

# Arguing for the Relistment of Postinor and the Right to Emergency Contraception

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## I. INTRODUCTION

The debate around contraception, and the inevitable accompanying issue of abortion, has consistently sparked passionate debate in the Philippines. Regardless of whether this is borne of the fact that the country is predominantly Roman Catholic — a reason readily proffered by many — the reality remains that, at a time when the outside world has largely set the line between contraception and abortion in ink and moved on to the more progressive issues of greater availability of, and effectively safeguarding against denial of access to, emergency contraception, the debate in the Philippines has remained stubbornly fixated at the most rudimentary level of mapping out this line.

Consequently, as other countries facing emergency contraception issues consider the precarious balance between a dispensing pharmacist's right to act in accordance with his own strong moral or religious convictions on the one hand and women's right to privacy and optimal health care, coupled with a rape victim's acknowledged prerogative to prevent an unwanted pregnancy, on the other, argument within the Philippines continues to rage on the most fundamental question of whether emergency contraception is in fact contraception or abortion in clever disguise. The issue being couched in this most basic of terms, resolution may be had via an equally straightforward discussion: first, of whether emergency contraception partakes of the nature of contraception or abortion as defined by science and the relevant experts — the medical community, and secondly, whether this characterization, shorn of the sophisticated talk around privacy, women's rights, and rights of conscientious objectors, holds water under Philippine law.

## II. OVERVIEW

Emergency contraception refers to a class of contraceptive measures which, if taken within a specified duration — most medical authorities indicate this as being 72 hours — from unprotected intercourse or failed contraception, could effectively prevent an unwanted pregnancy. Emergency contraceptives are typically pills containing high doses of the hormones estrogen and progestin found in oral contraceptives; however, the intra-uterine device, when inserted within seven days from intercourse, has also been considered an emergency contraceptive.<sup>1</sup> Emergency contraceptives have long gained

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1. Center for Reproductive Rights, *Governments Worldwide Put Emergency Contraception into Women's Hands: A Global Review of Laws and Policies*, at 2, available at [http://www.reproductiverights.org/pdf/pub\\_bp\\_govtswwec.pdf](http://www.reproductiverights.org/pdf/pub_bp_govtswwec.pdf) (last accessed Mar. 26, 2008) (citing PATH, *Resources for Emergency Contraception, A Toolkit, Module A: Information for Policy Makers A-55* (2004), available at [http://www.cecinfo.org/publications/PDFs/resources/Toolkit\\_ModuleA\\_InfoPolicyMakers.pdf](http://www.cecinfo.org/publications/PDFs/resources/Toolkit_ModuleA_InfoPolicyMakers.pdf); International Consortium for Emergency Contraception (ICEC), *What is Emergency Contraception?*,

global acceptance, as over 140 countries have registered emergency contraceptives as “safe and effective” methods of preventing pregnancy,<sup>2</sup> and emergency contraceptive formulations were added to the World Health Organization’s Model List of Essential Drugs in 1995 and 1997.<sup>3</sup>

*A. The Pregnancy Cycle and Emergency Contraceptives*

The human female reproductive system is an intricate network wired for periodic ovulation — a cycle that sets the stage for potential pregnancy. The brain’s hypothalamus signals commencement of the cycle beginning with the production of various hormones, and these in turn act on the ovary which contains ova- or egg-bearing follicles.<sup>4</sup> As the relevant follicle grows in preparation for the release of the ovum, estrogen produced by the ovary likewise causes other changes within the system, among which is the thickening of the uterus lining called the endometrium. When the mature ovum is released, the remaining follicle produces progesterone, preparing the endometrium for possible implantation of a fertilized ovum. If fertilization does not occur, blood flow to the endometrium is interrupted, resulting in menstruation.<sup>5</sup>

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*available at* <http://www.cecinfo.org/html/fea-what-is-ec.htm> (last accessed Mar. 26, 2008)) [hereinafter Center for Reproductive Rights, Governments Worldwide].

2. Clarita Rita A. Padilla, Position Paper on Levonorgestrel 1.5 mg as Emergency Contraceptive Pill, *Upholding Women’s Right to Levonorgestrel as Emergency Contraceptive Pill*, at 3 (unpublished manuscript on file with the author) (citing ICEC, EC Status and Availability, *available at* <http://www.cecinfo.org/database/pill/viewAllCountry.php>; NOT-2-LATE.com, The Emergency Contraception Website, *available at* <http://www.ec.princeton.edu>; International Planned Parenthood Federation, Directory of Hormonal Contraceptives, *available at* [http://contraceptive.ippf.org/\(ojzjzwj2kylxp5541lljpuj\)/introduction.aspx](http://contraceptive.ippf.org/(ojzjzwj2kylxp5541lljpuj)/introduction.aspx) (last accessed Mar. 26, 2008)).
3. *Id.* at 2 (citing Elisa Wells & Michele Burns, ICEC, Expanding Global Access to Emergency Contraception: A Collaborative Approach to Meeting Women’s Needs, at 6, *available at* <http://www.cecinfo.org/files/Expanding-Global-Access-to%20EC.rtf>).
4. See, Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 39 (2006) [hereinafter Collins]. More specifically, the hypothalamus produces the Gonadotropin-releasing hormone (GnRH) which in turn stimulates the production of both the follicle-stimulating hormone (FSH) and luteinizing hormone (LH). The FSH and LH thereupon signal the ovary’s follicle to prepare for the eventual release of an ovum.
5. *Id.* at 39 (citing ROBERT A. HATCHER, *ET AL.*, CONTRACEPTIVE TECHNOLOGY 70 (17d ed. 1998)).

Fertilization occurs when the sperm permeates the ovum, whereupon the fertilized ovum begins to divide into multiple cells called blastomeres. When there are 50 to 60 blastomeres, the fertilized ovum, now called a blastocyst, is ready for implantation.<sup>6</sup>

Implantation refers to the stage where “the blastocyst burrows into the lining of the uterus and begins to differentiate into cells that will form the placenta..., as well as the embryo.”<sup>7</sup> Medical studies<sup>8</sup> and authorities recently revealed that a number of factors<sup>9</sup> may adversely affect implantation, and that “[p]roblems with implantation occur more often than many realize.”<sup>10</sup> It is

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6. *Id.* at 40 (citing JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 893-20 (18d ed. 1989)).
  7. *Id.* (citing JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 40-41 (18d ed. 1989)).
  8. *Id.* at 40-41 (citing L. L. Penney, Unexplained Fertility, *available at* <http://www.fertilitynetwork.com/articles/articles-unexplained.htm> (last accessed Mar. 26, 2008); Serena H. Chen, Multiple Births: Risks and Rewards, *available at* [http://www.resolve.org/site/PageServer?pagename=pubs\\_mb](http://www.resolve.org/site/PageServer?pagename=pubs_mb)). Specifically, developments in the in vitro fertilization process have revealed that the implantation rate is generally low. In the United States (U.S.), a report from the Center for Disease Control and Prevention indicates the implantation success rate to be below 26%.
  9. *Id.* at 41 (citing Jerome H. Check & Robert Wood Johnson, *Support for the Contention That Sperm With Abnormal Chromatin Structure Assays are Associated With Reduced Embryo Implantation Potential*, 20 HUM. REPROD. 840, 840 (2005); L.C. Schulz & E.P. Widmaier, *The Effect of Leptin on Mouse Trophoblast Cell Invasion*, 71 BIOLOGY OF REPROD. 1963, 1963 (2004); Ernest Hung Yu Ng, *et al.*, *Comparison of endometrial and sub endometrial blood flow measured by three-dimensional power Doppler ultrasound between stimulated and natural cycles in the same patients*, 19 HUM. REPROD. 2385, 2385 (2004); Linda C. Giudice, *Elucidating Endometrial Function in the Post-Genomic Era*, 9 HUM. REPROD. UPDATE 223, 223 (2003); J.C. Huang, *et al.*, *Prostacyclin Enhances the Implantation and Live Birth Potentials of Mouse Embryos*, 19 HUM. REPROD. 1856, 1856-57 (2004); J.C. Huang, *et al.*, *Prostacyclin Enhances Embryo Hatching but not Sperm Motility*, 18 HUM. REPROD. 2582, 2588 (2003)). These have been identified to include the quality of the fertilizing sperm, the presence or absence of leptin (a protein hormone which affects body weight, metabolism and reproductive function), blood-flow, genetic characteristics and thickness of the endometrium, as well as prostacyclin (a chemical produced by the body that dilates blood vessels) production.
  10. Collins, *supra* note 4, at 41 (citing Serena H. Chen, Multiple Births: Risks and Rewards, [http://www.resolve.org/site/PageServer?pagename=pubs\\_mb](http://www.resolve.org/site/PageServer?pagename=pubs_mb) (last accessed Mar. 26, 2008)).

estimated that an optimally fertile population will experience about a 25% preembryo loss, half of which is attributable to unsuccessful implantation.<sup>11</sup>

The crux of the controversy surrounding emergency contraceptives arises from varied perspectives on when conception actually occurs. The predominant belief in the Christian (notably the Roman Catholic) community is that life begins at the point of fertilization, which is equated with conception.<sup>12</sup> Following this view, any intervention after fertilization is deemed to have an abortive effect. The consensus in the medical community, however, is that conception is a process that is completed only upon successful implantation; consequently, emergency contraceptives only prevent pregnancy and cannot be properly classified as an abortifacient.<sup>13</sup> On this premise, any measure taken prior to complete implantation is characterized to be contraceptive (as opposed to abortive) in nature.

