TOWARDS LEGALLY PROTECTING THE PROPERTY RELATIONS AND PARENTAL RIGHTS OF SAME-SEX COUPLES IN THE PHILIPPINES: BARRIERS, ALTERNATIVES AND PROSPECTS

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Formerly the natural state of man was not what it is now, but quite different. For at first there were three sexes, not two as at present, male and female, but also a third having both together...

- Plato, "The Symposium"

I. INTRODUCTION

Various attempts to articulate gay and lesbian rights have often been drawn into an unworkable framework in which the discussion of such rights is stifled by the unnecessary tension between homosexuality and morality. That is because such framework is heterosexual. Within such framework, some foreign authors say, "sexuality is assumed to be heterosexual in nature and homosexuality viewed as a deviation, rather than heterosexuality and homosexuality being merely the two ends of the sexual attraction continuum."[1]

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[1] See G. M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 924-925 (1986) cited in Joseph G. Arsenault, *"Family" But Not "Parent": The Same-sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813, 817 (1995).

The problem with morality is that it is a priori. As such, within the heterosexual framework, it functions as a convenient tool to decimate practically any meaningful discourse involving gay and lesbian rights. In the Philippines, one prominent doctor/psychologist opines that "there is too much unnecessary anguish connected with being gay. There are too many families that cause unspeakable pain to their gay members in a nation that claims that the family is the bedrock and foundation of its society."[2]

The social oppression associated with being gay in the Philippines is not in any way assuaged by the fact that "there are no concrete and specific laws that make lesbianism or homosexuality illegal".[3] The fact remains that neither are there concrete and specific laws that seek to protect or advance homosexual[4] rights. Non-recognition of homosexual rights under the law compliments the attitude of tolerance which Philippine society, at most, accords to homosexuals.[5] This complimenting of legal non-recognition and social tolerance translates into a form of discrimination, silent but oppressive. Such discrimination becomes manifest when viewed in the context of same-sex relationships.

Under the Family Code, only a "man and a woman" can marry. Under the Constitution, marriage is considered as the foundation of the family and shall be protected by the State. These legal provisions operate to reserve marriage and family and their consequent legal benefits to heterosexual couples, to the exclusion of same-sex couples. This "exclusion" of same-sex couples from marriage has been further utilized to delimit their rights as an offshoot of individual homosexual rights.

Because of this "exclusion," attempts to articulate on the rights of same-sex couples have, in turn, been drawn into a framework which portrays the advocacy of such rights as an attack upon the constitutional policy on marriage and the family. This framework is deplorable as it merely reflects the unworkable situation created by the heterosexual-morality framework traditionally used in

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[2] M. GO-SINGCO HOMES, A DIFFERENT LOVE: BEING GAY IN THE PHILIPPINES iv (1995).

[3] M. MARIN, PHILIPPINES, UNSPOKEN RULES 145, 148 (1994).

[4] The term "homosexual" used in this legal paper includes both gay men and lesbians.

[5] See A. Santiago, *Gay Manila: A Panel on homosexuality*, 1 MANILA PAPER no. 4 (May 1975). See also N. GARCIA, PHILIPPINE GAY CULTURE: THE LAST 30 YEARS: BINABAE TO BAKLA, SILAHIS TO MSM 330 (1996), where he says that "the Philippines enjoys a reputation as one of the contemporary societies most tolerant of homosexuality."

considering homosexual rights. Using this framework when considering the rights of same-sex couples is nothing more than adding insult to injury.

This legal research paper will attempt to articulate on the property relations and parental rights of same-sex couples as an offshoot of individual homosexual rights beyond the traditional and restrictive heterosexual-morality framework. In this manner, the discussion of the subject will have enough breathing space to prevent its being unnecessarily constrained.

This paper is divided into three parts. The first part will address the threshold issue of same-sex couples' rights vis-à-vis the constitutional provisions on marriage and the family. The second part, which is further divided into two, will deal with arguments and alternative interpretations to advance or protect the property relations and parental rights of same-sex couples within the framework of existing laws. The third part contains the author's conclusions and recommendations including some discussion on the possibility of legal intervention to further concretize the protection of the rights of same-sex couples through the possible enactment of either a domestic partnership law or a same-sex marriage law.

II. FRAMEWORK

In this attempt to recast the discussion of the rights of same-sex couples beyond the restrictive parameters of the traditional heterosexual-morality model, the author proposes to use the policy science approach developed by Professors Myres McDougal and Harold Lasswell as articulated by Professor W. Michael Reisman.[6]

Essentially, the policy science approach is a social decision process.[7] Professor Reisman points out that although a lawful decision is a choice made in conformity with appropriate procedural and substantive norms, such a decision is likewise a product of various social functions and operations which are considered by a decision-maker. The approach is useful in going beyond law as a matter

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[6] Myres S. McDougal & Harold D. Lasswell, *The Identification of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

[7] See W. Michael Reisman, *Law from the Policy Perspective, in* MYRES MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS 1, 3 (1981).

plainly of rules and of logic[8] specially in the area of Family law which is beset with emerging social realties like same-sex coupling and parenting which cannot just be ignored by the law if it is expected to provide a certain degree of order and stability in the system. This can be achieved by distinguishing law as myth system, or black-letter law, from law as operational code.

Reisman points out that:

> ...[t]here are enough discrepancies between this myth system and the way things are actually done by key officials or effective actors to force the observer to apply another a name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code.
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> The operational code – how the legal norms are used and manipulated and enforced by the different actors in a legal system – is a "by-product of social complexity, generated by the increase in social divisions and specializations." In the context of power, the operational code is a "private system of law."[9]

As explained by Professor La Viña, the operational code is not totally divorced from the myth system because it finds legitimacy in being able to invoke black-letter law. But it is distinct from the myth system. He says that to understand law as well as to make it more effective is to go beyond constitutional and statutory policy as myth into policy as operational code.[10]

The policy science approach is particularly useful in considering the issue of property relations and parental rights of same-sex couples since same-sex coupling and parenting are ultimately social decision processes in turn because the choice of same-sex couples to live this alternative lifestyle does have social implications. Such approach looks beyond the heterosexual-morality model, a construct of the established actors in society who traditionally interpret family law as necessarily inconsistent with same-sex coupling. It can be said that the reality of same-sex coupling is an operational code existing in the homosexual

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[8] See Antonio G.M. La Viña, *The Right to a Balanced and Healthful Ecology: The Odyssey of a Constitutional Policy*, 69 PHIL. L. J. 127, 129 (1995) (where the same framework was used in discussing environmental law issues in the Philippines).

[9] Reisman, *supra* note 7 at 26.

