solemnizing officer.

x x x x

Art. 5. Any male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38, may contract marriage.

[38] FAMILY CODE, Art. 45. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

x x x x

[39] FAMILY CODE, Art. 45. x x x

x x x x

(2) That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband and wife;

x x x x

[40] See Title IX (Parental Authority) of the Family Code.

implicates State interests, would require the reception of evidence to prove that the individual is willing and able to meet the bundle of duties and responsibilities imposed by the State as a consequence of parenthood.[41]

C

There is also Republic Act No. 11036 (RA 11036), otherwise known as the "Mental Health Act," which was approved only in June of last year. Under this law, the Congress, after consultation with a wide range of public mental health individuals, experts, academics, professionals, governmental and non-government associations,[42] declared as policy that mental health conditions be treated and that persons affected by mental health conditions are able to exercise the full range of human rights.[43] RA 11036 further states as an objective the protection of the rights and freedoms of persons with psychiatric, neurologic, and psychosocial health needs.[44] After defining a mental health condition as follows:

> Sec. 4. x x x
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> x x x x
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> (k) *Mental Health Condition* refers to a neurologic or psychiatric condition characterized by the existence of a recognizable, clinically-significant disturbance in an individual's cognition, emotional regulation, or behavior that reflects a genetic or acquired dysfunction in the neurobiological, psychosocial, or developmental processes underlying mental functioning. The determination of neurologic and psychiatric conditions shall be based on scientifically-accepted medical nomenclature and best available scientific and medical evidence[.][45]

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[41] See also Section 4(v) of RA 10354 which defines responsible parenthood.

[42] See Senate Committee on Health and Demography, Joint with the Committees on Local Government and Finance (Technical Working Group), Session of February 16, 2017, with the following in attendance as guests/resource persons: 1) Ms. Sally Bongalanta, Assistant Director, Institute of Family Life and Children Studies, Philippine Women's University, and Vice President, Alliance of Filipino Families for Mental Health, Inc.; 2) Ms. Maria Jerika Ejercito, Be Healed Foundation; 3) Ms. Alexandra Santos, Be Healed Foundation; 4) Ms. Janice S. Cambri, Psychological Disability Inclusive-Philippines; 5) Dr. Dinah Palmera Nadera, Community Mental Health Consultant, Kristoffel Blindenmission; 6) Dr. Leonor Cabral-Lim, Epilepsy Council, Philippine Neurological Association; 7) Dr. Manuel Panopio, President, Philippine College of Addiction Medicine, and Medical Specialist, Treatment and Rehabilitation Center, Department of Health (DOH); 8) Dr. Bernardino A. Vicente, Medical Center Chief III, National Center for Mental Health, DOH; 9) Ms. Frances Prescilla Cuevas, Program Manager, Mental Health, DOH; 10) Dr. Ronald del Castillo, Associate Professor, College of Public Health, University of the Philippines-Manila; 11) Dr. Edgardo L. Tolentino, Philippine Psychiatric Association; 12) Mr. Jose Antonio Delos Reyes, Patient, Community Organizer Liason-Community Mental Health Program of Naga City, and Program Officer, HELP Learning Center, Inc.; 13) Mr. Patrick Angeles, No Box Transitions; 14) Mr. Lee Yarcia, No Box Transitions; 15) Atty. Daniel Dy Lising, Institute of Human Rights, University of the Philippines College of Law; and 16) Ms. Liza Martinez, Philippine Alliance for Persons with Chronic Illness, Psychosocial Disability Inclusive-Philippines.

[43] Republic Act No. 11036, Sec. 2.

[44] Republic Act No. 11036, Sec. 3(c).

[45] Republic Act No. 11036, Sec. 4(k).

the law goes on to enumerate the rights of the person with a health condition, whom it calls the service user. These include: (1) the right against treatment that are cruel, inhumane, harmful or degrading and invasive procedures not backed by scientific evidence;[46] (2) the right to give informed consent before receiving treatment, such consent is required to be in writing and recorded in the service user's record;[47] and (3) the right to designate a person of legal age as his or her legal representative, who may act as substitute decision maker.[48] Where the service user fails to appoint, RA 11036 identifies the persons qualified to be his/her legal representative, in a prescribed order, as follows:

> Sec. 10. x x x
>
> x x x x
>
> (c) *Failure to Appoint*. If the service user fails to appoint a legal representative, the following persons shall act as the service user's legal representative, in the order provided below:
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> (1) The spouse, if any, unless permanently separated from the service user by a decree issued by a court of competent jurisdiction, or unless such spouse has abandoned or been abandoned by the service user for any period which has not yet come to an end;
> (2) Non-minor children;
> (3) Either parent by mutual consent, if the service user is a minor;
> (4) Chief, administrator, or medical director of a mental health care facility; or
> (5) **A person appointed by the court**. (Emphasis supplied.)

RA 11036 further requires public and private health facilities to create internal review boards to assess and decide, *motu proprio* or upon written complaint or petition, all cases, disputes and controversies involving the treatment, restraint or confinement of service users within their facilities.[49] Mental health professionals are also given the right to advocate for the rights of a service user, where the latter's wishes are deemed to be at odds with those of his/her family or legal representative.[50]

Through RA 11036, the Congress has put in place a legal regime requiring the informed consent of the service user prior to treatment. In the same measure, it nevertheless provided for: (1) exceptions to the requirement of informed consent, in cases of emergencies, or "when there is impairment x x x of decision-making capacity on the part of a service

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[46] Republic Act No. 11036, Sec. 5(h).
[47] Republic Act No. 11036, Sec. 5(m).
[48] Republic Act No. 11036, Sec. 10.
[49] Republic Act No. 11036, Sec. 12.
[50] Republic Act No. 11036, Sec. 7(g).

user,"[51] subject to certain safeguards and conditions;[52] and (2) penalties in case of violation of its provisions.[53]

Both RA 10354 and RA 11036 make possible alternative views on sterilization in relation to intellectually-disabled individuals. Under RA 10354, for example, vasectomy can be viewed as a family planning procedure that the parent/legal guardian of an intellectually-disabled child/individual may decide that the latter should undergo. In like manner, vasectomy can arguably qualify as a possible treatment or medical intervention for an individual with a mental health condition (to which his/her parents can give substituted consent to under certain specified conditions). By these lights, the view that vasectomy on intellectually-disabled individuals is criminal should be tested in a proper, prospective case.

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[51] Republic Act No. 11036, Sec. 13; Sec. 4(g) defines impairment or temporary loss of decision-making as follows:

> Sec. 3. x x x
>
> (g) *Impairment or Temporary Loss of Decision-Making Capacity* refers to a medically-determined inability on the part of a service user or any other person affected by a mental health condition, to provide informed consent. A service user has impairment or temporary loss of decision-making capacity when the service user as assessed by a mental health professional is unable to do the following:
>
> (1) Understand information concerning the nature of a mental health condition;
>
> (2) Understand the consequences of one's decisions and actions on one's life or health, or the life or health of others;
>
> (3) Understand information about the nature of the treatment proposed, including methodology, direct effects, and possible side effects; and
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> (4) Effectively communicate consent to treatment or hospitalization, or information regarding one's own condition[.]

[52] Republic Act No. 11036, Sec. 13. *Exceptions to Informed Consent.* – During psychiatric or neurologic emergencies, or when there is impairment or temporary loss of decision-making capacity on the part of a service user, treatment, restraint or confinement, whether physical or chemical, may be administered or implemented pursuant to the following safeguards and conditions:

(a) In compliance with the service user's advance directives, if available, unless doing so would pose an immediate risk of serious harm to the patient or another person;

(b) Only to the extent that such treatment or restraint is necessary, and only while a psychiatric or neurologic emergency, or impairment or temporary loss of capacity, exists or persists;

(c) Upon the order of the service user's attending mental health professional, which order must be reviewed by the internal review board of the mental health facility where the patient is being treated within fifteen (15) days from the date such order was issued, and every fifteen (15) days thereafter while the treatment or restraint continues; and

(d) That such involuntary treatment or restraint shall be in strict accordance with guidelines approved by the appropriate authorities, which must contain clear criteria regulating the application and termination of such medical intervention, and fully documented and subject to regular external independent monitoring, review, and audit by the internal review boards established by this Act.