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11. *Id.* (citing JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 896 (18d ed. 1989)).
  12. *See*, Leslie C. Griffin, *Conscience and Emergency Contraception*, 6 HOUS. J. HEALTH L. & POL'Y 299, 300 (2006).
  13. Padilla, *supra* note 2, at 2 (citing EDWARD C. HUGHES, OBSTETRIC-GYNECOLOGIC TERMINOLOGY 299 (1972); JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 664 (19d ed. 1993)); Brittany L. Grimes, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact Upon Pharmacists, Consumers and Conscience Clauses*, 41 GA. L. REV. 1395, 1398 (2007) (citing Karissa Eide, Comment, *Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds?*, 42 CAL. W. L. REV. 121, 125 (2005)); Briana C. Hill, Note, *Widening the Battlefield: Using Emergency Contraception to Get from Abortion to Birth Control*, 16 UCLA WOMEN'S L.J. 281, 287 (2007) (citing United States Food and Drug Administration, *Prescription Drug Products: Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception* 62 Fed. Reg. 8610 (1997)); *see*, Center for Reproductive Rights, *Governments Worldwide*, *supra* note 1, at 2 (citing ICEC, *Policy Statement on Mechanism of Action, How do Emergency Contraceptives Work to Prevent Pregnancy?* (2003), available at <http://www.cecinfo.org/files/ICEC%20-%20Mechanism%20of%20Action%20Policy%20Statement%202003.pdf>); World Health Organization (WHO) Department of Reproductive Health and Research (HRP), *Fact Sheet, Levonorgestrel for emergency contraception*, at 1 (Oct. 2005), at [http://www.who.int/reproductivehealth/family\\_planning/docs/ec\\_factsheet.pdf](http://www.who.int/reproductivehealth/family_planning/docs/ec_factsheet.pdf) (last accessed Mar. 26, 2008) [hereinafter WHO-HRP]; Heather Rae Skeeles, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?* 60 WASH. & LEE L. REV. 1007, 1013 (Summer 2003) (citing American College of Obstetricians & Gynecologists, *Statement on Contraceptive Methods* (2003), available at <http://www.acog.org/fromhome/departments/deptnotice.cfm?recno=11&bulletin=600>).

B. *Postinor in the Philippines*

Postinor, commonly referred to as the “morning after” pill, is an emergency contraceptive containing Levonorgestrel, which has been shown to prevent ovulation and which studies indicate is able to substantially reduce a woman’s chance of pregnancy by 60–90 percent.<sup>14</sup> In the Philippines, Postinor was made available upon approval by the Bureau of Food and Drugs (BFAD) in April 2000 for limited use to prevent unwanted pregnancies arising from rape or sexual assault.<sup>15</sup> In May 2001, however, acting on a letter-complaint filed by Abaypamilya Foundation, Inc. (Abaypamilya), a pro-life, pro-family organization, alleging that Postinor is actually an abortifacient and its sale and distribution unconstitutional, the BFAD delisted Postinor,<sup>16</sup> recalled all inventories from pharmacy shelves and warehouses, and prohibited any further importation, prescription or sale.<sup>17</sup>

Postinor was approved by BFAD for limited availability in the Philippines from government hospitals and women- and child-protection units<sup>18</sup> until the said letter-complaint filed by Abaypamilya sought recall of Postinor’s Certificate of Product Registration. Citing Postinor’s effect of preventing implantation of a fertilized ovum to the uterus, as differentiated from that of a common contraceptive which prevents fertilization at the onset, Abaypamilya asserted that BFAD’s approval and registration of the drug went against the constitutional mandate to protect life from conception.<sup>19</sup> Acting favorably on the complaint, BFAD issued Bureau Circular No. 18, Series of 2001, delisting Postinor and cancelling its Certificate of Product Registration. BFAD took further measures by

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14. WHO-HRP, *supra* note at 13, at 1.

15. Patrick Goodenough, *Pro-Life Victory as Philippines Bans ‘Morning-After Pill’*, available at <http://www.cnsnews.com/ViewForeignBureaus.asp?vPage=%5CForeignBureaus%5Carchive%5C200201%5CFOR20020108a.html> (last accessed Mar. 26, 2008); Foundation for Adolescent Development (FAD), DOH, Church Stand on Postinor Endangers Women’s Lives, <http://www.teenfad.ph/library/nonfad/churchvspostinor.htm> (last accessed Mar. 26, 2008) [hereinafter FAD].

16. Bureau of Food and Drug, Bureau Circular No. 18, s. 2001, Dec. 7, 2001, [hereinafter BFAD Circular].

17. Goodenough, *supra* note 15; FAD, *supra* note 15.

18. FAD, *supra* note 15; Deedee Sta. Cruz-Espina, *Beyond Numbers: Recognizing women’s reproductive rights-and ensuring their health*, MEDICAL OBSERVER, Sep. 2005, available at <http://www.medobserver.com/sep2005/ifbeyond.html> (last accessed Mar. 26, 2008).

19. Goodenough, *supra* note 15.

prohibiting — on stiff penalties — the importation, sale, distribution, and use of the Postinor, as well as directing its recall from local establishments.<sup>20</sup>

Notwithstanding a Special Committee recommendation to BFAD on 1 December 2003 that Postinor is not an abortifacient,<sup>21</sup> Postinor has not since been re-listed nor otherwise made available for sale and distribution.

### III. ABORTION UNDER PHILIPPINE LAW AND JURISPRUDENCE

As Postinor was delisted by the BFAD on the ground of it being an abortifacient,<sup>22</sup> an examination of Philippine law and jurisprudence on abortion will reveal whether such delistment is justified.

#### A. *The 1987 Constitution*

Protection to the unborn from conception is constitutionally mandated under article II, section 12:

Sec. 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. *It shall equally protect the life of the mother and the life of the unborn from conception.* The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.<sup>23</sup>

This state policy lies at the core of Philippine public policy against abortion, as it was adopted primarily to foreclose the possibility of a doctrine similar to that in *Roe v. Wade*,<sup>24</sup> which allowed abortion at the mother's option any time during the first six months of pregnancy,<sup>25</sup> from taking root in the Philippines.<sup>26</sup> That said, foremost constitutionalist and 1986 Constitutional Commission delegate Joaquin G. Bernas, S.J. explains that the provision “does not assert that the life of the unborn is placed on exactly the

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20. See, BFAD Circular, *supra* note 16; Goodenough, *supra* note 15; FAD *supra* note 15.

21. Padilla, *supra* note 2, at 3.

22. Cruz-Espina, *supra* note 18.

23. PHIL. CONST. art II, § 12 (emphasis supplied).

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. *Id.* *Roe* uses the viability of the fetus as the time to determine the legality of the abortion. Viability is understood as the capability of sustaining life. LUIS B. REYES, *THE REVISED PENAL CODE: CRIMINAL LAW BOOK TWO* 488 (15d ed. 2001).

26. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 85 (2003 ed.) (citing I RECORD of the 1986 Constitutional Commission 689-98 & 721-23; IV RECORD 596-602, 668-700 & 705-61).

same level as the life of the mother. ... [W]hen necessary to save the life of the mother, it may be necessary and legitimate to sacrifice the life of the unborn.”<sup>27</sup> In these cases of therapeutic abortion, the physician incurs no liability.<sup>28</sup> Abortion may not, however, be justified “merely to save the mother from emotional suffering or to spare the child from a life of poverty[,]... which can be attended to through other means such as availing of the resources of welfare agencies.”<sup>29</sup>

What the Constitution does not clarify, however, is the point at which conception occurs, or when there is an “unborn child” to speak of. Bernas avers that “The intention is to protect life from its beginning, and the *assumption* is that human life begins at conception and that conception takes place at fertilization,”<sup>30</sup> and that, although there is “no attempt to pinpoint the exact moment when conception takes place,”<sup>31</sup> a safer approach must be adopted in the protection of life.<sup>32</sup> He however concedes that, despite this assumption, “*the definition of conception can be a matter for science to specify.*”<sup>33</sup> As previously mentioned and as will be discussed in subsequent parts of the article, the consensus in the medical community is that conception begins after implantation of the fertilized egg in the uterine wall.<sup>34</sup> Relevantly,