[10] La Viña, *supra* note 8 at 130.

community, the articulation of which is barred in the context of the larger society due to the adherence of the established actors to the heterosexual-morality model.

The use of the policy science approach will constrain the established actors in Philippine society from divorcing same-sex coupling as operational code from the myth system or black-letter law and will allow the actors behind such operational code to find legitimacy in the legal system by being able to invoke black-letter law through alternative interpretations which situate them within its context. Through said approach, the Judiciary, acting as decision-maker in the dispute-processing mechanism of law, will have some leeway to exercise the discretion reposed upon it by the black-letter law in such a manner as to situate same-sex couples within the framework of the legal system, thereby, allowing the law as myth system to buttress the advocacy of the rights of same-sex couples. Whether or not the Judiciary will actually take up this role in the tradition of judicial activism remains to be seen in actual controversies squarely raising issues of same-sex coupling and parenting. Much depends on the extent that same-sex couples and the gay movement will be able to win other actors-decision-makers to their side.

III. SAME-SEX COUPLES AND THE CONSTITUTIONAL PROVISIONS ON MARRIAGE AND THE FAMILY

As a threshold consideration, it is necessary to test this attempt at advancing arguments for the protection of the property relations and parental rights of same-sex couples with the constitutional policies on marriage and the family.

The significance which our Constitution accords to marriage and the family and their roles in Philippine society can be gleaned from the following provisions of the 1987 Constitution:

> The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution...[11]

[11] CONST., art. II, sec. 12.

> The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.[12]
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> Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.[13]

Unlike other fundamental charters, the Philippine Constitution explicitly establishes the State's policy on marriage and the family.

It is noteworthy, however, that neither marriage nor family is defined in the Constitution. Marriage, rather, is defined by statute. The Family Code defines marriage as "a special contract of permanent union between a man and a woman" thereby clearly delineating marriage as a heterosexual institution.[14]

Although the term "family" remains undefined either by the Constitution or by law, it has been traditionally understood as an institution consisting of a husband and wife with their own children. In the deliberations of the 1986 Constitutional Commission, Commissioner Tingson said that "when we speak of family, we are speaking of the normal conservative definition of family, and that is, a man and a woman married together." To this, Commissioner Villegas replied that "both the natural law, the age-old traditions in the Philippines and religious values affirm that normal family life relationship, not conservative, is between a man and a woman."[15] This traditional notion of family finds support when the legal concept of marriage as a heterosexual institution is linked to the Constitutional concept of family.

That the Constitution intends a nexus between the concepts of marriage and family is clearly expressed in the provision which states that marriage is the foundation of the family. It must be noted, however, that the concept of heterosexuality finds legal connection to the family only through marriage, and only because marriage is defined by law strictly as a heterosexual institution. Heterosexuality has been traditionally intertwined with marriage because of the notion that the main purpose of marriage is procreation and child-rearing and that

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[12] CONST., art. XV, sec. 1.

[13] CONST., art. XV, sec. 2

[14] Marin, *supra* note 4 at 149.

[15] 4 RECORDS OF THE CONSTITUTIONAL COMMISSION 810 (Sept. 19, 1986).

these purposes can only be attained through the institution of the traditional family as husband, wife and their children.

As the law stands, it may be admitted that heterosexuality delimits marriage. However, there is room for argument as to whether or not heterosexuality should also delimit the concept of family. At present, it must be considered that emerging societal changes have brought about the rise of alternative family arrangements which are not predicated upon marriage.[16] One of these alternative arrangements is the "de facto homosexual families" which are creating unusual issues that challenge established legal precepts on the traditional family. These familial affiliations have caused a dramatic shift in the traditional family concept. The new family concept is functional and is characterized by intimacy, intensity, continuity and commitment among their members. Moreover, these non-traditional relationships are unleashing new demands, supported by different social behaviors that involve continual, unrelenting confrontations that challenge established legal precedents and public policies necessitating a reconsideration and re-evaluation of settled legal principles.[17]

In the Philippines, there is no study which reveals the exact number of individual homosexuals and same-sex couples. The absence of such numerical data can be explained by the fact that, in this country, a predominant number of individual homosexuals and same-sex couples have not "come out of the closet"[18] which means that their identities and relationships remain discreetly concealed. But such absence of data or research does not mean that same-sex couples are non-existent or, at best, a mere exaggerated product of homosexual imagination.

Thus far, considering the Constitutional provisions on marriage and family in connection with the foregoing discussion on the existence of same-sex couples, the following questions may be posed:

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[16] R. Melton, *Legal Rights of Unmarried heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAMILY L. 497 (1990-91).

[17] See M.D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 J. FAMILY L. 557, 562, 564 (1993).

[18] See NEIL GARCIA, PHILIPPINE GAY CULTURE: THE LAST 30 YEARS: BINABAE TO BAKLA, SILAHIS TO MSM 117-118 (1996) where he explains that "*coming out of the closet*" is an act and/or process of affirming one's gayness which is roughly translated into Filipino as "*paglaladlad ng kapa*" (unfurling one's cape).

1) Does the Constitution intend that marriage ought to be strictly *sine qua non* to family such that all other possible unions or relations short of marriage, particularly the union of same-sex couples, necessarily contravenes and, consequently, threatens the constitutional policy on marriage and family?

2) Is the State's policy to protect marriage and family necessarily directed against and totally irreconcilable with emerging alternative familial arrangements, particularly that of same-sex couples?

These questions are not well-settled either by statute or by judicial interpretation. These constitutional considerations are, perhaps, the first obstacles that must be hurdled in this attempt to articulate the rights of same-sex couples under Philippine law.

It is submitted that an articulation of the rights of same-sex couples does not contravene the express constitutional policy on marriage and family because the two are not mutually exclusive. The alleged clash between such rights and constitutional policy is more apparent than real three particular reasons.

First, basic to any process of analyzing constitutional policies such as marriage and family is to resort to the intent of the framers of the constitution. This can be done by looking into the language employed by the charter or by using extrinsic aids such as the Records of the Constitutional Commission.

A textual analysis of the provisions on marriage and family does not yield any reasonable implication that the framers intended such concepts to be necessarily in contravention with possible social change in values and preferences as the existence of same-sex couples shows.