[53] Republic Act No. 11036, Sec. 44. *Penalty Clause.* – Any person who commits any of the following acts shall, upon conviction by final judgment, be punished by imprisonment of not less than six (6) months, but not more than two (2) years, or a fine of not less than Ten thousand pesos (P10,000.00), but not more than Two hundred thousand pesos (P200,000.00), or both, at the discretion of the court:

(a) Failure to secure informed consent of the service user, unless it falls under the exceptions provided under Section 13 of this Act;

(b) Violation of the confidentiality of information, as defined under Section 4(c) of this Act;

(c) Discrimination against a person with a mental health condition, as defined under Section 4(e) of this Act; and

(d) Administering inhumane, cruel, degrading or harmful treatment not based on medical or scientific evidence as indicated in Section 5(h) of this Act.

D

More, it should also be considered that there are *differing* kinds and levels of intellectual disabilities; treating all of them similarly and without due consideration of their differences may only end up doing the concerned intellectually-disabled individual a disservice. The US Supreme Court, for example, has acknowledged the existence of levels of intellectual disabilities and how, in the context of the constitutional right forbidding the execution of the intellectually-disabled, they play a critical role in providing information on how intellectual disability should be measured and assessed.[54] Aside from acknowledging that its decisions on the matter is better informed by the views and assessments of medical experts and the professional medical community, the Court also recognized DSM-5, which provides for four severity levels for intellectual disability, namely: mild, moderate, severe and profound, as an authoritative reference.[55]

This Court, in a prosecution for rape and sexual assault of a 21 year-old intellectually-disabled person with a mental age of six years and an IQ of 38, has itself acknowledged differences with respect to mental/intellectual deficiencies:

> The term, "deprived of reason," is associated with insanity or madness. A person deprived of reason has mental abnormalities that affect his or her reasoning and perception of reality and, therefore, his or her capacity to resist, make decisions, and give consent.

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[54] See footnote 1.

[55] In *Hall v. Florida* (572 U.S. ___ (2014), the US Supreme Court held:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.
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> x x x x
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> In addition to the views of the States and the Court's precedent, this determination is informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments. See [*Kansas v. Crane*, 534 U. S. 407, 413 (2002)] ("[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . ."). It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.

Here, even as it voided Florida's fixed standard of IQ of 70, the US Supreme Court reiterated the need for evidence of both subaverage intellectual functioning and significant limitations in adaptive skills. Similarly, in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), it held that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."

> The term, "demented," refers to a person who suffers from a mental condition called dementia. Dementia refers to the deterioration or loss of mental functions such as memory, learning, speaking, and social condition, which impairs one's independence in everyday activities.
>
> We are aware that the terms, "mental retardation" or "intellectual disability," had been classified under "deprived of reason." The terms, "deprived of reason" and "demented," however, should be differentiated from the term, "mentally retarded" or "intellectually disabled." An intellectually disabled person is not necessarily deprived of reason or demented. This court had even ruled that they may be credible witnesses. However, his or her maturity is not there despite the physical age. He or she is deficient in general mental abilities and has an impaired conceptual, social, and practical functioning relative to his or her age, gender, and peers. Because of such impairment, he or she does not meet the "socio-cultural standards of personal independence and social responsibility."
>
> x x x Decision-making is a function of the mind. x x x[56] (Citations omitted.)

These viewpoints, to me, show that Justice Leonen's grand assertion of a "fundamental" right on the part of the intellectually-disabled to procreation and parenthood is not as self-evident as he makes it appear. The cited laws and court holdings, both here and abroad, underscore that rights do not exist in isolation; one man's liberty ends where another man's begins.[57] As a constitutional scholar writes:

> **Even when it has recognized a core kind of fundamental right, such as the right to autonomy in procreative matters, the Court should be reluctant to extend the protected interest to novel circumstances without considering countervailing factors**. x x x Instead, it should be recognized that there is a needed region of legislative flexibility to prevent negative consequences of these endeavors in which the State has legitimate interests and in which a "right" may destroy countervailing "rights." x x x **[T]he initial decision to recognize the interest as a fundamental right should not be undertaken without an inquiry into other individual interests that might be compromised by the categorization.**[58] (Emphasis supplied.)

Ignoring the reality of competing interests would mean wrongly presupposing, in the words of Justice Scalia, that "x x x there is only one

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[56] *People v. Quintos*, G.R. No. 199402, November 12, 2014, 740 SCRA 179, 201-202.
[57] See *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 538 (1902).
[58] Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights – Cataloguing the Methods of Judicial Alchemy*," 19 Harv. J. L. & Pub. Pol'y 795 (1996), p. 910.

side to this controversy—that one disposition can expand a 'liberty' of sorts without contracting an equivalent 'liberty' on the other side. Such a happy choice is rarely available."[59] The "ramifications and gravity of the issue involved"[60] simply does not justify traversing the complex issues pertaining to the reproductive rights of the intellectually-disabled, absent any evidence supporting the conflicting claims and arguments surveyed.

III

My views on the prematurity of reaching the constitutional issues notwithstanding, I take this occasion to discuss the concept of fundamental rights. I do so in response to Justice Leonen's assertion that the vasectomy conducted on Larry, an intellectually-disabled person, violated his "**fundamental** right to life and liberty,"[61] particularly, his rights "to procreate,"[62] to "start a family,"[63] to be a "parent,"[64] and that the decision to subject him to vasectomy required Larry's consent.[65]

A

The concept of fundamental rights, once described as "liberties that operate as trumps,"[66] was first extensively covered by the Court, through Chief Justice Puno, in *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*.[67] There, the Court, citing Gerald Gunther, traced its history and development in the context of American constitutional equal protection analysis.[68] The liberty interests declared by the US Supreme

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[59] *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).
[60] *J.* Leonen Main Resolution, p. 21.
[61] *J.* Leonen Separate Opinion, p. 12.
[62] *J.* Leonen Separate Opinion, p. 18.
[63] *J.* Leonen Separate Opinion, p. 18.
[64] *J.* Leonen Separate Opinion, p. 18.
[65] *J.* Leonen Separate Opinion, p. 18.
[66] Easterbrook, "*Implicit and Explicit Rights of Association*," Vol. 10 Harvard Journal of Law and Public Policy (1987), pp. 91-92.
[67] G.R. No. 148208, December 15, 2004, 446 SCRA 299.
[68] *Id.* at 371-374. Prior to the Warren Court era of the 1960's, there was an overall attitude of marginal judicial intervention with respect to equal protection cases. This "old" variety of equal protection scrutiny was deferential; insisting merely that the classification in the contested statute reasonably relate to the avowed legislative purpose. This meant that the rational classification requirement was satisfied fairly readily. In the 1960s, the US Supreme Court, under the leadership of Chief Justice Earl Warren, embraced a "new" approach to equal protection whereby it came to find more areas where strict rather than deferential scrutiny was to be applied. Under this "new" approach, strict scrutiny was to be applied when two characteristics were found to be present: the presence of "suspect" classifications or an impact on "fundamental" rights and interests. "Suspect" classifications typically involved those based on race, but eventually also included other areas as well (such as alienage, illegitimacy, gender, and wealth). Rights and interests considered fundamental by the Warren Court included those on voting, criminal appeals and interstate travel. Years later, the US Supreme Court under Chief Justice Warren E. Burger would retain the two-tier formulation of the Warren Court but slowed down any significant expansions with respect to defining new fundamental interests. In fact, scholars have noted a mounting discontent with the two-tier formulation such that Justice Marshall, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) would propose a "sliding scale" approach which provides that rather than limiting itself to two neat categories (between strict scrutiny and mere rationality), the Court should consider a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. Under this "newer" equal protection model, the Court would be less willing to supply justifying rationales by exercising its imagination. Instead, it would have to gauge the reasonableness of the challenged means on the basis of materials offered it, rather than "resorting to rationalizations created by perfunctory judicial

Court to be "fundamental" are the right to procreation, the right to marry, the right to exercise First Amendment freedoms such as free speech, political expression, press, assembly, the right to travel and the right to vote.[69] By way of continued acceptance of the concept, this Court, very recently in *Republic v. Manalo*[70] and applying equal protection analysis, identified marriage, among others, as a fundamental right.