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27. *Id.* at 84; *see*, FIGO Committee for the Ethical Aspects of Human Reproduction and Women’s Health, 48 GYNECOL. OBSTET. INVEST. 73, 76 (1999), *available at* <http://content.karger.com/ProdukteDB/produkte.asp?Aktion=ShowPDF&ProduktNr=223845&Ausgabe=225054&ArtikelNr=10142> (last accessed Mar. 26, 2008) (*e.g.* ectopic pregnancies and malignant diseases) [hereinafter FIGO]; Center for Reproductive Rights, Fact Sheet, The World’s Abortion Laws, at 2, *available at* [http://www.reproductiverights.org/pdf/pub\\_fac\\_abortionlaws.pdf](http://www.reproductiverights.org/pdf/pub_fac_abortionlaws.pdf) (last accessed Mar. 26, 2008); *see also*, *Geluz v. Court of Appeals*, 2 SCRA 801, 805 (1961) (In an *obiter dictum*, the Court stated that an abortion *without medical necessity* is criminal and morally reprehensible. This was, however, a civil case for damages.).
28. ANTONIO L. GREGORIO, FUNDAMENTALS OF CRIMINAL LAW REVIEW 654 (9d ed. 1997) (citing II FERIA & GREGORIO 315); FLORENZ D. REGALADO, CRIMINAL LAW CONSPECTUS 480 (2003) (citing *People v. Johnson*, 53 Colo. 224; *People v. Beasley*, 89 Ill. 571 (1878)).
29. BERNAS, *supra* note 26, at 84-85.
30. *Id.* at 85 (emphasis supplied).
31. *Id.*
32. *Id.* (citing IV RECORD 799-811). He explains that this is a Catholic approach to the issue as the provision was principally advocated for by Bishop Bacani and Commissioner Bernardo.
33. JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT: NOTES AND CASES PART I 43 (2005 ed.) (emphasis supplied).
34. Padilla, *supra* note 2, at 2 (citing EDWARD C. HUGHES, OBSTETRIC-GYNECOLOGIC TERMINOLOGY 299 (1972); JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 664 (19d ed. 1993)).



conception has been defined as “[t]he onset of pregnancy marked by implantation of a blastocyst in the endometrium, and formation of a viable zygote.”<sup>35</sup>

*B. The 1950 Civil Code*

Notwithstanding extensive constitutional protection of the unborn, the Civil Code clarifies that the legal personality begins at birth.<sup>36</sup> Under this Code, however, a conceived child is accorded presumptive or provisional personality for all purposes favorable to it, subject to its eventual birth under specified conditions.<sup>37</sup> Article 41 states that “the *fetus* is considered born if it is alive at the time it is completely delivered from the mother’s womb.”<sup>38</sup> Nevertheless, the fetus is not considered born if it had an intra-uterine life of less than seven months and it dies within 24 hours after its complete delivery.<sup>39</sup> To illustrate these articles, the Court has, for example, held that the unborn has a right to support under the provisional personality provided by the Civil Code.<sup>40</sup> In contrast, the Court has also held that an action for pecuniary damages on account of personal injury or death due to an abortion may not be instituted on behalf of an unborn child by its parents as “an unborn fetus is not endowed with legal personality ... [and is] incapable of having rights and obligations.”<sup>41</sup> Establishing birth as the point of reference for commencement of legal personality and vesting to the conceived child or the fetus which is subsequently born presumptive personality, however, still fails to satisfactorily elucidate the line between abortion and conception under Philippine law.

*C. The Revised Penal Code and Republic Act No. 4729*

While the heart of the policy against abortion is found in the constitutional protection of the unborn, it is Philippine criminal law which operationalizes

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35. JOSEPH C. SEGEN, M.D., *CONCISE DICTIONARY OF MODERN MEDICINE* 159 (2006).

36. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 40 (1950).

37. *Id.* art. 40; *see*, I EDGARDO L. PARAS, *CIVIL CODE OF THE PHILIPPINES ANNOTATED* 228 (1994).

38. CIVIL CODE, art. 41 (emphasis supplied).

39. *Id.*

40. *Quimiguing v. Icao*, 34 SCRA 132 (1970).

41. *Geluz v. Court of Appeals*, 2 SCRA 801, 803 (1961). The Court also stated that, in an abortion, the provisional personality of a fetus cannot be invoked as the Civil Code expressly imposes the condition that the child be subsequently born alive. In an abortion, the child is dead when separated from the mother’s womb. *Id.* at 804.

it. The Revised Penal Code criminalizes intentional abortion,<sup>42</sup> unintentional abortion,<sup>43</sup> abortion practiced by the woman herself or by her parents,<sup>44</sup> and abortion practiced by a physician or midwife or through the dispensing of abortives.<sup>45</sup> While detailing the variants of abortion as a criminal offense, the Revised Penal Code nevertheless fails to expressly define the act of abortion, merely hinting at the same by reference at times to “pregnancy.”

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42. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 256 (1930).

Art. 256. *Intentional abortion.* — Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusion temporal*, if he shall use any violence upon the person of the pregnant woman.
2. The penalty of *prision mayor* if, without using violence, he shall act without the consent of the woman.
3. The penalty of *prision correccional* in its medium and maximum periods, if the woman shall have consented.

43. *Id.* art. 257.

Art. 257. *Unintentional abortion.* — The penalty of *prision correccional* in its minimum and medium period shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

44. *Id.* art. 258.

Art. 258. *Abortion practiced by the woman herself or by her parents.* — The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon a woman who shall practice abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of *prision correccional* in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor, the offenders shall suffer the penalty of *prision correccional* in its medium and maximum periods.

45. *Id.* art. 259.

Art. 259. *Abortion practiced by a physician or midwife and dispensing of abortives.* — The penalties provided in Article 256 shall be imposed in its maximum period, respectively, upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos.

Abortion has, however, been defined as “the willful killing of the foetus in the uterus, or the violent expulsion of the foetus from the maternal womb which *results in the death of the foetus*.”<sup>46</sup> Commentators have also referred to the death of the fetus as a requisite for the consummation of an abortion.<sup>47</sup> This requisite has been affirmed by jurisprudence.<sup>48</sup> It must be noted that these definitions commonly refer to the death of a *fetus*, thus, referring to the period in the pregnancy cycle after the embryonic stage, beginning from the *seventh or eighth week after fertilization*,<sup>49</sup> a stage of gestation past the 72-hour, or even 120-hour, window after intercourse within which emergency contraception is capable of being effective. Philippine jurisprudence has, thus far, been limited to unintentional abortion; and in all these cases, the Court referred to a fetus and to a woman who was at least three months pregnant (most cases involved a woman already in an advanced stage of pregnancy).<sup>50</sup> This suggests that abortion is committed when there is already a fetus, or at least that the seventh week of development after fertilization has been reached.

As for contraception, there is no law criminalizing its use. Republic Act No. 4729<sup>51</sup> merely regulates the sale, dispensation, and distribution of contraceptive drugs and devices. It penalizes the sale, dispensation, and distribution of such drugs and devices by a person, partnership, or corporation unless by a duly licensed drug store or pharmaceutical company

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46. REYES, *supra* note 25, at 488.

47. *See e.g.*, REYES, *supra* note 25, at 488; JOSE N. NOLLEDO, *THE REVISED PENAL CODE ANNOTATED* 354 (14d ed. 2006); GREGORIO, *supra* note 28, at 652.

48. *See e.g.*, *People v. Salufrania*, 159 SCRA 401 (1988) (citing LUIS B. REYES, *THE REVISED PENAL CODE: CRIMINAL LAW BOOK TWO* 486 (12d ed. 1981)).

49. SEGEN, *supra* note 35, at 244.

50. *See e.g.*, *U.S. v. Boston*, 12 Phil. 134 (1908) (This case is an example of abortion through the administration of an abortive and involved the expulsion of a fetus three months in advance after the administration of a potion of herbs.); *U.S. v. Jeffrey*, 15 Phil. 391 (1910) (where the woman was three months pregnant); *People v. Genoves*, 61 Phil. 382 (1935) (where no mention was made as to what stage the woman's pregnancy was but referred to the premature birth of one twin and the death of the other upon the mother's death); *Salufrania*, 159 SCRA at 419 (where the woman was seven to eight months pregnant; *People v. Desalisa*, 229 SCRA 35 (1994) (where the woman was five months pregnant); *People v. Flores*, 239 SCRA 83 (1994) (where the woman was also five months pregnant); *People v. Villanueva*, 242 SCRA 47 (1995) (where the woman was six months pregnant); *People v. Lopez*, 344 SCRA 756 (2000) (where the woman was nine months pregnant); *People v. Robiños*, 382 SCRA 587 (2002) (where the woman was six months pregnant).

51. An Act to Regulate the Sale, Dispensation, and/or Distribution of Contraceptive Drugs and Devices, Republic Act No. 4729 (1966).

and with the prescription of a qualified medical practitioner.<sup>52</sup> Under this law, a contraceptive drug is defined as “any medicine, drug, chemical, or portion which is used exclusively for the purpose of preventing fertilization of the female ovum,”<sup>53</sup> and a contraceptive device as “any instrument, device, material, or agent introduced into the female reproductive system for the primary purpose of preventing conception.”<sup>54</sup> Although the definition of a contraceptive drug as one preventing fertilization seemingly casts doubt upon the inclusion of emergency contraception in this category – as emergency contraception prevents not just ovulation and fertilization, but also implantation (after fertilization)<sup>55</sup> – it is important to note this definition is meant to be read relative to regulation of the sale, dispensation, and distribution of certain drugs, and thus may not be pertinent to define contraception *vis-à-vis* abortion. Further, the definition of a contraceptive device as “preventing conception” also falls into ambiguity with the use of the word “conception.”