For instance, the Constitutional policy that the State shall protect marriage and the family is followed by an express enumeration of situations which the State shall defend, thus:

> The State shall defend:
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> (1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;
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> (2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse,

cruelty, exploitation, and other conditions prejudicial to their development;

(3) The right of the family to a living wage;

(4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.[19]

The foregoing enumeration does not expressly provide that the emergence or existence of alternative family arrangements, particularly unions of same-sex couples, is a situation against which the State shall defend marriage and family. Assuming *ex gratia argumenti* that the enumeration is not exclusive, there is no basis to imply that alternative family arrangements fall within the recognized class of cases against which the State shall defend marriage and family. In fact, a careful scrutiny of the debates in the 1986 Constitutional Commission does not reveal any explicit statement that an advocacy of the rights of same-sex couples is necessarily in conflict with the constitutional policy on marriage and family.

During the debate on the provision on the sanctity of family life, Commissioner Ople asked whether the term "sanctity," which he equates with purity and inviolability, will disauthorize Congress from passing a divorce law. To this, Commissioner Nolledo replied in the negative saying that, "we do not talk of the sanctity of marriage; we talk of the sanctity of the family as a whole." [20] Thus, divorce which severs marital bonds and dismembers the family is not even viewed by the framers as a necessary threat to family life against which the state must defend the family. By parity of reasoning, it can be reasonably inferred that the framers did not view the advocacy of the rights of same-sex couples living in alternative familial arrangements as a threat to the sanctity of the family because this alternative arrangement does not contemplate severance of marital bonds and dismemberment of the family. On the contrary, it encourages the same.

Commissioner Davide verified whether the words "family life" is deemed to include married life to which Commissioner Villegas replied in the affirmative. This prompted Commissioner Bennagen to ask whether family life also includes "instances where there is no marriage but there is family life" because "there are cases of family life without necessarily having to get married." Commissioner Aquino said that it is included. Because of this, Bishop Bacani asked a question to

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[19] CONST., art. XV, sec. 3

[20] 4 RECORDS OF THE CONSTITUTIONAL COMMISSION 760 (Sept. 18, 1986).

verify the interpretation of Commissioner Aquino on what Commissioner Bennagen meant when he mentioned "no marriage at all" or "no civil marriage." To this, Commissioner Bennagen replied that he contemplates "the possibility of two consenting adults plus children living a family life." Bishop Bacani added that these adults and their children "must have a mutual and stable compact" and that he wanted to make sure that the framers did not contemplate a type of living-in situation. However, Commissioner Tingson later made it clear that family must be understood as the normal conservative family consisting of a "man and a woman married together."[21]

It appears that whereas, Commissioner Bennagen and Bishop Bacani both contemplate that the provision on the sanctity of the family includes a situation where there is no marriage provided that the consenting adults and their children live together in a stable and mutual compact, Commissioner Tingson wanted to limit said provision to married heterosexuals.

From the foregoing debates, what can be clearly gathered is that the framers intended State protection and support to be dispensed only to married heterosexuals and their children excluding same-sex households. The debates, however, do not reveal that the framers view any advocacy of the rights of same-sex couples as a threat to the family. The framers merely say that the State should limit its affirmative action as regards the grant of material and/or moral support or protection to the traditional family. But they do not intend such policy to be used as an argument to stifle the rights of same-sex couples insofar as these may be protected by existing law.

Second, it must be noted that the Constitution ought to be construed in a manner that is not unreasonably rigid as to prevent it from keeping abreast with social evolution.

Justice Cruz states that one of the hallmark characteristics of a written constitution such as ours is its flexibility and its capability to embody the past, to reflect the present and to anticipate the future. The Constitution must be comprehensive enough to provide for every contingency. The Constitution is "not only the imprisonment of the past but the unfolding of the future."[22]

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[21] 4 RECORDS OF THE CONSTITUTIONAL COMMISSION 808 (Sept. 18, 1986).

[22] ISAGANI CRUZ, CONSTITUTIONAL LAW 5 (11th ed., 1991).

The Constitution must not be petrified but must change with the changing times lest it impede the progress of the people with antiquated rules grown ineffective in a modern age.[23] "The political and philosophical aphorism of one generation is doubted by the next and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress." [24]

In this connection, to say that attempts to articulate the rights of same-sex couples will necessarily contravene the Constitutional policy on marriage and family is to construe the Constitution in a manner that will prevent it from confronting present realities and anticipating the future, contrary to the hallmark characteristics of a written constitution.

Third, it is a basic rule in Constitutional construction that the entire document must be construed as a whole, thus, unnecessary conflicts between and among its provisions are avoided. In relation to this, an elucidation of specific constitutional policies such as those relating to marriage and family must be balanced with countervailing constitutional rights. The choice of homosexuals to enter into alternative family arrangements is a direct and outward exercise of a right that ought to be protected not because it contributes, in some direct and material way, to the general public welfare, but because it forms so central a part of an individual's life.[25] It is also basic that a constitutional policy, as an assertion of State power, must be tempered by individual rights. Hence, that construction must be adopted whereby the rights of same-sex couples to privacy as a dimension of their right to liberty, as enshrined in the due process clause, will not be trampled upon by other Constitutional policies.[26]

No Philippine case has directly tested the claimed right of same-sex couples to engage in consensual homosexual activity as a privacy right. In the U.S., however, *Bowers v. Hardwick* directly tackled the said issue. In this case, a homosexual who was charged under the Georgia anti-sodomy law challenged its constitutionality on the ground that the statute violates privacy rights of homosexuals, the US Supreme Court refused to extend the right of privacy as an

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[23] *Id.* at 8

[24] *Id* (citation omitted).

[25] Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun,J., dissenting. Justice Blackmun concludes his dissent by expressing his belief that *"depriving individuals of the right to choose for themselves how to conduct their intimate relationship poses a greater threat to the values most deeply rooted in our Nation's [USA] history than tolerance of nonconformity could ever do."*).

[26] See Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

aspect of liberty to homosexuals. This is applicable to same-sex couples because it is reasonable to assume that sexual activity is as much a part of the life of same-sex couples as it is of married heterosexuals. Justice White speaking for the majority began by distinguishing previous Constitutional privacy cases including *Griswold v. Connecticut*,[27] *Eisenstadt v. Baird*,[28] *Roe v. Wade*,[29] and *Carey v. Population Services International*.[30]

Justice White linked the privacy right protected in the preceding cases to family, marriage and procreation.[31] The majority said that none of the rights announced in the previous cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. No connection between family, marriage and procreation, on the one hand, and homosexual activity, on the other, has been demonstrated.[32]

In referring to the *Bowers* case in an attempt to test the Constitutional right of same-sex couples to privacy, as an aspect of liberty, vis-a-vis the express Constitutional policy on marriage and family under Philippine law, it is very important to make distinctions based on the factual and legal milieu of *Bowers*.