The recognition of an asserted liberty interest as "fundamental" has significant legal consequences. Traditionally, liberty interests are protected only against arbitrary government interference. If the government can show a rational basis for believing that its interference advances a legitimate legislative objective, a claim to a liberty interest may fail.[71] Where, however, a liberty interest has been accorded an "elevated" status by characterizing it as a right (or a fundamental right), then the government is subject to a *higher* burden of proof to justify intrusions into these interests, namely, the requirements of strict scrutiny in equal protection cases[72] and that of compelling State interest in due process cases.[73] As the US Supreme Court has warned, affixing the label "fundamental" to such liberty interests would place them outside the arena of public debate and legislative action.[74] Resultantly, and as is also true in this jurisdiction, fundamental rights have been deemed to include only those basic liberties explicitly or implicitly guaranteed by the Bill of Rights of the Constitution.[75]

B

There seems to me little disagreement as to the "fundamental" nature of an asserted liberty interest when the same can be read from the text of the Bill of Rights of the Constitution itself. Thus, when a State act is alleged to have implicated an **explicit** "fundamental right," *i.e.*, a right textually found in the Bill of Rights, the Court has been wont to subject the government to a *higher* burden to justify its challenged action:

In *Ebralinag v. The Division Superintendent of Schools of Cebu*,[76] the Court annulled and set aside orders expelling petitioners from school, thereby upholding their right under the Constitution to refuse to salute the

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hypothesizing." This "newer" approach of modest interventionism essentially provides the middle ground and bridges the yawning gap between the extreme deference of the "old" approach and the excessive interventionism of the "new" approach. (Gunther, "*Constitutional Law Cases and Materials*," University Casebook Series, pp. 657-685.)

[69] Gunther, "*Constitutional Law Cases and Materials*," University Casebook Series, pp. 697-698.

[70] G.R. No. 221029, April 24, 2018.

[71] Crump, "*How do the Courts Really Discover Unenumerated Fundamental Rights - Cataloguing the Methods of Judicial Alchemy*," *supra* note 58 at 799-800.

[72] See *Central Bank Employees Association, Inc. v. Bangko Central ng Pilipinas*, *supra* note 67.

[73] See *Obergefell v. Hodges*, 576 U.S. ___ (2015).

[74] *Id.*

[75] *Republic v. Manalo*, *supra* note 70, citing *J.* Brion Separate Opinion, *Biraogo v. Philippine Truth Commission of 2010*, G.R. No. 192935, December 7, 2010, 637 SCRA 78, 359-360.

[76] G.R. No. 95770, March 1, 1993, 219 SCRA 256.

Philippine flag on account of their **religious beliefs** as guaranteed under Section 5, Article III.[77]

In *Legaspi v. Civil Service Commission* (CSC),[78] the CSC was ordered, via mandamus, to open its register of eligibles for the position of sanitarian, and to confirm or deny, the civil service eligibility of certain identified individuals for said position in the Health Department of Cebu City, in furtherance of the fundamental **right of the people to information on matters of public concern** provided under Section 7, Article III of the Constitution.[79]

In *Disini, Jr. v. Secretary of Justice*,[80] the Court struck down as unconstitutional Sections 4(c)(3), 12, and 19 of the Cybercrime Law[81] for being violative of the **right to freedom of expression, right to privacy, and right against unreasonable searches and seizures**, as explicitly provided under Sections 4, 3, and 2, respectively, of Article III of the Constitution.[82]

The case of *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*[83] involved a challenge against curfew ordinances for minors for being violative of the constitutional **right to travel**. There, the Court chose to apply the strict scrutiny test and found that while the government was able to show a compelling State interest, it failed to show that the regulation set forth was the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest.

In *Chavez v. Gonzales*,[84] the Court nullified the official government statements warning the media against airing the alleged wiretapped conversation between the President and other personalities. According to the Court, any attempt to restrict the exercise of **freedom of the press**

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[77] CONSTITUTION, Sec. 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

[78] G.R. No. L-72119, May 29, 1987, 150 SCRA 530.

[79] CONSTITUTION, Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

[80] G.R. No. 203335, February 18, 2014, 716 SCRA 237.

[81] Republic Act No. 10175, Cybercrime Prevention Act of 2012.

[82] These provisions of Article III of the 1987 Constitution read as follows:

Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

x x x x

Sec. 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

[83] *Supra* note 31.

[84] G.R. No. 168338, February 15, 2008, 545 SCRA 441.

guaranteed under Section 4, Article III must be met with "an examination so critical that only a danger that is clear and present would be allowed to curtail it."[85]

In *Newsounds Broadcasting Network, Inc. v. Dy*,[86] on the other hand, the Court held that respondents' actions, which ranged from withholding permits to operate to the physical closure of those stations under color of legal authority, failed to pass the test of strict scrutiny which it deemed appropriate to assess content-based restrictions on **free speech and press**. According to the Court, "[a]s content regulation cannot be done in the absence of any compelling reason, the burden lies with the government to establish such compelling reason to infringe the right to free expression."[87] Due to the government's failure to show a compelling State interest, the Court granted petitioner's prayer for a writ of mandamus and ordered respondents to immediately issue the requisite permits.

In *Kabataan Party-List v. Commission on Elections* (COMELEC),[88] a challenge was made against a COMELEC resolution setting a shorter deadline for voter registration, one outside of the period provided by Section 8 of Republic Act No. 8189, otherwise known as the "Voter's Registration Act of 1996." The Court found that existing laws grant the COMELEC the power to fix other periods and dates for pre-election activities only if the same cannot be reasonably held within the period provided by law. Since the COMELEC was unable to justify why the mandate of continuing voter registration cannot be reasonably held within the period provided, the Court nullified the deadline set by the COMELEC for being unduly restrictive of the people's **right to vote**.[89]

C

Justice Harlan of the US Supreme Court has famously noted that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in, or limited by, the precise terms of the specific guarantees elsewhere provided in the Constitution."[90] Thus, American jurisprudence is

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[85] *Id.* at 473.

[86] G.R. Nos. 170270 & 179411, April 2, 2009, 583 SCRA 333, 334.

[87] *Id.* at 355. Citation omitted.

[88] G.R. No. 221318, December 16, 2015, 777 SCRA 574.

[89] The Constitution devotes an entire Article on Suffrage. This Article reads:

ARTICLE V
Suffrage

Sec. 1. Suffrage may be exercised by all citizens of the Philippines not otherwise disqualified by law, who are at least eighteen years of age, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months immediately preceding the election. No literacy, property, or other substantive requirement shall be imposed on the exercise of suffrage.

Sec. 2. The Congress shall provide a system for securing the secrecy and sanctity of the ballot as well as a system for absentee voting by qualified Filipinos abroad.

The Congress shall also design a procedure for the disabled and the illiterates to vote without the assistance of other persons. Until then, they shall be allowed to vote under existing laws and such rules as the Commission on Elections may promulgate to protect the secrecy of the ballot.

[90] *Poe v. Ullman*, 367 U.S. 497, 543 (1961), *J.* Harlan Dissenting Opinion.

replete with instances wherein their Supreme Court has given "fundamental" status to otherwise unenumerated rights.

The first **unenumerated** right to be widely recognized was the **liberty of contract** in the 1905 landmark case of *Lochner v. New York.*[91] In *Lochner*, the US Supreme Court invalidated a New York statute which provided that employees shall not be required to work in bakeries for more than 60 hours in a week, or 10 hours a day. It found the regulation "an unreasonable, unnecessary and arbitrary interference with the **right and liberty of the individual to contract** in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution."[92]

In what became known as the *Lochner*-era, the US Supreme Court during this time focused on the term "liberty" under the Due Process Clause, construed it to include the "freedom of contract," and subjected any attempt by the State to regulate *contractual* relations to a level of review "that was as demanding as implied by the modern term 'strict scrutiny.'"[93] Thus, "liberty of contract" was used as basis to invalidate laws providing for maximum working hours,[94] minimum wage laws,[95] and even those which allowed

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[91] 198 U.S. 45 (1905).

[92] *Id.* at 56. The Court in *Lochner v. New York* held:

> The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day, and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer's permitting, under any circumstances, more than ten hours work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.
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> **The statute necessarily interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.** (Emphasis supplied.) *Id.* at 52-53.

[93] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), pp. 204-205. Farrell also writes that "[w]henever the Court, in a *Lochner*-type case determined that a statute infringed on a protected 'liberty' interest, the statute was typically invalidated as a matter of course, usually without measuring the significance of the government's interest in regulating that activity."