#### D. *The Child and Youth Welfare Code*

Proceeding to special laws, article 3 of the Child and Youth Welfare Code<sup>56</sup> enumerates the rights of a child and states that, “Every child is endowed with the dignity and worth of a human being from the moment of his *conception*, as generally accepted in medical parlance, and has, therefore, the right to be born well.”<sup>57</sup> Once again, the point of reference is conception. In this case, however, conception is expressly referenced to its medically-accepted definition, which has been previously established as the period beginning from implantation. The other provisions of the law, however, do not provide much value as they uniformly refer one to the Civil Code provisions

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52. *Id.* § 1.

53. *Id.* § 2 (a).

54. *Id.* § 2 (b).

55. Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Politics in the United States*, 29 RUTGERS L. REC. 1, 8 (2005) (citing Scientific Advances in Reproductive Health: Non-Surgical Abortion and Emergency Contraception, available at <http://www.lawrecord.com/archive/pdfs/29rlr1.pdf> (last accessed Mar. 26, 2008)).

56. The Child and Youth Welfare Code, Presidential Decree No. 603 (1974).

57. *Id.* art. 3 (1) (emphasis supplied).

as regards commencement of civil personality<sup>58</sup> and the Revised Penal Code in cases of abortion.<sup>59</sup>

Examining the current state of Philippine law, the intent to establish a policy against abortion is clear. Nevertheless, when exactly an abortion occurs under the law is ambiguous at best. There is no express constitutional declaration of when conception occurs and other laws on abortion and conception refer either to the medical definition or advanced stages of gestation. The ambiguity seems to stem from use of the term “conception” as the starting point of the constitutional protection of the unborn. “[N]ew embryological data[, new medical techniques, such as menstrual extraction, the ‘morning after’ pill, implantation of embryos, artificial insemination, and even artificial wombs] ... purport to indicate that conception is a ‘process’ over time, rather than an event.”<sup>60</sup> A look at abortion laws worldwide may shed light on this ambiguity.

#### IV. ABORTION UNDER FOREIGN LAWS

“Abortion laws around the world recognize the distinction between abortion and contraception.”<sup>61</sup> In many cases, this distinction is implied in the relevant law’s reference to advanced stages of fetal gestation, to the termination of a “pregnancy,” or to causing a “miscarriage.” In common medical and legal usage, these terms assume that implantation of the fertilized egg to the uterine wall has already occurred.<sup>62</sup>

A few laws expressly refer to abortion or pregnancy as being a procedure post-implantation. “In a federal regulation, the United States government also defines pregnancy as beginning with the confirmation of implantation.”<sup>63</sup> In the Asia-Pacific Region, New Zealand, for example, expressly defines abortion as “the medical or surgical procedure carried out

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58. *Id.* art. 5 (“[t]he civil personality of the child shall commence from the time of his conception, for all purposes favorable to him, subject to the requirements of article 41 of the Civil Code.”).

59. *Id.* art. 6 (“[t]he abortion of a conceived child, whether such act be intentional or not, shall be governed by the pertinent provisions of the Revised Penal Code.”).

60. Samantha Harper, Note, “*The Morning After*”: *How Far Can States Go to Restrict Access to Emergency Contraception*, 38 COLUM. HUM. RTS. L. REV. 221, n.143 (2006) (citing *Roe v. Wade*, 410 U.S. 113, 161 (1973)).

61. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 3.

62. *Id.*

63. *Id.* at 4 (citing PART 46 - PROTECTION OF HUMAN SUBJECTS, 45 CFR § 46.203 (U.S.), available at [http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr\\_2004/octqtr/pdf/45cfr46.101.pdf](http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr_2004/octqtr/pdf/45cfr46.101.pdf) (last accessed Mar. 26, 2008)).

for the purpose of procuring the destruction or death of an embryo or fetus *after implantation*.”<sup>64</sup> Similarly, in Europe, Germany explicitly excludes from the definition of abortion “procedures whose effect occurs *before the fertilized egg settles in the uterine wall*,”<sup>65</sup> and Dutch abortion law “provides that ‘termination of pregnancy shall *not* mean the application of a method *to prevent the nidation [implantation] of a fertilized ovum in the uterus*.”<sup>66</sup> In Africa, Liberia excludes from its abortion law “drugs or other substances for *avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization*,”<sup>67</sup> and “Zimbabwe defines pregnancy as ‘an intra-uterine pregnancy where the foetus is alive.’”<sup>68</sup>

Numerous other laws do not expressly define abortion and/or pregnancy but refer to advanced stages of gestation post-implantation (such as the termination of a “pregnancy” or “procurement of a miscarriage”).<sup>69</sup> Japan, Costa Rica, Bolivia, and Namibia, for example, refer to a “fetus” in their abortion laws.<sup>70</sup> To illustrate, Japan defines abortion as “the artificial discharge of a fetus and its appendages from the mother during the period that a fetus is unable to keep its life outside the mother’s body.”<sup>71</sup> Fetus, medically-defined, is “the unborn offspring in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth,”<sup>72</sup> a period after implantation.

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64. *Id.* (citing CONTRACEPTION, STERILIZATION AND ABORTION ACT 1977, No. 112, art. 2 (N.Z.) (emphasis supplied)).

65. *Id.* (citing GERMAN PENAL CODE, art. 218 (F.R.G.) (unofficial translation, emphasis supplied)).

66. *Id.* (citing LAW OF MAY 1, 1981, Stb. 257 (Neth.), *translated in* 32 INT’L DIG. HEALTH LEGIS. 442 (1981) (emphasis supplied)).

67. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 3 (citing AMENDMENT TO CRIMINAL CODE, Title 26, ch.16, art. 6 (Liber.), *reprinted in* United Nations Fund for Population Activities, ANN. REV. POP. L. 16 (1977) (emphasis added)).

68. *Id.* (citing TERMINATION OF PREGNANCY ACT, ch. 15:10, art. 2 (Zimb.)).

69. *Id.* at 4 (citing CHRISTOPHER TIETZE & STANLEY K. HENSHAW, INDUCED ABORTION, A WORLD REVIEW, 1986 5 (1986)).

70. Harvard Law School, Annual Review of Population Law, *available at* [http://www.law.harvard.edu/programs/annual\\_review/](http://www.law.harvard.edu/programs/annual_review/) (last accessed Feb. 18, 2008) [hereinafter Harvard Law School]. *Feto* is the Spanish word for fetus. EDWIN B. WILLIAMS, THE BANTAM NEW COLLEGE REVISED SPANISH & ENGLISH DICTIONARY 158 (1989).

71. Harvard Law School, *supra* note 70 (citing THE MATERNAL PROTECTION LAW (Japan)).

72. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 684 (30d ed. 2003).

Other abortion laws, such as those of the Republic of Korea, Cuba, and Guyana, allude to an “embryo.”<sup>73</sup> For instance, in the Republic of Korea, abortion is defined as “an operation to draw off artificially an embryo and things attached to it out of the mother’s body at the time the embryo is unable to maintain its life outside the mother’s womb.”<sup>74</sup> An “embryo” refers to the “the developing organism from the fourth day after fertilization to the end of the eighth week.”<sup>75</sup> If these laws intended to refer to the period after fertilization but prior to implantation, reference to an embryo would be inaccurate, and they could have easily referred to a zygote,<sup>76</sup> or a preembryo.<sup>77</sup>

Other countries use the terms “miscarriage,” “with child,” “unborn child,” and “loss of a child.” Examples are Bangladesh, Mauritius, Gambia, Jamaica, Kenya, Tanzania, and Uganda.<sup>78</sup> “Miscarriage” refers to a stage after the fertilized egg has been implanted in the uterus, as no “carriage” has occurred prior to this phase.<sup>79</sup> The other terms are not medical, but “child,” in common usage as well as in medical and legal terms, suggests an advanced stage of human development.<sup>80</sup>

Some abortion laws explicitly state that abortion or pregnancy occurs after implantation. Many other abortion laws imply this in their reference to advanced stages of fetal gestation, to the termination of a “pregnancy,” or to

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73. Harvard Law School, *supra* note 70. *Embrion* is the Spanish word for embryo. WILLIAMS, *supra* note 70, at 127;
74. Harvard Law School, *supra* note 70 (citing, MOTHER-CHILD HEALTH ACT (S. Korea), Current Laws of the Republic of Korea, Release No. 16, 1990, at 3456[1]-[7], available at <http://annualreview.law.harvard.edu/population/abortion/korea.abo.htm> (last accessed, Mar. 26, 2008)).
75. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 603 (30d ed. 2003).
76. *Id.* at 2080 (It is “the fertilized ovum; the cell resulting from union of a male and a female gamete (sperm and ovum)”); see also, T.W. SADLER, LANGMAN’S MEDICAL EMBRYOLOGY 3 (8d ed. 2000).
77. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 75, at 1500 (“denoting the early stages of development of the zygote, during the first three days after fertilization.”).
78. Harvard Law School, *supra* note 70.
79. Emily Jackson, Reproduction, Genetics and the Rule of Law, available at <http://www.fathom.com/course/21701786/session2.html> (last accessed Mar. 26, 2008); Penny Oakeley, M.D., *emergency contraception*, WISE-UP, May/June 2001, at 2, available at <http://www.wandsworth-pct.nhs.uk/shared/pdf/wisep/wisep052001.pdf> (last accessed Mar. 26, 2008).
80. See e.g., WEBSTER’S ONLINE DICTIONARY, available at <http://www.websters-online-dictionary.org/definition/child> (last accessed Feb. 18, 2008); SEGEN, *supra* note 35, at 135; JAMES E. CLAPP, RANDOM HOUSE WEBSTER’S POCKET LEGAL DICTIONARY 40 (1996).