The *Bowers* case was essentially a litmus test of the claimed Constitutional right of privacy of homosexuals mutually consenting to engage in homosexual activity as against the anti-sodomy law of the State of Georgia.[33] The Philippines has never had an anti-sodomy law throughout its legal history, and as such, any case which might purport to test Constitutional privacy rights of homosexuals in our jurisdiction will not possibly be resolved against homosexuals, or same-sex couples for that matter.

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[27] 381 U.S. 479 (1965) (where the U.S. Supreme Court said that right of privacy protects marital use of contraceptives).

[28] 405 U.S. 438 (1972) (where the U.S. Supreme Court said that right of privacy protects distribution of contraceptives).

[29] 410 U.S. 113 (1973) (where the U.S. Supreme Court said that right of privacy protects freedom to obtain abortion of nonviable fetus).

[30] 431 U.S. 678 (1977) (where the U.S. Supreme Court said that right of privacy limits regulations on the distribution of contraceptives).

[31] See Jeffrey Swart, *The Wedding Luau - Who is Invited?: Hawaii, Same-Sex Marriage and Emerging Realities*, 43 EMORY L. J. 1577 1583 (1994).

[32] *Id.*, at 1583

[33] *Id.*, at 1581 (citation omitted).

It appears that the US Supreme Court in *Bowers v. Hardwick* was compelled to rule that there is no demonstrable connection between homosexual activity and marriage, procreation and family because, otherwise, it would be compelled to extend the privacy right of heterosexuals announced in *Griswold, Eisenstadt, Roe* and *Carey*, to homosexuals, a conclusion the Court sought to avoid because it wanted to save the Georgia anti-sodomy law from Constitutional infirmity.[34] The Court in *Bowers* was asked simply whether Georgia's anti-sodomy law violated the defendant's right of privacy.[35] Instead of resolving the issue, the court spoke of morality, the Bible and history.[36] In essence, thus, the Court said that a long tradition of discrimination could serve as a rational basis for a law.[37]

Considering these distinctions, it can be fairly said that if a case purporting to test homosexual privacy rights of same-sex couples against the Constitutional policy on marriage and family will be presented before our courts, our judges might not be compelled to conclude in the same way as the US Supreme Court did in *Bowers*. There might not even be a need for our courts to delve into marriage, procreation and family and conclude that they have no demonstrable connection to homosexual activity of same-sex couples.

Thus, it can be argued that under our jurisdiction, the aforesaid majority opinion of the US Supreme Court which refused to extend privacy rights to homosexuals, is not a persuasive basis for saying that under Philippine law the privacy rights of homosexuals, as exemplified by same-sex couples, cannot or should not be legally protected and advanced because such a claimed right has no connection to marriage, family and procreation. Besides, the mere lack of connection between the two should not be taken to mean that they are essentially irreconcilable, or worse, that advancing such rights of same-sex couples will threaten marriage and family which the State has sworn to defend under our Constitution.

Bearing in mind the factual and legal context of *Bowers*, the following can be gathered:

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[34] See J. Arsenault, *"Family" but not "Parent": The Same-sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALBANY L. REV. 813, 820 (1995).

[35] Bowers v. Hardwick, 478 U.S. 186, 188, 190 (1986).

[36] *Id.* at 196-197 (Burgess, C.J., concurring).

[37] Arsenault, *supra* note 34 at 820.

1. In our jurisdiction, a claimed privacy right of same-sex couples to engage in sexual activity will likely be upheld by our courts. If such sexual activity will be legally protected as a privacy right, then it is reasonable to argue that the property relations or parental rights of same-sex couples should also be protected under existing law. Thus, the silent discrimination, against homosexuals under the law may be obviated.

2. In our jurisdiction, a case testing the claimed privacy rights of same-sex couples as against the constitutional policy on marriage and family will not likely compel our courts to conclude that there is no connection between the two, as the US Supreme Court did in Bowers, or worse, that they are necessarily in conflict.

3. Because there is no conflict between said rights and constitutional policy, legal protection to same-sex couples in the Philippines may be carried a step further through the enactment of a law that directly addresses them such as a domestic partnership or a same-sex marriage law. It has been demonstrated by the foregoing discussion that such laws can withstand constitutional attack.

A. Where Do We Fit In? Same-Sex Couples *vis-a-vis* Specific Legal Provisions Governing Family Relations of Married Couples

Under the present state of the law, marriage is not a legal option for same-sex couples. This is the necessary implication of the Family Code when it defines marriage as "a special contract of permanent union between a man and a woman."[38] Exclusion of same-sex couples is not by express prohibition but by a definitional obstacle.

Heterosexuality is further embedded into the concept of marriage and family when the Code provides that no marriage shall be valid unless the essential requisite of legal capacity of the contracting parties who must be a male and a female is present.[39] It also provides that "any male or female not incapacitated may contract marriage".[40] These provisions formally ordain heterosexuality as a

[38] FAMILY CODE, art. 1.
[39] FAMILY CODE, art. 2.
[40] FAMILY CODE, art. 5.

condition *sine qua non* to marriage thereby effectively denying same-sex couples the option to marry because of their sexual orientation.[41]

However, the law has not prevented homosexuals from actually uniting or living with each other as same-sex couples in alternative family arrangements which are functionally identical to the traditional family. This simply means that the development or expansion of the concept of family which is characterized by such considerations as emotional support, financial intermingling, and commitment[42] is not impeded by the fact that the law has chosen to circumscribe marriage within the confines of heterosexuality.

The denial to same-sex couples of the right to marry under existing law carries with it the denial of the package of rights or privileges which would flow naturally to partners in a heterosexual marriage. Some of these rights include the:

> Rights to spousal shares of marital property upon death of one partner: tax benefits (including joint income tax returns, dependency deductions etc.); rights in tort law (including emotional distress, wrongful death actions, and loss of consortium); rights in criminal law (including immunity from compelled testimony and the marital communication privilege);... visitation privileges in hospitals and other institutions; authority to make decisions for an ill spouse (including health insurance, medical leave and bereavement leave); government benefits (including social security).[43]

Thus, there is a need to situate same-sex couples within existing laws which govern or have implications on family relations of married heterosexuals in order to protect the former's rights. This is not merely aimed at validating a homosexual lifestyle which is already perceived by heterosexuals as an aberration

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[41] Same-sex couples argue that it is unconstitutional when they are, in effect, denied the right to marry because of their sexual orientation. Thus, some of them clamor for same-sex marriage. *See* Perez v. Lippold, 198 P.2d 17 (Cal. 1948), cited in K.A. Zambrowics, *To Love and Honor All the Days of Your Life: A Constitutional Right to Same-Sex Marriage*, 43 CATHOLIC U. L. REV. 907, 934 (1994).