[94] See *Lochner v. New York*, *supra* note 91.

[95] See *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923), wherein the US Supreme Court invalidated a District of Columbia statute requiring minimum wages for women. There, the Court held:

> It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity — under penalties as to the employer — to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.
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> x x x x
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> A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. **But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked,**

employers to require, as a condition for hiring or continued employment, non-membership in unions.[96]

Interestingly, around this time, the US Supreme Court also had occasion to interpret "liberty" outside of contracts and *in the specific context of family relations*. In *Meyer v. Nebraska*,[97] the US Supreme Court reversed a conviction of an instructor in a parochial school who taught the subject of reading in German language to a child of 10 years and who had not attained and successfully passed the eighth grade. It found that **Meyer's right thus to teach foreign languages and the right of parents to engage him so to instruct** their children fall within the liberty of the Fourth Amendment.[98]

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arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States. (Emphasis supplied.) *Id.* at 554-555, 559.

[96] *Coppage v. Kansas*, 236 U.S. 1 (1915), wherein the US Supreme Court invalidated a Kansas law prohibiting employees from requiring employees not to join a union. The Court in *Coppage* held:

> Included in the right of personal liberty and the right of private property — partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich, for the vast majority of persons have no other honest way to begin to acquire property save by working for money.
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> An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power.
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> x x x **[S]ince the relation of employer and employee is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.**
>
> When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.
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> To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other, for "it takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires, or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised, and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct. (Emphasis supplied.) *Id.* at 14, 20-21.

See also Samberg, The Fundamentals of Fundamental Rights, https://medium.com/@mattsamberg/the-fundamentals-of-fundamental-rights-1138ced2ad4, last accessed November 13, 2018.

[97] 262 U.S. 390 (1923).

[98] *Id.* at 399-402. The Court held:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. **Without doubt, it denotes not merely freedom from bodily restraint,**

Similarly, in *Pierce v. Society of Sisters*,[99] the US Supreme Court invalidated a State statute mandating, with limited exceptions, the enrollment of children in public schools within their residential districts. According to the Court, the challenged law "unreasonably interferes with the **liberty of parents and guardians to direct the upbringing and education of children** under their control:"[100]

> [A]s often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. **The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.**[101] (Emphasis supplied.)

Come 1937, the US Supreme Court would abandon its "broad" stance on economic liberties, signaling the decline of the *Lochner*-era. Scholars would debate that this new attitude (reduction of judicial intervention in economic regulation) was a reaction to then President Franklin D.

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but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. x x x

x x x x

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.

x x x x

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquility has been shown.

[99] 268 U.S. 510 (1925).

[100] *Id.* at 534.

[101] *Id.* at 535.

Roosevelt's "Court-Packing Plan,"[102] purportedly an attempt by the president to stem the Court's continuous invalidation of federal New Deal statutes.[103] In any case, by 1937, the Court would decide *West Coast Hotel Co. v. Parrish*,[104] upholding a statute providing for minimum wages (and expressly reversing its earlier ruling in *Adkins)*. In a sharp retreat from the philosophy characteristic of its *Lochner*-era holdings, the Court in *Parrish* found that the liberty protected by the Due Process Clause was neither absolute nor uncontrollable but rather subject to regulation which is reasonable in relation to its subject.

From then on, the Court never looked back, marking the demise of the now infamous *Lochner*-era. With *Parrish*, the practice of subjecting to rigid scrutiny government regulation of business and commercial matters (in the name of protecting constitutional liberty) was stopped. The Court thereafter shifted its focus to deciding "substantive" rights under the Due Process and Equal Protection Clauses. While the aspect of *Lochner* severely curtailing economic regulation waned, the future significant cases touching on fundamental "non-economic" rights would build on *Lochner* insofar as it protected "fundamentals" which, as demonstrated by *Meyer* and *Pierce*, was "not wholly limited to economic rights: to the Court of that era, there was no sharp distinction between economic and non-economic, 'personal' liberties x x x."[105]

In *Skinner v. Oklahoma ex rel Williamson*,[106] the US Court struck down a state statute providing for compulsory sterilization after a third conviction for a felony "involving moral turpitude," but excluding felonies such as embezzlement, for being violative of the guarantee of equal protection. There, it declared that the challenged legislation involved "one of the basic civil rights of man," **marriage and procreation both being "fundamental to the very existence and survival of the race.**"[107] Gunther writes:

> [T]he 1942 reference in *Skinner* to "fundamental," "basic" liberties in the area of marriage and procreation was extraordinary: that decision mixing due process and equal protection considerations was virtually the only one in that

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[102] Under President Roosevelt's plan, also known as the Judicial Procedures Reform Bill of 1937, the membership of the Supreme Court would be increased every time a Justice reaches the age of 70 and fails to retire, with the end purpose of ensuring that the Lochner majority would eventually be outvoted. This plan was eventually rejected by the Senate. (Sujit Choudh, The *Lochner* Era and Comparative Constitutionalism, 2 Int'l J. Const. L. 1 [2004], taken from https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com.ph/&httpsredir=1&article=3282&context=facpubs, last accessed November 23, 2018.)

[103] Gunther, "*Constitutional Law Cases and Materials*," University Casebook Series, p. 583.

[104] 300 U.S. 379 (1937).

[105] Gunther, "*Constitutional Law Cases and Materials*," University Casebook Series, p. 617.

[106] 316 U.S. 535 (1942).

[107] *Id.* at 541. The US Supreme Court held the Oklahoma statute unconstitutional on the ground that equal protection requires that the state must either (1) sterilize embezzlers along with larceners or (2) sterilize neither class of "habitual criminals." (See also James E. Fleming and Linda C. McClain, "Liberty," Oxford Handbook of the United States Constitution, www.bu/edu/law/faculty/scholarship/workingpapers/2014.html, last accessed November 13, 2018.)

> period from the demise of *Lochner* x x x to exercise special scrutiny in favor of a "basic liberty" not tied to or justifiable by a specific constitutional guarantee.[108]

Subsequently, in the 1967 case of *Loving v. Virginia*,[109] the **freedom to marry** was recognized such that any restriction of such freedom based solely on racial classifications violates the central meaning of the Equal Protection Clause.

In *Lawrence v. Texas*,[110] the Supreme Court reversed its earlier ruling in *Bowers v. Hardwick*[111] and recognized a **liberty of consensual sexual conduct**.

In *Cruzan v. Director, Missouri Department of Health*,[112] the Court found a constitutionally protected **liberty interest in refusing unwanted medical treatment**.

Furthermore, while the US Constitution does not explicitly mention it, the US Supreme Court, in a line of cases, has recognized a general **right to personal privacy**, finding that liberties extend to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[113] In *Griswold v. Connecticut*,[114] the Court recognized a privacy right in favour of married couples to use contraceptives.[115] A similar right would later on be recognized in *Eisenstadt v. Baird*[116] in favor of unmarried individuals.[117] *Roe v. Wade*[118] would find

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[108] Gunther, "*Constitutional Law Cases and Materials*," University Casebook Series, p. 619.

[109] 388 U.S. 1 (1967).

[110] 539 U.S. 558 (2003).

[111] 478 U.S. 186 (1986).

[112] 497 U.S. 261 (1990).

[113] *Obergefell v. Hodges*, *supra* note 73, citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See discussion in *Roe v. Wade*, 410 U.S. 113 (1973). See also liberty and privacy discussion in *J.* Jardeleza's Concurring Opinion in *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*, G.R. No. 187417, February 24, 2016, 785 SCRA 18, 41).

[114] 381 U.S. 479 (1965).

[115] *Id.* at 485-486. In striking down a Connecticut statute forbidding the use of contraceptives, the *Griswold* Court held:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." x x x Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

[116] 405 U.S. 438 (1972).

[117] *Id.* at 453-454. The Court, applying equal protection, held:

> x x x [W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.
>
> If, under *Griswold*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that, in *Griswold*, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If

the Court holding that the right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy and under what conditions.[119] Two decades later, the Court would reaffirm the essential ruling in *Roe* through its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[120]

More recently, the American Supreme Court, in *Obergefell v. Hodges*,[121] held that the **right of same-sex couples to marry** is part of the liberty under both the Due Process and Equal Protection Clauses; that these couples may exercise their fundamental right to marry in all States; and that States have no legal basis to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Not all assertions to unenumerated fundamental rights, however, are able to obtain recognition from the Court:

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the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. x x x

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried, but not to married, persons. In each case, the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. x x x

[118] 410 U.S. 113 (1973).