causing a “miscarriage.” In common medical and legal usage, these terms assume that implantation of the fertilized egg to the uterine wall has already occurred.<sup>81</sup> This is fully and precisely consistent with the scientific and medical definition of abortion as being “the termination of pregnancy using drugs or surgical intervention after implantation and before the conceptus has become independently viable,”<sup>82</sup> as well as the legal definition of abortion as being the “artificially induced expulsion of an embryo or fetus.”<sup>83</sup>

## V. THE GLOBAL VIEW ON EMERGENCY CONTRACEPTION

### A. *The World Health Organization and the Medical Community*

Medically, pregnancy has been established to occur only after implantation of the fertilized egg in the uterine wall is complete, a process beginning at the end of the first week after fertilization.<sup>84</sup> In fact, “[t]here is no medical test that can detect the presence of a fertilized egg. *Pregnancy tests* detect

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81. *Id.*

82. FIGO, *supra* note 27, at 76; Tricia K. Fujikawa Lee, Comment, *Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy*, 27 U. HAW. L. REV. 65, 74 (2004) (citing Aileen Pincus, FDA Panel endorses ‘morning after’ pill, CNN, June 29, 1996, available at <http://www.cnn.com/HEALTH/9606/29/nfm/contraception/index.html> (last accessed Mar. 26, 2008)).

83. *Id.* (citing BLACK’S LAW DICTIONARY 4 (7d ed. 2000)).

84. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 2 (citing JACK A. PRITCHARD, *ET AL.*, WILLIAMS OBSTETRICS 116, 165 & 664 (19d ed. 1993)). Pregnancy has been defined as “the period of time from confirmation of implantation of a fertilized egg within the uterus ... until the fetus has entirely left the uterus.” SEGEN, *supra* note 35, at 531. *See also*, Harper, *supra* note 60, at 243 & 245 (citing Rachel Benson Gold, The Implications of Defining When a Woman is Pregnant, Guttmacher Report on Public Policy (2005), available at <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html>); Collins, *supra* note 4, at 44 (citing American College of Obstetricians & Gynecologists Committee on Ethics, Preembryonic Research: History, Scientific Background, and Ethical Considerations 1, 5 & 6 (No. 136, Apr. 1994)).

The American College of Obstetricians and Gynecologists’ Committee on Ethics believes that during the first fourteen days after fertilization, the embryo lacks the ‘biologic individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype. The preembryo can thus be considered valuable but not at the same level as a human person.’ The Committee based its conclusions on the ability of the preembryo to undergo twinning, lose cells and still develop, and the tremendous percentage of preembryos lost through common malfunctions in the process.



established pregnancies, which are present *after the pre-embryo implants eight to nine days after ovulation.*"<sup>85</sup> Following the medical definition of pregnancy, "drugs that act to affect implantation or pre-implantation events would be considered contraceptives. Drugs that act to affect or impact post-implantation events would be considered abortifacients."<sup>86</sup> Emergency contraception, which may prevent ovulation, fertilization of the egg, or implantation of the fertilized egg, has thus been scientifically and clinically accepted as a contraceptive, and not an abortifacient.<sup>87</sup> It is, in reality, merely the use of a concentrated or elevated dose of ordinary birth control pills.<sup>88</sup> As opposed to RU-486, or the abortion pill, "[o]nce implantation has begun, ... [emergency contraceptive] pills are ineffective, since they cannot interfere with an existing pregnancy."<sup>89</sup>

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85. Erica S. Mellick, Comment, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 416 (2006) (emphasis supplied).

86. Harper, *supra* note 60, at 243.

87. *Id.*; see also, Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 2 (citing American College of Obstetricians and Gynecologists (ACOG), Statement on Contraceptive Methods, available at [www.acog.org/departments/dept\\_notice.cfm?recno=15&bulletin=1326](http://www.acog.org/departments/dept_notice.cfm?recno=15&bulletin=1326)); NARAL Pro-Choice America Foundation, Emergency Contraception (EC): An Important and Underutilized Contraceptive Option, at 1, available at <http://www.prochoiceamerica.org/assets/files/Birth-Control-EC-EC-underutilized.pdf> (last accessed Mar. 26, 2008) (citing, *inter alia*, ROBERT A. HATCHER, *ET AL.*, EMERGENCY CONTRACEPTION: THE NATION'S BEST KEPT SECRET 29-30 (1995)) [hereinafter NARAL]; Schaper, *supra* note 55, at 5 & 8 (citing Scientific Advances in Reproductive Health: Non-Surgical Abortion and Emergency Contraception, available at <http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1973>); Melissa Bond, *Winning the Battle, but Perhaps Losing the War: Endorsing Deregulation of Emergency Contraception at the Expense of Derogating Abortion*, 15 CARDOZO J. INT'L & COMP. L. 259, 263 & 270 (2007) (citing Susan F. Wood, Editorial, *When Politics Defeats Science*, WASH. POST, Mar. 1, 2006, at A17); Hill, *supra* note 13, at 286.

88. NARAL, *supra* note 87, at 1 (citing Press Release, Women's Capital Corporation, A New Generation of Contraception Has Arrived (July 28, 1999)).

89. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 2 (citing ICEC, Policy Statement on Mechanism of Action, How Do Emergency Contraceptive Pills Work to Prevent Pregnancy? (2003), available at <http://www.cecinfo.org/files/ICEC%20Mechanism%20of%20Action%20Policy%20Statement%202003.pdf>); see also, F. GARY CUNNINGHAM, *ET AL.*, WILLIAMS OBSTETRICS 746 (22d ed. 2005); WHO-HRP, *supra* note 13, at 2 (citing Susan F. Wood, Editorial, *When Politics Defeats Science*, WASH. POST, Mar. 1, 2006, at A17); Lee, *supra* note 82, at 67 (citing Planned Parenthood

There are marked differences between emergency contraception and the abortion pill (also known as RU-486, Mifepristone, or Mifeprex).

The abortion pill is actually several drugs used in combination. A high dose of mifepristone works to block the creation of progesterone, a hormone that is necessary to create and sustain pregnancy. Then, methotrexate "stops the further development of the pregnancy in the uterus, and misoprostol causes the uterus to contract and empty," expelling the embryo and creating an abortion.<sup>90</sup>

"Mifepristone affects post-implantation events, and will terminate an established pregnancy of up to 63 days,"<sup>91</sup> while emergency contraception is ineffective after a fertilized egg has been implanted in the uterine wall.<sup>92</sup> The function of emergency contraception is to *prevent* pregnancy after sex, while Mifepristone terminates an established pregnancy. Emergency contraception is only effective if taken within a few days after intercourse, but Mifepristone can be effective if taken within the first seven weeks succeeding sexual contact.<sup>93</sup>

The view that emergency contraception is a contraceptive, interrupting the reproductive process right before the beginning of pregnancy, and not an abortifacient, is shared by institutions such as the World Health Organization (WHO), the International Federation of Gynecology and Obstetrics (FIGO), the American College of Obstetricians and Gynecologists (ACOG), United States Department of Health and Human Services, and the United States (U.S.) Food and Drug Administration (FDA).<sup>94</sup> "Even majority of the

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Federation of America, Inc., Fact Sheet, Emergency Contraception is Not Abortion, available at <http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html> (last accessed Mar. 26, 2008)); Griffin, *supra* note 12, at 300.

90. Lynne Marie Kohm, *From Eisenstadt to Plan B: A Discussion of Conscientious Objections to Emergency Contraception*, 33 WM. MITCHELL L. REV. 787, 792 (2007) (citing Planned Parenthood Federation of America, Inc., *The Difference Between Emergency Contraception and Medication Abortion* (Dec. 2006), available at <http://www.plannedparenthood.org/files/PPFA/fact-EC-mabortion.pdf> (last accessed Mar. 26, 2008)).
91. Harper, *supra* note 60, at 225.
92. Kohm, *supra* note 90, at 792 (citing Planned Parenthood Federation of America, Inc., *The Difference Between Emergency Contraception and Medication Abortion* (Dec. 2006), available at <http://www.plannedparenthood.org/files/PPFA/fact-EC-mabortion.pdf> (last accessed Mar. 26, 2008)).
93. NARAL Pro-Choice America Foundation, *The Difference Between Emergency Contraception and Early Abortion Options (RU 486)*, available at <http://www.prochoiceamerica.org/assets/files/Birth-Control-EC-EC-Mife-difference.pdf> (last accessed Mar. 26, 2008).
94. WHO-HRP, *supra* note 13, at 1; FIGO, *supra* note 27, at 77; Harper, *supra* note 60, at 243 & 245 (citing Rachel Benson Gold, *The Implications of Defining*

members of the Special Committee created by the Bureau of Food and Drugs (BFAD) recommended in December 1, 2003 that Postinor, containing levonorgestrel, is not an abortifacient.”<sup>95</sup>