[42] K. A. Zambrowicz, *To Love and Honor All the Days of your Life: A Constittutional Right to Same-sex Marriage*, 43 CATHOLIC U. L. REV. 907, 929-930 (1994). *See also* Braschi v. Stahl Assocs. 543 N.E. 2d 49 (N.Y. 1989) (in which the court held that the dynamics of the relationship between two men who lived together for ten years in an apartment is similar that between heterosexual couples. The court added that the definition of family should be based on emotional and financial interdependence and commitment.).

[43] W. Rubenstein, *Non-marital Forms of Recognition*, op. cit. at 430-431.

from the norm and an affront to traditional family, religious and societal values.[44] More importantly, this is to prevent the existing legal non-recognition of same-sex couples from further resulting into a wholesale denial of rights. Certainly, it is legally disturbing that an identified sector of society like same-sex couples should remain largely deprived of rights and legal remedies to enforce the same.

Consequently, a rethinking of laws that have pertinent implications to family relations is fitting and proper. Through this process, same-sex couples will be provided with legal alternatives to protect their relationships which ultimately result to a form of legal recognition, albeit "non-marital" in character.[45]

1. Property Relations

One of the principal effects of a valid marriage is the personal and economic relations between spouses, which become sources of important rights and duties.[46] The Family Code provides that:

> The property relations between husband and wife shall be governed in the following order: (1.) By marriage settlements executed before the marriage; (2.) By the provisions of this Code; and (3.) By the local custom.[47]
>
> The future spouses may, in the marriage settlements, agree upon the regime of absolute community, conjugal property of gains, complete separation of property, or any other regime. In the absence of marriage settlements, or when the regime agreed upon is void, the system of absolute community of property as established in this Code shall govern.[48]

The foregoing provisions are clearly inapplicable to same-sex couples because of their incapacity to marry under existing law.

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[44] Hunter, *supra* note 17.

[45] *See* Rubenstein, *supra* note 43, at 431.

[46] 1 A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES WITH THE FAMILY CODE 224 (citation omitted).

[47] FAMILY CODE, art. 74.

[48] FAMILY CODE, art. 75.

Since same-sex couples cannot validly enter into marriage settlements nor rely upon the automatic application of the regime of absolute community, then what will govern their property relations?

To say that the law will simply have to leave same-sex couples where it finds them is not plausible. This line of reasoning outstretches the meaning and application of the *pari delicto* doctrine in civil law because same-sex couples are not in *pari delicto* when they choose to live together consensually.

A US Court had occasion to explain in *Beal v. Beal*[49] that an invocation of the *pari delicto* or "clean hands doctrine" does not actually keep the court's hands off the property disputes between unmarried cohabitants[50] because ultimately, ownership is left to whoever happens to have title or possession at the time.

It is submitted that court pronouncements refusing to grant relief to a same-sex partner based on the *pari delicto* doctrine are unrealistic. In fact, the *Beal* court said that, among other things, such decisions "ignore the fact that an unannounced (but nevertheless effective and binding) rule of law is inherent in any such terminal statements by a court of law. So, although the courts proclaim that they will have nothing to do with such matters, the proclamation in itself establishes, as to the parties involved, an effective and binding rule of law which tends to operate purely by accident or perhaps by reason of cunning, anticipatory designs of just one of the parties."[51] It is likewise argued that same-sex couples may utilize the theory of express and implied contracts, in relation to Articles 148 and 149 of the Family Code to govern their property relations.

a. The Theory of Express and Implied Contracts

State intrusion into marital property and economic relations has been diminished through the institution of marriage settlements.

However, the fact that the Family Code allows future married spouses to control their property and economic relations through marriage settlements does not necessarily imply that unmarried adult cohabitants, particularly same-sex

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[49] 577 P.2d 507 (1978).

[50] Regardless of whether such unmarried cohabitants are heterosexual or homosexual.

[51] West v. Knowles, 311 P.2d 689, 692 *cited in* Beal v. Beal, 577 P.2d 509 (1957).

couples, are prohibited from entering into contracts, pursuant to the Civil Code,[52] to govern their own property and economic relations.

If at all, such merely shows the reduction of State interest and consequent intrusion insofar as property relations are concerned, as compared to the other rights and incidents of marriage which are "governed by law and not subject to stipulations."[53]

This diminution of State intrusion in property relations can be interpreted as a reflection of a function of marriage, recognized by some commentators, in which it is viewed as:

> a legal medium through which intimately related adults can, if they choose, make a binding commitment to each other to act as a unit for many purposes. The partners can rely on this commitment in their dealings with each other and third parties can rely on it in their dealings with both. Marriage is thus a crucial framework for overcoming atomistic individualism and allows a couple to operate as a unit.[54]

This function of marriage has nothing to do with gender or sexual orientation.

Bearing in mind this gender-neutral and sexual-orientation-neutral function of marriage, it can be said that the institution of marriage settlements has reduced the differences between married and unmarried couples with regard to their mutual property rights, since couples in either category may usually rearrange these rights by mutual consent.[55]

Thus, it is submitted that the exclusion of same-sex couples from marriage under the Family Code should not be extended to mean an injunction against unmarried cohabitors, particularly same-sex couples, from entering into contracts to govern their property relations. Such argument supports the

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[52] CIVIL CODE, art. 1306, provides: The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, public policy."

[53] See FAMILY CODE, art. 1. The "other" rights and incidents of marriage include the rights and obligations between spouses, dissolution of marriage, support, parental authority etc.

[54] W. Hohengarten, *Same-Sex Marriage and the Right to Privacy*, 1023 YALE L. J. 1495, 1505 (1994).

[55] *Id.*, at 1500.

invocation by same-sex couples of the rule on liberality of contracts under art. 1306, Civil Code.

The foregoing functional analysis of marriage is significant in considering the validity and enforceability of contracts between unmarried cohabitors, particularly same-sex couples. This is an issue which same-sex couples have to contend with in the attempt to give legal recognition to their relationships.

A survey of Philippine jurisprudence on this issue shows that there is as yet no case squarely addressing it. Thus, an examination of pertinent U.S. jurisprudence on the subject would be helpful.

In the U.S., the development of the contract (cohabitors' agreement) theory as a means of securing legal protection to nonmarital property relations was first elucidated in cases involving unmarried heterosexual cohabitors. This theory was later extended to same-sex couples as it is both illogical and unfair to make a distinction between same-sex couples and unmarried heterosexual couples as to the application of this theory considering that both are non-marital in character.