[119] *Id.* at 153, 155, 163-164. The Court, applying due process analysis, held:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. x x x [T]hat the right, nonetheless, is not absolute, and is subject to some limitations; and that, at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant. x x x

x x x x

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, x x x, that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. x x x

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

[120] 505 U.S. 833 (1992). The Court held:

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each. *Id.* at 846.

[121] *Supra* note 73.

San Antonio Independent School District v. Rodriguez[122] involved a suit brought by Mexican-American parents on behalf of school children said to be members of poor families who reside in school districts having a low property tax base. Asserting an implied right to education, which they claim is necessary for their effective exercise of their rights to free speech and suffrage, petitioners challenged the Texas system of financing public education (which provides that State funding for basic education is to be supplemented by each district through an *ad valorem* tax on property within its jurisdiction) insofar as it allegedly favored children from more affluent neighborhoods, in violation of equal protection requirements. The Court found unpersuasive, the reasons for the asserted liberty claim and held as follows:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. x x x It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State, because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. **Specifically, they insist that education is itself a fundamental personal right, because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.** x x x
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> x x x x
>
> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet **we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted.** x x x **These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.**
>
> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, **that argument provides no basis for finding an interference**

[122] 411 U.S. 1 (1973).

> **with fundamental rights where only relative differences in spending levels are involved and where — as is true in the present case — no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process**.[123] (Emphasis and underscoring supplied.)

The US Supreme Court has also refused to recognize an asserted implied fundamental right to die in *Washington v. Glucksberg*.[124] In *Glucksberg*, which involved the constitutionality of a Washington statute prohibiting persons from aiding another to attempt suicide, the Court was confronted with the issue of whether the "liberty" protected under the Due Process Clause includes a right to commit suicide (as well as a right to assistance in doing so). After examining relevant history, tradition and practice, the Court ruled in the negative and held:

> That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Independent School Dist. v. Rodriguez* x x x and *Casey* did not suggest otherwise.
>
> **The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.** x x x[125] (Emphasis supplied.)

The Court also sought to differentiate the liberty interest asserted in *Glucksberg* from that asserted (and recognized) in *Cruzan* which, as earlier stated, involved the right to refuse unwanted medical treatment:

> The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. x x x In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do

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[123] *Id.* at 35-37.
[124] 521 U.S. 702 (1997).
[125] *Id.* at 727-728.

> today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide. x x x[126]

It also found that the Washington ban on assisted suicide was rationally related to (or implicated) legitimate State interests, such as interests in the preservation of human life and protection of the integrity and ethics of the medical profession.

D

In this jurisdiction, this Court has also had some occasions to rule on assertions of unenumerated fundamental rights:

In the 1924 case of *People v. Pomar*,[127] and reminiscent of the *Lochner*-era rulings, this Court declared unconstitutional provisions of law which required employers to pay a woman employee, who may become pregnant, her wages for 30 days before and 30 days after confinement. Citing a long line of US Supreme Court *Lochner*-era decisions, this Court found that the right to liberty includes **the right to enter into (and terminate) contracts**. Accordingly, it held:

> [S]aid section creates a *term* or condition in every contract made by every person, firm, or corporation with any woman who may, during the course of her employment, become pregnant, and a failure to include in said contract the terms fixed by the law, makes the employer criminally liable subject to a fine and imprisonment. **Clearly, therefore, the law has deprived, every person, firm, or corporation owning or managing a factory, shop or place of labor of any description within the Philippine Islands, of his right to enter into contracts of employment upon such terms as he and the employee may agree upon. The law creates a *term* in every such contract, without the consent of the parties. Such persons are, therefore, deprived of their liberty to contract.** The [C]onstitution of the Philippine Islands guarantees to every citizen his *liberty* and one of his *liberties is the liberty to contract*.[128] (Emphasis supplied.)

Philippine adherence to this ruling would, however, be short-lived.[129] As Justice Fernando would later explain in *Edu v. Ericta*,[130] the decision in *Pomar* was largely brought about by the fact that "our Supreme Court had no other choice as the Philippines was then under the United States," where

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[126] *Id.* at 725-726.
[127] 46 Phil. 440 (1924).
[128] *Id.* at 454.
[129] See also *Calalang v. Williams*, 70 Phil. 726 (1940); *Antamok Goldfields Mining Company v. Court of Industrial Relations*, 70 Phil. 341 (1940). See also *J.* Fernando's Opinion in *Alfanta v. Noe*, G.R. No. L-32362, September 19, 1973, 53 SCRA 76.
[130] G.R. No. L-32096, October 24, 1970, 35 SCRA 481.

only a year before *Pomar*, a statute providing for minimum wages was declared in *Adkins* to be constitutionally infirm. The Court (and the Constitutional Convention) would adopt a more deferential attitude towards government regulation of economic relations and covering such subjects as "collective bargaining, security of tenure, minimum wages, compulsory arbitration, the regulation of tenancy as well as the issuance of securities, and control of public services."[131]

In the meantime, and taking its cue from the US Supreme Court, this Court would also go on to recognize unenumerated, yet fundamental, non-economic rights:

Although the Bill of Rights speaks only of a right of privacy over communication and correspondence, the Court, in the 1968 case of *Morfe v. Mutuc*,[132] adopted the reasoning in *Griswold* and recognized a constitutional right to *personal* privacy. It declared that "[t]he right to privacy x x x is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection."[133] *Morfe* concerned the validity of a law requiring the periodic submission of sworn statements of financial conditions, assets and liabilities of an official or employee of the government. Considering the avowed purpose behind the requirement of periodic submission, the Court held:

> Even with due recognition of such a view, it cannot be said that the challenged statutory provision calls for disclosure of information which infringes on the right of a person to privacy. **It cannot be denied that the rational relationship such a requirement possesses with the objective of a valid statute goes very far in precluding assent to an objection of such character.** This is not to say that a public officer, by virtue of a position he holds, is bereft of constitutional protection; it is only to emphasize that in subjecting him to such a further compulsory

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[131] *Id.* at 493. Citations omitted. Justice Fernando further writes:

> x x x [T]o erase any doubts, the Constitutional Convention saw to it that the concept of *laissez-faire* was rejected. **It entrusted to our government the responsibility of coping with social and economic problems with the commensurate power of control over economic affairs.** Thereby it could live up to its commitment to promote the general welfare through state action. **No constitutional objection to regulatory measures adversely affecting property rights, especially so when public safety is the aim, is likely to be heeded, unless of course on the clearest and most satisfactory proof of invasion of rights guaranteed by the Constitution.** x x x
>
> x x x x
>
> It is in the light of such rejection of the *laissez-faire* principle that during the Commonwealth era, no constitutional infirmity was found to have attached to legislation covering such subjects as collective bargaining, security of tenure, minimum wages, compulsory arbitration, the regulation of tenancy as well as the issuance of securities, and control of public services. So it is likewise under the Republic this Court having given the seal of approval to more favorable tenancy laws, nationalization of the retail trade, limitation of the hours of labor, imposition of price control, requirement of separation pay for one month, and social security scheme. (Emphasis supplied; citations omitted.) *Id.* at 491-493.

[132] G.R. No. L-20387, January 31, 1968, 22 SCRA 424.

[133] *Id.* at 444.

> revelation of his assets and liabilities, including the statement of the amounts and sources of income, the amounts of personal and family expenses, and the amount of income taxes paid for the next preceding calendar year, there is no unconstitutional intrusion into what otherwise would be a private sphere.[134] (Emphasis supplied.)