The WHO has described emergency contraception as “‘contraceptive methods that can be used by women in the first few days following unprotected intercourse to prevent an unwanted pregnancy.’”<sup>96</sup> In fact, wider access to emergency contraception is supported by more than 50 health organizations, including the WHO, the ACOG, the American Medical Association (AMA), and the American Medical Women’s Association (AMWA).<sup>97</sup> The WHO “has endorsed EC as a proven safe and effective method of modern contraception”<sup>98</sup> and has “added the combined estrogen-progestin (Yuzpe) regimen [and the levonorgestrel-only EC regimen] to the WHO *Model List of Essential Drugs*.”<sup>99</sup> The WHO has, in

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When a Woman is Pregnant, Guttmacher Report on Public Policy (2005), available at <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html> (last accessed Mar. 26, 2008)); Lee, *supra* note 82, at 74 (citing Aileen Pincus, *FDA Panel endorses ‘morning after’ pill*, CNN, June 29, 1996, available at <http://www.cnn.com/HEALTH/9606/29/nfm/contraception/index.html> (last accessed Mar. 26, 2008)); NARAL, *supra* note 87, at 2; Center for Reproductive Rights, Supplementary information on the Philippines, Scheduled for review by the U.N. Human Rights Committee during its 79th session, at 3, available at [http://www.reproductiverights.org/pdf/sl\\_Philippines\\_2003.pdf](http://www.reproductiverights.org/pdf/sl_Philippines_2003.pdf) (last accessed Mar. 26, 2008) (citing WHO, *Emergency Contraception, A Guide for Service Delivery*, Geneva, WHO/FRH/FPP/98.19 (1998)) [hereinafter Center for Reproductive Rights, Supplementary information].

95. Padilla, *supra* note 2, at 3.

96. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 2 (citing WHO, *Emergency Contraception, A Guide for Service Delivery*, Geneva, WHO/FRH/FPP/98.19 (1998)).

97. Schaper, *supra* note 55, at 13-14 (citing Salynn Boyles, *Easy Access to Morning-After Pill Backed*, available at <http://content.health.msn.com>); Center for Reproductive Rights, Supplementary information, *supra* note 94, at 3 (citing WHO, *Emergency Contraception, A Guide for Service Delivery*, Geneva, WHO/FRH/FPP/98.19 (1998)).

98. Center for Reproductive Rights, Supplementary information, *supra* note 94, at 3 (citing WHO, *Emergency Contraception, A Guide for Service Delivery*, Geneva, WHO/FRH/FPP/98.19 (1998)). ‘Moreover, EC [emergency contraception] is safe for self-medication because it is not toxic to the woman, nor to an embryo if implantation has already occurred.’ Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 7 (citing Citizen’s Petition, Food and Drug Administration, Department of Health and Human Services, Petition to Make EC available OTC (Feb. 14, 2001), at 3).

99. Center for Reproductive Rights, Supplementary information, *supra* note 94, at 6 (citing Elisa Wells & Michele Burns, Consortium for Emergency Contraception (ICEC), *Expanding Global Access to Emergency Contraception*:

particular, recommended 1.5 mg levonorgestrel as these emergency contraceptive pills “have been shown to prevent ovulation and ... did not have any detectable effect on the endometrium (uterine lining) or progesterone levels when given after ovulation.”<sup>100</sup>

### *B. Emergency Contraception under Foreign Jurisprudence*

American jurisprudence, while not having definitively ruled on when pregnancy legally begins, has, however, had occasion to rule on emergency contraception. Lower courts in the U.S. have favored the view that pregnancy begins upon implantation<sup>101</sup> and no court has, thus far, declared emergency contraception to constitute abortion.<sup>102</sup> *Margaret S. v. Edwards*<sup>103</sup> held that “‘Abortion, as it is commonly understood, does not include the IUD, the ‘morning-after’ pill, or for example, birth control pills.’”<sup>104</sup> *Brownfield v. Daniel Freeman Marina Hospital*<sup>105</sup> has likewise held that abortion laws have no application to emergency contraception, stating that “the morning-after pill was a ‘pregnancy prevention’ treatment.”<sup>106</sup> In *Charles v. Carey*,<sup>107</sup> the Seventh Circuit Court of Appeals struck down parts of an Illinois statute on the ground of being overbroad, when, in criminalizing the sale of abortifacients, it included post-fertilization forms of contraception.<sup>108</sup>

In Europe, two cases are noteworthy. In the United Kingdom, the High Court of England and Wales ruled that Emergency Contraception cannot induce a miscarriage as the embryo is not, in any way, attached to the

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A Collaborative Approach to Meeting Women’s Needs 6 (2000), available at <http://www.cecinfo.org/files/Expanding-Global-Access-to%20EC.rtf>.

100. WHO-HRP, *supra* note 13, at 1.

101. Schaper, *supra* note 55, at 8-9; see, Tony J. Kriesel, *Pharmacists and the “Morning-After Pill”*: *Creating Room for Conscience Behind the Counter*, 7 MINN. J. L. SCI. & TECH. 337, 345 (2005) (citing *Margaret S. v. Edwards*, 488 F. Supp.181, 190-92 (E.D. La. 1980); *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405, 408-13 (Cal. Ct. App. 1989)).

102. Harper, *supra* note 60, at 246 (citing Bradley E. Cunningham, Note, *Implications of FDA Approval of RU-486: Regulating Mifepristone within the Bounds of the Constitution*, 90 KY. L.J. 229 (2002)).

103. *Margaret S. v. Edwards*, 488 F. Supp.181 (E.D. La. 1980).

104. *Id.* at 191.

105. *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405 (Cal. Ct. App. 1989).

106. *Id.* at 413.

107. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

108. *Id.* at 789.

woman prior to the attachment stage.<sup>109</sup> The High Court re-affirmed current medical views that “pregnancy begins once the blastocyst has implanted in the endometrium and ... that miscarriage is the termination of such a post-implantation pregnancy.”<sup>110</sup> The court found that emergency contraception is ineffective after implantation and, thus, cannot cause an implanted fertilized egg to de-implant.<sup>111</sup> The Judicial Section of France’s highest administrative court likewise ruled that emergency contraceptive pills, containing levonorgestrel are hormonal contraceptives, not abortifacients.<sup>112</sup>

In Latin America, a Peruvian administrative case and a Chilean Supreme Court decision ruled in favor of access to emergency contraception. “The Peruvian Ministry of Health tried to deny access to EC [emergency contraception] by asking the Peruvian Medical Board to decide whether EC is contrary to the constitutionally protected right to life from the moment conception.”<sup>113</sup> The Peruvian Society for Obstetrics and Gynecology, to whom the determination was delegated, allowed the use of emergency contraception until 48 hours after sexual intercourse.<sup>114</sup> The Chilean Supreme Court, on the other hand, initially ruled that the emergency contraceptive pill Postinal was abortifacient and, consequently, in contravention of the constitutionally protected right to life. This decision was later overturned and the court authorized the sale of Postinor-2.<sup>115</sup>

### C. Increasing Availability of Emergency Contraception

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109. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 3 (citing United Kingdom, *Smeaton v. Secretary of State for Health* [2002] EWHC 610 (Admin) (Apr. 18, 2002), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2002/610.html> (last accessed Mar. 26, 2008)).

110. *Id.*

111. *Id.*

112. *Id.* (citing France, *Conseil d'Etat*, Apr. 25, 2001, N° 216521, available at <http://www.legifrance.gouv.fr/WAspad/Visu?cid=119822&indice=1&table=JADE&ligneDeb=1> (last accessed Mar. 26, 2008)).

113. Center for Reproductive Rights, *supra* note 1, at 5 (citing Anna Britcoe, *Informing Choices: Expanding Access to EC in Peru*, Latin American Consortium for Emergency Contraception (LACEC) Newsletter, Oct. 2002, at 8).

114. *Id.* (citing Anna Britcoe, *Informing Choices: Expanding Access to EC in Peru*, Latin American Consortium for Emergency Contraception (LACEC) Newsletter, Oct. 2002, at 8).

115. *Id.* (citing Deborah Meacham & Lezak Shallat, *Chileans to Bishops: The Choice Is Not Yours to Make*, PANOS FEATURES (Panos London), Jan. 4, 2002, available at <http://www.panos.org.uk/newsfeatures/featureprintable.asp?id=1047> (last accessed Mar. 26, 2008)).

Efforts to make EC [emergency contraception] widely available depend on government's recognition that EC is a contraceptive method and not a form of abortion. The medical community has taken this position and advised governments to do so as well. A number of governments have officially acknowledged that EC is a means of preventing pregnancy, a position that is implicit in many countries.<sup>116</sup>

Emergency contraception is widely available worldwide. In over 100 countries, governments have registered dedicated products. Argentina, Bangladesh, Brazil, Egypt, France, Germany, Jamaica, Kenya, New Zealand, Poland, Russia, and the U.S. are examples of these countries.<sup>117</sup> "Almost all of the ten ASEAN countries including Burma/Myanmar, Cambodia, Indonesia, Malaysia, Singapore, Thailand and Vietnam have registered levonorgestrel."<sup>118</sup> In more than 30 countries — such as in China, Malaysia, Vietnam, Sri Lanka, Australia, New Zealand, Albania, Belgium, Denmark, Finland, France, Lithuania, Norway, Portugal, Sweden, Switzerland, the United Kingdom, Sri Lanka, Israel, and South Africa — these contraceptive pills are even available without a prescription.<sup>119</sup> Even countries with highly restrictive abortion laws, including Thailand, Pakistan, Argentina, Brazil, Colombia, El Salvador, Venezuela and Kenya, permit the use of emergency

116. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 2.