In the case of *Marvin v. Marvin*[56], it was held that:

> Courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretrecious sexual services. In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrines of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.[57]

In this case, a woman sued a man with whom she had lived for approximately six years without marriage alleging that she and defendant entered into an oral agreement that while the parties lived together they would combine their efforts and earnings and would share equally in any and all property

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[56] 557 P.2d 106 (1976).

[57] *Id.*, at 110 (emphasis supplied). The term "meretrecious" is understood as something of the nature of unlawful sexual connection. The term is descriptive of the relation sustained by persons who contract that is void by reason of legal incapacity (Black's law Dictionary, 891). It also means something that is lewd sexually immoral (Ballantine's Law Dictionary, 794).

accumulated as a result of their efforts, whether individual or combined; that they would hold themselves out to the general public as husband and wife; and that plaintiff would give up her career as an entertainer and singer in order to devote her full time to defendant as his companion, housekeeper and cook; in return defendant agreed to provide for all of plaintiff's financial support and needs for the rest of her life. Plaintiff further alleged that after she had lived with defendant for almost six years, he forced her to leave his household and refused to recognize her rights under the contract. Plaintiff asked the court to determine her contractual and property rights, and also to impose a constructive trust on half of the property acquired during the course of the relationship. The Supreme Court said that:

> adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remain the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.[58]

Marvin is significant because it lays down the following standard which must guide a court in determining whether or not contracts between non-marital partners are unenforceable for being founded upon meretricious consideration:

> ... [A] contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement. In sum, a court will not enforce a contract for the pooling of property and earnings if it is explicitly and inseparably based upon services as a paramour." ... However, "even if sexual services are part of the contractual consideration, any severable portion of the contract supported by independent consideration will still be enforced.[59]

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[58] *Id.*, *cited* in Jones v. Daly , 176 Cal. Rptr. 130. (1981).

[59] *See* Hill v. Estate of Hillbrook, 247 P. 2d. 19 (1952) and Updeck v. Samuel, 266 p. 2d. 822 (1964), construed and applied in Marvin, *supra* note 56 at 110.

The foregoing standard is narrower and more precise as compared to one which merely inquires whether an agreement is "involved" in or "contemplates" a non-marital relationship. The *Marvin* court said the latter standard is vague and unworkable since virtually all agreements between non-marital partners can be said to be "involved" in some sense in their mutual sexual relationship, or to "contemplate" the existence of that relationship and thus, if taken literally, might invalidate all agreements between non-marital partners, a result which no one favors.[60]

The narrower standard in *Marvin* equips a court with a practical guide to prevent it from rendering sweeping and straitjacketed decisions once a cohabitors' agreement is attacked on grounds of immorality or alleged violations of public policy. The principle announced in *Marvin* is a result of a distillation of a line of cases which likewise addressed the issue.

In *Trutalli v. Meraviglia*,[61] the court, rejecting the assertion of the illegality of the agreement, stated that "the fact that the parties to this action at the time they agreed to invest their earnings in property to be held jointly between them were living together in an unlawful relation did not disqualify them from entering into a lawful agreement with each other, so long as such immoral relation was not made a consideration of their agreement."[62]

In *Bridges v. Bridges*,[63] rejecting the man's contention that the contract was illegal, the court stated that "[N]owhere is it expressly testified to by anyone that there was anything in the agreement for the pooling of assets and the sharing of accumulations that contemplated meretrecious relation as any part of the consideration or as any object of the agreement."[64]

In *Croslin v. Scott*[65] the Court of Appeals stated that "the mere fact that the parties agree to live together in meretrecious relationship does not necessarily make an agreement for disposition of property between them invalid. It is only when the property agreement is made in connection with the other agreement, or

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[60] *Id.*, at 114.

[61] 12 P.2d 430 (1932).

[62] *Id.* cited in Marvin, *supra* note 56, at 112.

[63] 270 P.2d 69 (1954).

[64] See Marvin, *supra* note 56 at 112.

[65] 316 P. 2d. 755 (1957).

the illicit relationship is made a consideration of the property agreement, that the latter becomes illegal."[66]

The aforesaid standard for determining the validity and enforceability of a cohabitors' agreement announced in *Marvin* has been reiterated in two other cases which tested the applicability of such standard to contracts between same-sex cohabitors.

Jones v. Daly[67] involved two adult males who "dated, engaged in sexual activities, and in general, acted towards one another as two people do who have discovered a love, one for the other." The complaint stated that "plaintiff orally agreed to cohabit with [Daly] as if [they] were, in fact, married; at the same time they entered into the *cohabitors' agreement* whereby they agreed that during the time *they lived and cohabited together* they would hold themselves out to the public at large as 'cohabiting mates' and plaintiff would render his services to Daly as *a lover, companion, housemaker, travelling companion, housekeeper and cook*; in order that plaintiff would be able to devote his time to Daly's benefit *as his lover, companion, housemaker, travelling companion, housekeeper, and cook*, he would abandon his career; plaintiff and Daly *cohabited and lived together* and pursuant to and in reliance on the *cohabitors' agreement*, plaintiff allowed himself to be known to the general public as the *lover and cohabitation mate of Daly*."[68]

Applying the standard in *Marvin*, the court said that the cohabitors' agreement between Jones and Daly is unenforceable because "plaintiff's rendition of sexual services to Daly was an inseparable part of the consideration for such agreement, and indeed was a predominant consideration"[69] The illegal meretrecious consideration pervaded the cohabitor's agreement in this case, hence, it did not fit the standards announced in Marvin.

On the other hand, *Whorton v. Dillingham*[70] also involved a cohabitors' agreement between two homosexuals, but unlike in *Jones v. Daly*, the court here upheld the enforceability of the contract but only as to those severable portions thereof which were not affected by the meretrecious consideration.

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[66] See Marvin, *supra* note 56 at 113.

[67] 176 Cal. Rptr. 130 (1981).

[68] *Id.* (emphasis supplied).

[69] *Id.*

[70] 248 Cal. Rptr. 405 (1988).

In this case, the parties orally agreed that Whorton's exclusive, full-time occupation was to be Dillingham's chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on his behalf when requested. Whorton was to render labor, skills and personal services for the benefit of Dillingham's business and investment endeavors. Additionally, Whorton was to be Dillingham's constant companion, confidant, travelling and social companion, and lover, to terminate his schooling upon obtaining his Associate in Arts degree, and to make no investment without first consulting Dillingham.

In consideration of Whorton's promises, Dillingham was to give him one-half equity interest in all real estate acquired in their joint names, and in all property thereafter acquired by Dillingham. Dillingham agreed to financially support Whorton for life, and to open bank accounts, maintain a positive balance in those accounts, grant Whorton invasionary powers to savings accounts held in Dillingham's name, and permit Whorton to charge on Dillingham's personal accounts. Dillingham was also to engage in a homosexual relationship with Whorton.