In *Oposa v. Factoran, Jr.*,[135] this Court accorded fundamental right status to an asserted liberty interest in "a balanced and healthful ecology" under Section 16, Article II of the 1987 Constitution. Petitioners filed suit to question the grant of timber licensing agreements by the Secretary of Environment and Natural Resources, arguing that the continued allowance of timber licenses "to cut and deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs—especially plaintiff minors and their successors—who may never see, use, benefit from and enjoy this rare and unique natural resource treasure."[136] While conceding that the asserted right cannot be found in the Bill of Rights, the Court declared that such right was "no less important" because "it concerns nothing less than self-preservation and self-perpetuation[,] x x x the advancement of which may even be said to predate all governments and constitutions."[137]

In *Imbong v. Ochoa, Jr.*,[138] which involved a number of challenges against the constitutionality of RA 10354, this Court recognized the constitutional right of parents to exercise parental control over their minor-child:

> To insist on a rule that interferes with the right of parents to exercise parental control over their minor-child or the right of the spouses to mutually decide on matters which very well affect the very purpose of marriage, that is, the establishment of conjugal and family life, would result in the violation of one's privacy with respect to his family. It would be dismissive of the unique and strongly-held Filipino tradition of maintaining close family ties and violative of the recognition that the State affords couples

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[134] *Id.* at 445-446.

[135] G.R. No. 101083, July 30, 1993, 224 SCRA 792.

[136] *Id.* at 799. The Court, through Justice Davide, declared:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come—generations which stand to inherit nothing but parched earth incapable of sustaining life. *Id.* at 804-805.

[137] *Id.* at 805.

[138] *Supra* note 27.

> entering into the special contract of marriage to as one unit in forming the foundation of the family and society.
>
> The State cannot, without a compelling state interest, take over the role of parents in the care and custody of a minor child, whether or not the latter is already a parent or has had a miscarriage. Only a compelling state interest can justify a state substitution of their parental authority.[139]

A liberty interest in the access to safe and non-abortifacient contraceptives, hinged on a **right to health** under Section 15, Article II,[140] and other sections of the Constitution, was also recognized in *Imbong*. Petitioners therein questioned the inclusion of hormonal contraceptives, intrauterine devices, injectables and family products and supplies in the National Drug Formulary, the use of which, they claimed, greatly increased risks of developing breast and cervical cancer and other serious medical conditions. Although the Court declared that "the constitutional right to health" is a component of the right to life,[141] it, nevertheless, found petitioners' assertion of impairment of said right unfounded[142] and premature:[143]

> The distribution of contraceptive drugs and devices must not be indiscriminately done. The public health must be protected by all possible means. As pointed out by Justice De Castro, a heavy responsibility and burden are assumed by the government in supplying contraceptive drugs and devices, for it may be held accountable for any injury,

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[139] *Id.* at 352-353.

[140] CONSTITUTION, Art. II, Sec. 15:
The State shall protect and promote the right to health of the people and instill health consciousness among them.

[141] See *Imbong v. Ochoa Jr.*, *supra* note 27, the Opinion of *J.* Del Castillo where he posited that the right to health is a fundamental right; Opinion of *J.* Perlas-Bernabe where she posited that the right to health is an inextricable adjunct of one's right to life; Opinion of *J.* Leonardo-De Castro where she stated that the right to health is itself a fundamental human right.

[142] The Court in this regard held:
> x x x [T]he 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. x x x
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> x x x x
>
> Thus, in the distribution by the DOH of contraceptive drugs and devices, it must consider the provisions of R.A. No. 4729, which is still in effect, and ensure that the contraceptives that it will procure shall be from a duly licensed drug store or pharmaceutical company and that the actual dispensation of these contraceptive drugs and devices will [be] done following a prescription of a qualified medical practitioner. x x x (Emphasis omitted). *Id.* at 315-318.

[143] The Court said:
> 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 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. (Emphasis omitted.) *Id.* at 318.

> illness or loss of life resulting from or incidental to their use.[144] (Emphasis omitted.)

On the other hand, *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*[145] involved a suit questioning Brent Hospital's act of putting an unwed, pregnant employee on suspension until such time that she married her child's father in accordance with law. The Court there found the employer's condition for re-employment "coercive, oppressive, and discriminatory," depriving the employee of her "freedom to choose her status, which is a privilege that inheres in her as an intangible and inalienable right."[146] It was also proposed that the constitutional right to personal liberty and privacy should be read to include a woman's **right to choose whether to marry** and **to decide whether she will bear and rear her child outside of marriage.**[147]

Most recently, this Court in *Republic v. Manalo*,[148] applying equal protection analysis, upheld, pursuant to the **fundamental right to marry**, a liberty interest on the part of a Filipino spouse to be recapacitated to marry, in cases where a valid foreign divorce has been obtained.

IV

A

Unlike the case of rights that can be located on the text of the Bill of Rights, the rules with respect to locating unenumerated "fundamental" rights, however, are not clear. According to Justice Harlan, speaking in the context of identifying the full scope of liberty protected under the Due Process Clause, the endeavor essentially entails an attempt at finding a balance between "respect for the liberty of the individual x x x and the demands of organized society."[149]

The question that presents itself then is **how** one determines whether an implied liberty interest being asserted is "fundamental," as to call for the application of strict scrutiny. For its part, the US Supreme Court has attempted, over time, to craft principled formulations on how to identify such "unenumerated" or "implied" rights:

> [T]he Court has used a wide variety of methods, ranging from the restrained approach of locating protected interests in the constitutional text to the generous test of evaluating interests by the importance they have for contemporary individuals. Because the Justices do not uniformly agree upon these methods, it is also understandable that opinions

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[144] *Id.*
[145] G.R. No. 187417, February 24, 2016, 785 SCRA 18.
[146] *Id.* at 37-38. Citation omitted.
[147] See *J.* Jardeleza Concurring Opinion, *id.* at 49-50.
[148] *Supra* note 70.
[149] *J.* Harlan Dissenting Opinion in *Poe v. Ullman*, *supra* note 90 at 542.

> for the Court rarely express consensus about the way the methods are chosen, or whether they fit into the hierarchy, or whether some methods are preferable in some situations and others in other situations. x x x
>
> These methods lie along a continuum, all the way from hair-trigger formulas that can support a cornucopia of fundamental rights to stingy theories that protect virtually nothing that is not undeniably enumerated. x x x [n]o one method is comprehensive or exclusive, and indeed, the Justices themselves often have used two or three different theories in combination while analyzing a single interest. x x x[150] (Citations omitted.)

This Court has not laid down clear guidelines on this matter. Thus, reference to American scholarly commentary is again instructive.

In his article *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, Robert Farrell wrote that the US Supreme Court uses "a multiplicity of methods of identifying implied fundamental rights."[151] After a survey of US Supreme Court cases, Farrell has classified the different methods used by the Court in categorizing certain rights as fundamental. These are either because the asserted rights: (1) are important;[152] (2) are implicit in the concept of ordered liberty[153] or implicitly guaranteed by the Constitution;[154] (3) are deeply rooted in the Nation's

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[150] Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," *supra* note 58 at 839. In his article, Crump surveyed more than 10 methodologies used by the court for recognizing unenumerated fundamental rights. These include the "history and tradition" test under *Washington v. Glucksberg*, *supra* note 124, the "essential requisite for ordered liberty" test under *Palko v. Connecticut*, 302 U.S. 319 (1937), to the "importance to the individual test" under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[151] *Supra* note 93 at 209.

[152] *Id.* at 217-221. The US Supreme Court used the "importance" test in *Skinner v. Oklahoma*, *supra* note 106, in striking down a state statute providing for the sterilization of habitual criminals, which by law was limited to perpetrators of felonies involving moral turpitude. The US Supreme Court did not uphold the fundamental right to procreate on the basis of any language in the Bill of Rights; rather, it simply asserted, based on an incontrovertible fact of human existence, that marriage and procreation are fundamental to the very existence and survival of the race. This appears to be the test/approach considered and used by the Court in *Oposa v. Factoran, Jr.*, *supra* note 135.

[153] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 221-224. In *Palko v. Connecticut*, 302 U.S. 319 (1937), the US Supreme Court confined fundamental liberties to those that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko* concerned a state statute which allowed for the re-trial of an accused if made upon the instance of the State. There, the accused, who was initially convicted for the crime of murder in the second degree and sentenced to life in prison, was, upon re-trial, convicted for the crime of murder in the first degree and sentenced to death. An action to challenge said state statute was brought before the US Supreme Court which thereafter upheld it, saying "[t]he right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" See also Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights - Cataloguing the Methods of Judicial Alchemy*," *supra* note 58 at 871.