117. *Id.* at 5-6 (citing ICEC, Dedicated Products and their Availability, available at <http://www.cecinfo.org/html/res-product-issues.htm>; ICEC, ECP Status and Activity by Country, at <http://www.cecinfo.org/files/ecstatusavailability.pdf>; NOT-2-LATE.com (The Emergency Contraception Website), Emergency Contraception Around the World, available at <http://www.ec.princeton.edu/worldwide/>; International Planned Parenthood Federation, Directory of Hormonal Contraceptives, available at [http://contraceptive.ippf.org/\(ojzjzwj2kyl-lxp5541lljpuj\)/introduction.aspx](http://contraceptive.ippf.org/(ojzjzwj2kyl-lxp5541lljpuj)/introduction.aspx)); see also, Schaper, *supra* note 55, at 5-6 (citing Heather M. Field, Note, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN'S L.J. 141, 151 (2000)); Barr says FDA Extends Plan B Emergency Contraceptive PDUFA Date, available at [http://biz.yahoo.com/prnews/040213/nyf091\\_1.html](http://biz.yahoo.com/prnews/040213/nyf091_1.html) (Thailand, China, New Zealand, Canada, United Kingdom, Germany, Sweden, Switzerland, Hungary, and South Africa provides access to emergency contraceptives).

118. Padilla, *supra* note 2, at 3.

119. See, Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 7 (other countries are Jamaica, Argentina, Benin, Cameroon, Gabon, Guinea, Kenya, Madagascar, Côte d'Ivoire, Mali, Mauritius, Morocco, Namibia, Republic of Congo, Senegal, Togo, Tunisia, and Thailand); see also, Mellick, *supra* note 85, at 431 (citing Guttmacher Institute, Emergency Contraception: Improving Access (Dec. 2002), available at [http://www.guttmacher.org/pubs/ib\\_3-03.pdf](http://www.guttmacher.org/pubs/ib_3-03.pdf) (last accessed Mar. 26, 2008)).

contraception.<sup>120</sup> Like the Philippines, some countries provide constitutional or statutory protection to life from conception — this list includes Hungary, Venezuela, Ecuador, Guatemala, and Peru.<sup>121</sup> With the exception of Guatemala, these countries have permitted access to emergency contraception as of February 2007. Postinor registration in Guatemala was reported underway in early 2007.<sup>122</sup>

“Many countries have moved beyond merely recognizing that EC is a contraceptive method and have implemented measures to promote access to it.”<sup>123</sup> A measure that has been taken by some governments is “to make EC available to women who are at greatest risk of unwanted pregnancy, such as rape survivors and adolescents.”<sup>124</sup>

#### *D. Access for Victims of Rape and Sexual Assault*

All over the world, governments are sponsoring health programs that provide emergency contraception to rape survivors.<sup>125</sup> Emergency contraception is free of charge in countries like the United Kingdom and Canada and is available at a low cost in countries like Kenya.<sup>126</sup> Several Latin

120. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 3 (citing Anika Rahman, *et al.*, *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 INT’L FAM. PLA. PERSP. 56, 58 (1998)).

121. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 5; Padilla, *supra* note 2, at 9 (citing HUNGARY LAW NO. 79 OF 17 DEC. 1992 ON THE PROTECTION OF THE LIFE OF THE FETUS (Hung.), *translated in* 44 INT’L DIG. HEALTH LEGIS. 249, 249-50 (1993)); United Nations Population Division, Department of Economic and Social Affairs, Abortion Policies: A Global Review (2002), *available at* <http://www.un.org/esa/population/publications/abortion/doc/ecuador.doc> (last accessed Mar. 26, 2008), <http://www.un.org/esa/population/publications/abortion/doc/guatem.doc> (last accessed Mar. 26, 2008) & <http://www.un.org/esa/population/publications/abortion/doc/peru.doc> (last accessed Mar. 26, 2008).

122. *See generally*, ICEC, EC Status and Availability, *available at* <http://www.cecinfo.org/database/pill/viewAllCountry.php> & <http://www.cecinfo.org/database/pill/viewAll.php> (last accessed Mar. 26, 2008).

123. Center for Reproductive Rights, Governments Worldwide, *supra* note 1, at 5.

124. *Id.*

125. Padilla, *supra* note 2, at 8.

126. *Id.* (citing The Family Planning Association (FPA), Emergency Contraception, *available at* <http://www.fpa.org.uk/guide/emergency/index.htm#>); American Society for Emergency Contraception (ASEC) & ICEC, The Emergency Contraception Newsletter, Winter 2001/2002, *available at* [http://www.cecinfo.org/publications/newsletters/Winter\\_2001\\_2002.rtf](http://www.cecinfo.org/publications/newsletters/Winter_2001_2002.rtf) (last accessed Mar. 26, 2008); ICEC, Kenya: Collaboration is the Key to Success, *available at* <http://www.cecinfo.org/html/exp-kenya.htm>).

American countries, such as Argentina, Peru, Brazil, Chile, Mexico, and Colombia, have made the provision of emergency contraception part of the government protocol in dealing with rape survivors.<sup>127</sup> Medical institutions and organizations, such as the ACOG, AMA, and AMWA, recognize it as the accepted standard of care for rape victims.<sup>128</sup> The United Nations High Commissioner for Refugees Health and Community Section has even included it as protocol in the clinical management of refugee sexual assault victims.<sup>129</sup>

Various reasons have been proffered by advocates of establishing emergency contraception as a standard procedure in dealing with rape and sexual assault survivors. Obviating an invasive procedure or surgery as well as the consequent use of anesthesia, victims are allowed a certain level of

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127. *Id.* (citing Anna Britcoe, *Informing Choices: Expanding Access to EC in Peru*, Latin American Consortium for Emergency Contraception (LACEC) Newsletter, Oct. 2002, at 6-8; Liliana Pauluzzi, *Emergency Contraception in Argentina*, Latin American Consortium for Emergency Contraception (LACEC) Newsletter, Oct. 2002, at 8); Center for Reproductive Rights, *Governments Worldwide Put Emergency Contraception into Women's Hands: A Global Review of Laws and Policies*, available at <http://www.reproductiverights.org/pdf/pubbgovtswwec.pdf> (last accessed Mar. 26, 2008); Center for Reproductive Rights, *Governments in Action: Legal and Policy Developments Affecting Reproductive Rights*, available at [http://www.reproductiverights.org/pdf/pub\\_bp\\_gia.pdf](http://www.reproductiverights.org/pdf/pub_bp_gia.pdf) (last accessed Mar. 26, 2008)).

128. Skeeles, *supra* note 13, at 1011 & 1035 (citing American Medical Association House of Delegates § 75.985, *Emergency Contraception for Assault Victims* at <http://www.ama-assn.org/meetings/public/annual05/417a05.pdf> (last accessed Mar. 26, 2008)); *see also*, Mellick, *supra* note 85, at 436 (citing American Medical Association, *Strategies for the Treatment and Prevention of Sexual Assault* (1995), available at <http://www.ama-assn.org/amal/pub/upload/mm/386/sexualassault.pdf> (last accessed Mar. 26, 2008); American Medical Association Policy Compendium *Women Physicians Congress*, available at <http://www.ama-assn.org/ama1/pub/upload/mm/19/wpccompendfinal.pdf> (last accessed Mar. 26, 2008)).

129. Padilla, *supra* note 2, at 7 (citing WHO & United Nations High Commissioner for Refugees (UNHCR) Health and Community Section, *Clinical Management of Survivors of Rape: A guide to the development of protocols for use in refugee and internally displaced person situations*, WHO/RHR/02.08, available at <http://www.rhrc.org/pdf/Part%201.pdf> (last accessed Mar. 26, 2008); UNHCR, *Reproductive Health in refugee situations, an Inter-agency Field Manual* 40, 43, available at <http://www.unfpa.org/emergencies/manual/> (last accessed Mar. 26, 2008); UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response* 148, available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3f696bcc4> (last accessed Mar. 26, 2008)).



control over their bodies following the trauma of a rape or assault.<sup>130</sup> Unintended pregnancies are also significantly reduced<sup>131</sup> and deleterious effects on the mother's and resulting child's health are avoided. "Unintended pregnancies have serious health effects for both women and children."<sup>132</sup> It is said that, "Women facing unplanned pregnancies are less likely to identify health risks associated with pregnancy prior to conception and often do not take full advantage of the health options available to manage such conditions safely during pregnancy."<sup>133</sup> Also, "[s]tatistically speaking, children of unplanned pregnancies are at a greater risk of low birth weight, dying before reaching their first birthday, being abused, and receiving insufficient resources in order to ensure healthy development."<sup>134</sup> In the case of incest survivors, the pregnancy is dangerous not only because of the victim's tender age, but the elevated probability of fetal deformity due to the victim's blood relationship with the perpetrator and the possibility of the victim becoming suicidal. In addition, a research conducted revealed that 83% of the rape victims surveyed attempted to obtain an abortion.<sup>135</sup>

The use of emergency contraception is also encouraged in these cases as it is safe, effective, and simple — it is neither harmful to women with medical conditions nor associated with major side effects, and is simple enough to allow women to diagnose themselves and administer it without assistance.<sup>136</sup>

Notably, the first documented case of emergency contraception, published in the 1960s, involved a survivor of sexual assault.<sup>137</sup> This is

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130. Schaper, *supra* note 55, at 4-5 (citing Scientific Advances in Reproductive Health: Non-Surgical Abortion and Emergency Contraception, at <http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1973>); *see also*, NARAL, *supra* note 87, at 2.