The problem arose when Dillingham later refused to perform his part of the contract by giving Whorton the consideration for the business services rendered. Here, the court reiterated the rule in *Marvin* that adults who voluntarily live together and engage in sexual relations are competent to contract respecting their earnings and property rights, that such contracts will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services, and that even if such sexual services are part of the consideration, any severable portion of the contract supported by independent consideration will still be enforced.

At this point, it is important to consider that Dillingham does not assert that Marvin is inapplicable to same-sex partners, and that there is no legal basis to make a distinction.

The crux of analysis is whether Whorton made contributions, apart from sexual services, which provided independent consideration for Dilingham's alleged promises pertaining to financial support and property rights. The services which Whorton provided include being a chauffeur, bodyguard, secretary, and partner and counselor in real estate investments. The court held that these services are of monetary value, and the type for which one expects to be compensated unless

there is evidence of contrary intent. Thus, the court properly characterized them as consideration independent of the sexual aspect of the relationship. By way of comparison, the court said that such services as *being a constant companion and confidant* are not the type which are usually monetarily compensated nor considered to have a value for purposes of contract consideration, and, absent peculiar circumstances, would likely be considered so intertwined with the sexual relationship as to be inseparable."[71] This led the court to hold that Whorton has stated a cause of action arising from contract supported by consideration independent of sexual services.

The court in *Whorton* was compelled to delve into the severability of certain portions of the contract and make a finding as to whether such portions are supported by consideration independent of meretrecious sexual services because unlike *Marvin*, the parties' sexual relationship in *Whorton* was an express, rather than an implied part of the consideration. Had this not been the case, the court would simply have made the suggestion, as it did in *Marvin*, that the contract before it did not expressly include sexual services as part of the consideration and uphold its enforceability without having to deal with the issue of severability.

Thus, it appears that when confronted with a cohabitors' agreement, the court employs a two-tiered approach. First, it will determine whether the contract involves meretrecious sexual consideration. Second, if the contract does have such consideration, it will then consider whether there are portions of the contract supported by consideration independent of sexual services. This explains why the court struck down the contract in *Jones v. Daly* for not passing said two-tiered test.

It is important to point out that the ruling in *Whorton v. Dilllingham* does not conflict with *Jones v. Daly* because the latter is "factually different in that the complaining party did not allege contracting to provide services apart from those normally incident to the state of cohabitation itself. In contrast, *Whorton* separately itemizes services contracted for as companion, chauffeur, bodyguard, secretary, partner and business counselor. These, except for companion, are significantly different than those household duties normally attendant to non-

[71] *Id.*

business cohabitation and are those for which monetary compensation ordinarily would be anticipated."[72]

The foregoing discussion is significant as it demonstrates that a court should not or need not be compelled to read from a cohabitors' contract between same-sex couples sexual services as consideration. This is because the fact that the parties cohabit or agree to hold themselves out to the public as cohabiting mates or as 'husband and wife' is not sufficient to indicate that sexual services were part of the consideration. Otherwise, a contract respecting earnings and property between adults who live together and engage in sexual relations will necessarily be stricken down on its face and *pari delicto* will be utilized to justify a refusal to grant relief, negating more precise and narrower standards. This was suggested by the court in *Marvin* and there is no legal reason to make a distinction with respect to same-sex couples.[73]

The manner in which Philippine courts will decide, when confronted with a cohabitors' agreement, the enforceability of which is objected to on grounds of morals or public policy, remains to be tested in an actual case squarely raising this issue. But whether or not our courts will enforce such agreements and adopt, to a certain extent, the narrower and more precise standards announced in *Marvin*, as applied to same-sex couples in *Whorton*, will more or less be indicated by an examination of the following Philippine cases which involved contracts that have been stricken down for having illegal services as consideration.

In *Batarra v. Marcos*,[74] the court refused to give due course to a complaint for breach of contract with damages due to defendant's failure to perform his promise of marriage as the "carnal connection" was a consideration of the promise.

In *Inson v. Belzunce*,[75] it was held that:

> A promise of marriage based upon carnal relations, is founded upon an unlawful consideration and no action can be maintained by the woman against the man therefor.[76]

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[72] *Id.*

[73] *Id.*

[74] 7 Phil. 156 (1906).

[75] 32 Phil. 342 (1915).

[76] Inson v. Belzunce, 32 Phil. 342, 343 (1915).

In *Liguez v. CA*,[77] the Supreme Court ruled that:

> The facts as found by the Court of Appeals...demonstrate that in making the donation in question, the late Salvador P. Lopez was not moved exclusively by the desire to benefit appellant Conchita Liguez, but also to secure her cohabiting with him, so that he could gratify his sexual impulse. This is clear from the confession of Lopez to the witnesses Rodriguez and Ragay, that he was in love with appellant, but her parents would not agree unless he donated the land in question to her. Actually, therefore, the donation was but part of an onerous transaction (at least with appellant's parents) that must be viewed in its totality . Thus considered, the conveyance was clearly predicated upon an illicit causa. x x x It is scarcely disputable that Lopez would not have conveyed the property in question had he known that appellant would refuse to cohabit with him; so that the cohabitation was an implied condition to the donation, and being unlawful, necessarily tainted the donation itself.[78]

It is noteworthy that the foregoing Philippine cases did not involve facts which resemble the cohabitors' agreements that were upheld in *Marvin v. Marvin*[79] and in *Whorton v. Dillingham*.[80] Rather, illegal sexual service as consideration was either patent or necessarily implied from the contracts in said cases, hence, the court applied the *pari delicto* doctrine to prevent the grant of relief to the plaintiffs therein. Recourse to the severability-of-contract-provisions test announced in *Marvin* cannot be had as the contracts in said cases are bereft of other provisions supported by consideration independent of sexual services. Carnal relations as consideration pervaded the entirety of these contracts and infected them with illegality, thus, barring their enforceability.

However, it is significant that these Philippine cases do not in any manner foreclose our courts from adopting the narrower and more precise standards when considering cohabitors' agreements as held in Marvin and applied to same-sex couples in *Whorton*. Thus, at present, there is no legal basis for saying that all contracts governing property relations between same-sex couples in the Philippines will immediately be tainted with illegality for having sexual services as consideration. It is submitted that much will depend upon how our courts will

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[77] 102 Phil. 577 (1957).

[78] Liguez v. CA, 102 Phil. 577, 582 (1957).

[79] Liguez v. CA, 102 Phil. 577, 582 (1957).