[154] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 224-225. The US Supreme Court also used the "implicit" test in *San Antonio Independent School District v. Rodriguez*, *supra* note 122 at 135, where it rejected an asserted "implied right to education." In seeming rejection of the importance test, the US Supreme Court declared:

history and tradition;[155] (4) need protection from government action that shocks the conscience;[156] (5) are necessarily implied from the structure of government[157] or from the structure of the Constitution;[158] (6) provide

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> x x x [T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. x x x
>
> x x x x
>
> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education, as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> **Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not, alone, cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.** (Emphasis supplied.) *Id.* at 30-35.

[155] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 225-235. Under this approach, the test of whether or not a right is fundamental is to be determined by whether or not it is rooted in our Nation's history and traditions that is, whether the asserted liberty has been the subject of traditional or historical protection (See also Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," *supra* note 58 at 860). In *Bowers v. Hardwick*, *supra* note 111, the US Supreme Court upheld a Georgia sodomy statute. It claimed that the right asserted, which it described as "the claimed constitutional right of homosexuals to engage in acts of sodomy" was not considered fundamental within the nation's history and traditions, as is evidenced by a slew of anti-sodomy acts from the time of the enactment of the Bill of Rights to about the time the case was decided. See also the 1934 case of *Snyder v. Massachusetts*, 291 U.S. 97 (1934), where an accused sought to challenge his conviction for the crime of murder on the ground that he was denied permission to attend a view, which was ordered by the court on motion of the prosecution, at the opening of the trial. The jurors, under a sworn bailiff, visited the scene of the crime, accompanied by the judge, the counsel for both parties, and the court stenographer. The Court affirmed the conviction as there was no showing that there was a history or tradition in the State of Massachusetts affording the accused such right. It held that "[t]he constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness." For more recent applications, see *Michael H. v. Gerald D.*, *supra* note 59 and *Washington v. Glucksberg*, *supra* note 124. See, however, *J.* Kennedy's Opinion in *Obergefell v. Hodges*, *supra* note 73, where the Court held that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. x x x That method respects our history and learns from it without allowing the past alone to rule the present."

[156] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 235-237. In the case of *Rochin v. California*, 342 U.S. 165 (1952), the US Supreme Court held that the act of the police in arranging to have a suspect's stomach pumped to produce evidence of illegal drugs constituted a kind of conduct that "shocks the conscience" and therefore violated the Due Process Clause of the Constitution. This test was again seen appropriate to evaluate "abusive executive action," which in said case was a police car chase which resulted in the death of one of those being chased. The Court eventually found in favor of government as what was determinant of whether the challenged action "shocks the conscience" was not negligence or deliberate indifference but whether there was "an intent to harm suspects physically or worsen their legal plight." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 236.

[157] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 237-239. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the US Court considered the constitutional "right to travel interstate" which was alleged to have been infringed by a Connecticut statute which provided that residents cannot receive welfare benefits until they had lived in the state for at least one year. According to the Court, while unwritten in the Constitution, the right to travel is "fundamental to the concept of our Federal Union," which was, by and large, made up of several sovereign states coming together.

The New Union would not have been possible, and would have made no sense, unless citizens of that Union were free to travel from one end of it to another. Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 237-239.

necessary access to government processes;[159] and (7) are identified in previous Supreme Court precedents.[160]

There is no one mode of constitutional interpretation that has been recognized as appropriate under all circumstances. In fact, one would find critiques for every approach in scholarly commentaries on the subject.[161] Nevertheless, and despite the particular shortcomings of each individual approach, it is my view that, the Court should endeavor to be deliberate and open about its choice of approach in fundamental rights cases. This, to my mind, would help greatly not only in furthering the public's understanding of the Court's decisions in complex constitutional cases; it would reinforce the credibility of Our decisions, by exacting upon the Court and its members the duty to clearly articulate with consistency the bases of its decisions in difficult constitutional cases.

B

With all due respect, Justice Leonen has not provided sufficient basis to justify his view of "fundamental right" status, whether expressly or impliedly sourced, to the asserted liberty interest of an intellectually-disabled person in procreation and parenthood. Firstly, Justice Leonen cites the Constitution's *express* guarantee to due process of law.[162] An examination of the due process clause, however, will immediately show that it does not *textually* grant upon an intellectually-disabled person a liberty interest in procreation and parenthood.

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[158] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 240-241. In *Griswold v. Connecticut*, *supra* note 114 at 484, which dealt with the right of married couples to use contraceptives, the US Supreme Court, speaking through *J.* Douglas, "spoke of the 'penumbras formed by emanations' from the guarantees of specific kinds of privacy in the Bill of Rights and used these x x x as a basis for finding a more generalized, more encompassing right of privacy." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 240.)

[159] Farrell writes that the US Court has found implied constitutional rights to vote (See *Reynolds v. Sims*, 377 U.S. 533 [1964]) and to some level of access to court processes (See *Griffin v. Illinois*, 351 U.S. 12 [1956] and *Boddie v. Connecticut*, 401 U.S. 371 [1971]) on the ground that "legislation and adjudication in the courts are essential elements of a democracy and that a limitation on access to these two institutions is a threat to the institution of government itself." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 241-245.

[160] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra* note 120, the Supreme Court used *stare decisis*, in particular its decision in the case of *Roe v. Wade*, *supra* note 118, to explain the nature of the fundamental right to privacy as it related to abortion. *Roe*, in turn, also enumerated several cases from which it understood to have recognized a broad and generalized right to privacy (which includes a woman's decision whether or not to terminate her pregnancy) that is part of the Fourteenth Amendment "liberty." (Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 93 at 245-246.) This approach appears to have been used by this Court in *People v. Pomar*, *supra* note 127, and *J.* Jardeleza in his Concurring Opinion in *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*, *supra* note 145.

[161] For in depth discussions of the different methods and approaches, see Crump, "*How do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," *supra* note 58; and Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*," *supra* note 93.

[162] CONSTITUTION, Art. III, Sec. 1.

Justice Leonen then relies on the fundamental right to privacy, citing *Morfe v. Mutuc*[163] which, in turn, cited *Griswold v. Connecticut*,[164] holding that there are "zones of privacy," including martial privacy, which cannot be unconstitutionally violated.[165] For that matter, *Eisenstadt v. Baird*,[166] building on the foundations of *Griswold*, would provide even stronger precedent. In the context of the right of unmarried persons to access contraceptives, the US Supreme Court held: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[167] Despite *Griswold* and *Eisenstadt*, however, the US Supreme Court has yet to recognize a fundamental right to procreation or parenthood on the part of the intellectually-disabled.[168] In fact, the various American State Supreme Courts are split on the issue, *depending in part on whether the State legislatures have statutes governing sterilization.*[169]

The reason is understandable. Recognizing a fundamental right in a single person to bear or beget a child, and becoming a parent, is a far cry from recognizing *in an intellectually-disabled person* a fundamental right to make the same decision on procreation or parenthood. The underlying issues that have bedeviled the courts and the state legislatures in the US include whether an intellectually-disabled person can make that decision and whether the parent or guardian can substitute the disabled child or ward in making that decision. As a commentator has so aptly stated, the ruling in *Eisenstadt* begs the question: "[b]ut what happens when that individual lacks the capacity to comprehend the possession of a reproductive function and

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[163] *Supra* note 132.
[164] *Supra* note 114.
[165] *Id.* at 444-445.
[166] *Supra* note 116.
[167] *Id.* at 453.
[168] Irvine, "*Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse*," 12 Law & Psychology Review 95 (1988), p. 96. In the case of *In Re Grady*, 85 N.J. 235, 426 A.2d 467 (1981), it was held that "[a] right to sterilization has yet to receive constitutional protection from the United States Supreme Court."
[169] Fourteen states have statutes authorizing sterilization of persons with mental impairments who are deemed incapable of consent. For the most part, these statutes provide procedural and substantive safeguards designed to protect the class from arbitrary enforcement. (Cepko, "*Involuntary Sterilization of Mentally Disabled Women*," 8 Berkeley Women's L.J. 122 [1993]). In states where no specific statues authorize sterilization, courts faced with a petition for sterilization have had varied responses. A majority of the courts will not accept jurisdiction absent legislative authority, but a minority accepts jurisdiction even without said authority and lay downs guidelines to be followed to determine if sterilization is warranted. (Irvine, "*Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse*," 12 Law & Psychology Review 95 [1988], p. 96.) Typical of the majority view is that the inherent equity power of the courts did not include the ability to order a sterilization without statutory authority. (*Hudson v. Hudson*, 373 So. 2d 310 [1979], as cited by Irvine, "*Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse*," 12 Law & Psychology Review 95 [1988], p. 107.) The minority view, on the other hand, while conceding that a right to sterilization has yet to receive express constitutional protection from the US Supreme Court, and most states have found that they lack the power to grant a petition for sterilization absent legislative authorization, relies on the inherent *parens patriae* power of the courts and maintains that it still holds the final determination whether consent to sterilization should be given on behalf of an incompetent individual. *In Re Grady*, 85 N.J. 235, 426 A.2d 467 (1981).