131. NARAL, *supra* note 87, at 6.

132. *Id.* at 2 (citing COMMITTEE ON UNINTENDED PREGNANCY, INSTITUTE OF MEDICINE, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 80-82 (Sarah S. Brown & Leo Eisenberg eds. 1995)).

133. *Id.*

134. *Id.*

135. Padilla, *supra* note 2, at 7 (citing Women's Crisis Center (WCC), *Feminist Action Research on Reproductive Health Needs and Concerns of VAW Survivors*).

136. *Id.* at 1 (citing CHARLOTTE ELLERTSON, *ET AL.*, *EMERGENCY CONTRACEPTION: THE NATION'S BEST KEPT SECRET* 29-30 (1995); David A. Grimes, *Switching Emergency Contraception to Over-the-Counter Status*, 347 *NEW ENG.. J. MED.* 846, 846-47 (2002)).

137. Planned Parenthood, *A Brief History of Emergency Hormonal Contraception*, available at <http://www.ppacca.org/site/pp.asp?c=kuJYJeO4F&b=139489> (last

indicative of a recognition, at the onset of the availability of emergency contraceptives, that a critical treatment rape victims should be entitled to is access to emergency contraception, especially given that an unwanted pregnancy would cause the victim further trauma.<sup>138</sup> *Brownfield* even went so far as to pronounce that a rape victim becoming pregnant can sue the hospital which had neglected to provide emergency contraception for damages for failing to comply with proper emergency care.<sup>139</sup> It has further been argued that denying a rape survivor access to emergency contraception is a violation of a patient's right to proper treatment.<sup>140</sup>

Moreover, a rape victim's right to privacy includes access to emergency contraception. "Rape victims have both a privacy interest in intimate decisions concerning their reproductive health and an autonomy interest in important decisions concerning their medical treatment."<sup>141</sup> A short note on this privacy right is thus relevant.

#### VI. A SHORT NOTE ON THE RIGHT TO PRIVACY IN THE USE OF AND ACCESS TO CONTRACEPTIVES

If emergency contraception is not an abortifacient, and is a contraceptive, it will then necessarily fall under the privacy right to access and to use contraceptives — a right that may not be infringed upon unless "narrowly tailored to advance a compelling government interest."<sup>142</sup> "The right to privacy is a personal right and not a property right; its invasion impair[s] people's sense of their own uniqueness, trammel[s] their independence, impair[s] their integrity, and assault[s] their dignity."<sup>143</sup>

The right to privacy in the use of contraceptives was established by the landmark case *Griswold v. Connecticut*<sup>144</sup> more than 30 years ago. This development is of primary significance in legal history. In fact, *Griswold's*

accessed Mar. 26, 2008) (citing Charlotte Ellertson, *History and Efficacy of Emergency Contraception: Beyond Coca-Cola*, 22 FAM. PLA. PERSP. 44-8 (1996)).

138. Skeeles, *supra* note 13, at 1010 & 1034 (citing Statement of Doug Delaney, Executive Director of the Catholic Conference of Illinois, Editorial, in *Caring for Victims of Rape*, CHI. TRIB., Apr. 12, 2001, LexisNexis Library, Chicago Tribune File).

139. *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405, 414 (Cal. Ct. App. 1989).

140. See, Padilla, *supra* note 2, at 7; Skeeles, *supra* note 13.

141. Skeeles, *supra* note 13, at 1033.

142. Hill, *supra* note 13, at 294 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

143. Reynato S. Puno, C. J., *Legislative Investigations and the Right to Privacy*, 32 IBP J. 1, 39 (2006).

144. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

discussion on the privacy right to use contraceptives was the first time the right to privacy became recognized as an independent constitutional right,<sup>145</sup> finding its foundation in the “penumbras” in the Bill of Rights in the “zones of privacy” created.<sup>146</sup> The U.S. Supreme Court further characterized the privacy right to use contraceptives as “a right of privacy older than the Bill of Rights — older than our political parties, older than our school system.”<sup>147</sup>

U.S. jurisprudence has been replete with key instances where the courts ruled on the matter of the right to privacy in the area of contraception. *Griswold* ruled that the use of contraceptives could not be prohibited as to do so would constitute an impermissible intrusion into the fundamental right of married couples to privacy.<sup>148</sup> The case gave rise to subsequent cases on contraception. *Eisenstadt v. Baird*<sup>149</sup> extended the right to unmarried individuals on the ground of equal protection.<sup>150</sup> As the court explained, “If the right to privacy means anything, it is the right of the individual, married and 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.”<sup>151</sup> In recognizing the significance of this fundamental right, the courts subjected burdens on such right to “strict scrutiny.”<sup>152</sup> Later on, *Carey v. Population Services*<sup>153</sup> allowed minors access to contraceptives<sup>154</sup> — making clear that the protection afforded is not only over the right to use contraceptives, but also the right of access to it.<sup>155</sup> “[I]ndividual decisions in matters of childbearing [were protected] from unjustified intrusion by the state.”<sup>156</sup> “Birth control, in the post-*Griswold* and post-*Eisenstadt* world, was considered a settled area of law.”<sup>157</sup>

While the U.S. Supreme Court has determined, in many instances, that a constitutional right to privacy protecting a woman’s prerogative to choose to use contraception exists,<sup>158</sup> the Supreme Court of the Philippines has yet

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145. Puno, *supra* note 143, at 42.

146. *Griswold*, 381 U.S. at 484-85.

147. *Id.* at 485-86.

148. *Id.*

149. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

150. *Id.* at 448-53.

151. *Id.* at 453.

152. *See generally, id.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

153. *Carey v. Population Services International*, 431 U.S. 678 (1977).

154. *Id.* at 682-84.

155. Harper, *supra* note 60, at 248.

156. *Carey*, 431 U.S. at 687.

157. Hill, *supra* note 13, at 283.

158. *Id.* at 294.

to generate jurisprudence involving contraception. Nevertheless, the Court's first right to privacy case may be instructive. While the 1968 case of *Morfe v. Mutuc*<sup>159</sup> involved the constitutionality of certain provisions of the Anti-Graft and Corrupt Practices Act,<sup>160</sup> the Court upheld the *Griswold* ruling on the right to privacy.<sup>161</sup> This strongly implies that the *Griswold* doctrine on the right to privacy in the use of and access to contraceptives is likewise accepted in this jurisdiction. This is bolstered by the fact that the use of, and access to, contraceptives are not prohibited under Philippine law and that the Philippines is a state party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>162</sup> "the only human rights treaty which affirms the reproductive rights of women."<sup>163</sup>

## VII. CONCLUSION

A survey of the Constitution and relevant local legislation does not convincingly lay down substantial basis for the claim that allowing the sale, prescription and distribution of Postinor is unlawful. While Philippine law clearly extends protection, and is willing to consider circumstances favorable, to the unborn, these all vest at the point of *conception*, a term which has not been legally and unequivocally defined to this day and thus remains largely ambiguous and susceptible to varied interpretation.

While the state of local law relative to the point of conception remains vague, foreign laws and jurisprudence, as well as the universal opinion of the expert medical community and international organizations, are instructive. A cross-section of states, including, notably, predominantly Catholic ones and most of the ASEAN members, have allowed emergency contraception on the premise that conception commences upon implantation; thus, a drug or device which prevents implantation is, by sheer definition, a contraceptive and not an abortifacient. This premise is founded on two uncontroverted scientific facts established and accepted by the medical community: first, that conception is completed only upon implantation, and second, that emergency contraceptives can only prevent a pregnancy, and are incapable of affecting a pregnancy that already exists.

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159. *Morfe v. Mutuc*, 22 SCRA 424 (1968).

160. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

161. *Morfe*, 22 SCRA at 444.

162. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

163. United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, Convention on the Elimination of All Forms of Discrimination against Women, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last accessed Mar. 26, 2008).

Having established the line that divides contraceptive from abortifacient and demonstrated that Postinor as an emergency contraceptive clearly falls under the classification of contraceptive, the case for re-listing becomes even more compelling when one considers that its previous registration was for a narrow, restricted purpose, directed towards making Postinor availability – on considerations of effectivity, convenience, and historical data pointing to adverse long-term effects of unwanted pregnancies – a standard of care for victims of rape and sexual assault. Even more fundamentally, where claims that a drug such as Postinor, widely accepted as an emergency contraceptive, is an abortifacient not only remains unsubstantiated but are clearly proven to be untrue, the right to ready access to, and use of, such lawful contraceptive transcends the question of viable prerogative to become a matter of constitutional guarantee rooted in the individual's fundamental right to privacy.