right, and is not capable of making any decision regarding that right?"[170] It presents, as the Supreme Court of New Jersey puts it, a "disturbing paradox: how we can preserve the personal freedom of one incapable of exercising it by allowing others to make a profoundly personal decision on her behalf?"[171]

Justice Leonen also cites the Convention on the Rights of Persons with Disabilities (Convention), which guarantees persons with disabilities a right to non-discrimination, *i.e.*, full and effective participation in society on an equal basis with others.[172] There is, however, no law, rule, nor judicial holding which provides that the Convention can operate to "create" a "fundamental" right in the absence of the enactment by a State party of an implementing law precisely creating such substantive right. Secondly, the Convention itself is carefully worded that it does not *textually* grant persons with disabilities a right to be treated with absolute equality. Rather, its language is carefully parsed to state that equality is "on an equal basis with others." By so qualifying, it is my view that the Convention realizes that the State must not only consider the particular type of disability affected, but also provide for remedies that relate to the specific type of interest to be promoted and their effect of the exercise of the right on "others." In Our case, the State, through the Congress and in explicit recognition of its obligations under the Convention, enacted RA 11036, or the "Mental Health Act." As discussed, RA 11036 does not treat persons with mental health conditions (which includes the intellectually-disabled) on the same footing as persons without such conditions, in terms of the role that their informed consent bears on their access to treatment (such as vasectomy). The law sought to balance the peculiar interests of the disabled with the interests of the other members of society (which includes their parents) through a very robust and exacting procedure to ensure the exercise of informed consent.

All told, there is no clear showing as to *how* Justice Leonen has arrived at (much less, justified) his conclusion that the unenumerated liberty interest of an intellectually disabled person to procreation or parenthood warrants accordance of the "fundamental" status. The record is absolutely bereft of evidence to prove the proposition. Thus, and without prejudice to a future and proper case where the modalities/approaches/methods for its analysis and interpretation are clearly and sufficiently set forth and first presented to a trier of fact with supporting evidence, I simply cannot support his view at this time.

V

Finally, I must note the peculiar process by which the asserted "fundamental" right is sought to be established by Justice Leonen in this

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[170] Irvine, "*Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse*," 12 Law & Psychology Review 95 (1988).

[171] *In Re Grady*, 85 N.J. 235, 426 A.2d 467 (1981).

[172] *J.* Leonen Separate Opinion, p. 19.

case. Jurisprudence would show that assertion of fundamental rights, whether on due process or equal protection grounds, are usually made at the heels of a *positive* act on the part of the State, an exercise of State powers resulting to unwarranted intrusions into the personal life of individuals. Such exercises of governmental powers are typically manifested in the form of laws,[173] ordinances,[174] and executive acts[175] or issuances[176] which are alleged to, either facially or in its operation, actively discriminate and deprive individuals of certain fundamental rights.

Here, while there is an assertion of an infringement of "fundamental" liberties, there is no claim of any law, ordinance, or executive issuance of the State which has caused the infringement alleged. In fact, the specific act in issue, that is, the vasectomy conducted on Larry, was carried out by medical practitioners, upon guardian Pedro's request/consent, all of whom are private individuals. Clearly, there is no State action as to call for the guarantee of the protection of "fundamental" liberties. As so clearly held by this Court in *People v. Marti*:[177]

> That the Bill of Rights embodied in the Constitution is not meant to be invoked against acts of private individuals finds support in the deliberations of the Constitutional Commission. True, the liberties guaranteed by the fundamental law of the land must always be subject to protection. But protection against whom? Commissioner Bernas in his sponsorship speech in the Bill of Rights answers the query which he himself posed, as follows:
>
> > First, the general reflections. The protection of fundamental liberties in the essence of constitutional democracy. Protection against whom? Protection against the state. **The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals.** What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder.[178] (Emphasis supplied.)

The Bill of Rights, which Justice Leonen cites among his bases for his proposition, affords protection against possible *State* oppression against its citizens, not against an unjust or repressive conduct by *a private party* towards another, as explained by Justice Dante Tinga in his Separate Opinion in *Agabon v. National Labor Relations Commission.*[179]

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[173] See *Kabataan Party-List v. Commission on Elections*, *supra* note 88.
[174] See *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, *supra* note 31.
[175] See *Ebralinag v. Superintendent of Schools of Cebu*, *supra* note 76.
[176] See *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, April 8, 2010, 618 SCRA 32.
[177] G.R. No. 81561, January 18, 1991, 193 SCRA 57.
[178] *Id.* at 67.
[179] G.R. No. 158693, November 17, 2004, 442 SCRA 573.

Justice Leonen also seems to take the view that existing laws, as they are written, do not suitably protect the reproductive interests of the intellectually-disabled, hence, the proposed interpretation. The Court, however, has no power to dictate unto the Congress the object or subject of bills that the latter should enact into law. The judicial power to review the constitutionality of laws does not include the power to prescribe what laws to enact.[180] In any case, the alleged "gap" in the law with respect to decision-making by parents and legal guardians on matters of reproductive rights of the intellectually-disabled can be interpreted to mean that Congress did not intend to criminalize, but only regulate, said act. To reiterate, it is not the province of the Judiciary to speculate what the Legislature should have done:

> Even on the assumption that there is in fact a legislative gap caused by such an omission, neither could the Court presume otherwise and supply the details thereof, because a legislative lacuna cannot be filled by judicial fiat. Indeed, courts may not, in the guise of the interpretation, enlarge the scope of a statute and include therein situations not provided nor intended by the lawmakers. An omission at the time of the enactment, whether careless or calculated, cannot be judicially supplied however after later wisdom may recommend the inclusion. Courts are not authorized to insert into the law what they think should be in it or to supply what they think the legislature would have supplied if its attention has been called to the omission.[181]

I am afraid that Justice Leonen's proposition, however well-intentioned, is fraught with still unseen implications, and I am reminded of the following observation of Easterbrook:

> I am nervous when a case is so easy. x x x If "everyone" endorses a particular aspect of liberty, it is easy for the Court to say in the aberrant case (the one where the legislature has not acted) that the judges are the true guardians of the "spirit" of the people and may produce what an "enlightened" legislature would have done. x x x
>
> x x x [E]asy cases, popular and obviously right cases, may produce dangerous doctrines because they establish the *principle* that the Constitution allows the judges to do whatever the legislature ought to have done. x x x
>
> The easy cases allow judges to establish doctrines that collapse the judicial and legislative processes. x x x[182]

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[180] *Montesclaros v. Commission on Elections*, G.R. No. 152295, July 9, 2002, 384 SCRA 269, 281.

[181] *Romualdez v. Marcelo*, G.R. Nos. 165510-33, July 28, 2006, 497 SCRA 89, 102-103, citing *Canet v. Decena*, G.R. No. 155344, January 20, 2004, 420 SCRA 388.

[182] Easterbrook, "*Implicit and Explicit Rights of Association*," 10 Harvard Journal of Law and Public Policy 91 (1987), pp. 94-95.

With these, I would reserve judgment on the issue of whether an intellectually-disabled person has a "fundamental" right to procreate until after Congress passes, if it so decides, a law on the subject. Barring congressional action, a proper petition may still conceivably raise the issue in relation to the implementation of the Mental Health Act, whose provisions I have cited may be tested in a constitutional challenge.[183]

Accordingly, I vote to **DISMISS** the petition.

FRANCIS H. JARDELEZA
Associate Justice

[183] See *J.* Panganiban Separate Opinion in *Ople v. Torres*, G.R. No. 127685, July 23, 1998, 293 SCRA 141, 174.