[80] Liguez v. CA, 102 Phil. 577, 582 (1957).

characterize specific stipulations in a particular cohabitors' contract governing property relations of same-sex couples. In the process of judicial scrutiny and characterization of cohabitors' agreements in the Philippines, Jurisprudence in the U.S. deserves attention. However, such reference must be reconciled with our existing laws, particularly the Family Code. This is because the Family Code governs the property regimes of legally married couples which nonmarital partners cannot mimic by using cohabitors' contracts. Otherwise, nonmarital partners will be in a better position than their legally married counterparts because the former can now utilize the property regimes under the Family Code by mimicking the same in their contracts without being constrained by the Code's provisions on dissolution and termination of marital relations.

Therefore, a finding by a Philippine court that a cohabitors' contract is not based on meretrecious consideration, or that even if the said contract does contain such consideration, there are still other severable provisions supported by consideration independent of sexual services, will not be a sufficient basis for holding that such contract is valid and enforceable. Such contract must still not circumvent the Family Code.

At this point, it is vital to consider that the Family Code also provides for property relations of unions without marriage under Art. 147 and Art. 148, as follows:

> Art. 147. When a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through heir work or industry shall be governed by the rules on co-ownership.
>
> In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares, For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the former's efforts consisted in the care and maintenance of the family and of the household.
>
> Neither party can encumber or dispose by acts inter vivos of his or her share in the property acquired during cohabitation and owned

> in common, without the consent of the other, until after the termination of their cohabitation.
>
> When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation.
>
> Art. 148. In cases of cohabitation not falling under the preceding Article, only the properties acquired by both of the parties through their actual joint contribution of money, property or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding shares shall be presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit.
>
> If one of the parties is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her share shall be forfeited in the manner provided in the last paragraph of the preceding Article.
>
> The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith.

The foregoing provisions must not, however, be construed to preclude nonmarital cohabitors' contracts, proceeding by analogy from the fact that the Family Code itself allows future married spouses to control, to a certain extent, their property relations through marriage settlements, even as the said Code already provides for such property regimes as absolute community property and conjugal partnership of gains.

Since same-sex relationships are necessarily non-marital, and can be deemed similar to nonmarital heterosexual unions covered by Art. 147 and Art. 148, it is submitted that cohabitors' contracts may contain provisions similar to Art. 147.

For instance, a same-sex cohabitors' contract in our jurisdiction containing a provision similar to that in *Whorton v. Dillingham*[81] that one of the partners will stay at home and take charge of the household while the other works or maintains a business to earn a living, should not be construed as illegal simply because it is similar to Art. 147 which is expressly made applicable by the Code to nonmarital unions of a "man and a woman" who are not incapacitated to marry. This is because Art. 147 does not prohibit other persons from entering into contracts similar to its provisions. Such contracts, pursuant to the rule of liberality of contracts in Art. 1306 of the Civil Code, are valid and enforceable for as long as and to the extent that the same are not founded upon meretrecious sexual services as consideration. This result will depend largely on the manner in which a particular court will characterize and construe the specific stipulations in each and every same-sex cohabitors'contract.

It must be noted that the rationale for precluding same-sex cohabitors from copying the absolute community property or conjugal partnership regimes under the Family Code through cohabitors' contracts is the resulting unfair situation of allowing them to enjoy the benefits of said property regimes without being constrained by the marital dissolution and termination requirements under the Code. When same-sex cohabitors or other unmarried persons, for that matter, enter into contracts with stipulations similar to Art. 147, the aforesaid "unfair situation" does not find application as there is nothing to dissolve or terminate, there being no marital ties to begin with. This is true for all unmarried cohabitors, whether heterosexual or homosexual. Therefore, the aforesaid "rationale" cannot and must not be used to prevent same-sex couples from entering into cohabitors' contracts with provisions similar to Art. 147.

With respect to Art. 148, some argue that this provision, rather than being regarded as delimiting same-sex cohabitors' contracts, should instead be applied by extension to same-sex couples who have not entered into express contracts to govern their property relations. The argument is that Art. 148 is applicable to all kinds of cohabitations, other than that provided in Art. 147, which is a nonmarital union of a "man and a woman" not incapacitated to marry. In fact, in the Minutes of the Civil Code Revision Committee, it is stated that even multiple cohabitations may fall under Art. 148. If such is the case, then why

[81] Jones, *supra* note 67.

should not Art. 148 be applied to "committed and lasting relationships" between same-sex couples."[82]

The foregoing argument applying Art. 148 by extension to same-sex couples should not, however, be taken to delimit a court's possible inquiry into the "reasonable expectations of the parties" when exploring the application of the principle of implied contracts to same-sex cohabitors who have not entered into express contracts to govern their relationships.

In the absence of an express contract which may be oral or written, unmarried cohabitors need not necessarily be left without judicial remedy. Referring back to Marvin, it was held therein that "if an express agreement will be enforced, there is no legal or just reason why an implied agreement to share the property cannot be enforced."[83]

Marvin stated that the courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture or some other tacit understanding between the parties in order to fulfill their reasonable expectations.[84]

Worth noting is the statement in Marvin that nonmarital partners need not be treated as putatively married persons in order to apply principles of implied contracts or other equitable remedies. They need only be treated as any other unmarried persons because in some instances a confidential relationship may arise between nonmarital partners, and economic transactions between them should be governed by the principles applicable to such relationships.[85] For this reason, it is submitted that there is no legal obstacle to the application of the foregoing legal remedies to same-sex couples.

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[82] *See* MINUTES OF THE CIVIL CODE REVISION COMMITTEE, 13 (June 22, 1985) (Dean Gupit asked a clarification of the word "cohabitation" as to whether it means exclusive cohabitation without another household. He mentioned the case when although a man is already previously married to someone else, he now lives exclusively with another woman, forgetting already the old marriage. Justice Puno replied that all other situations not covered by the proposed Art. 155 (now Art. 147, FAMILY CODE) is governed by the proposed Art. 156 (now Art. 148, FAMILY CODE). He added that it can be multiple cohabitations).

[83] Marvin, *supra* note 56 at 115 (citation omitted).

[84] *Id.*

[85] *Id.*

If same-sex couples are to be treated as any other unmarried persons in applying the principles of implied contracts to them, then the fact that they live together and engage in sexual relations, even if proved in court, must not prevent a court from granting relief based on implied contracts. Otherwise, such a court proceeds by making distinctions which have no legal basis, and in the process, it is being used as a means of perpetuating a social prejudice or distaste against non-traditional same-sex relationships. This is fundamentally repugnant to our system which is supposed to be a system of laws and not of men.

2. Parental Rights

Can we be parents to our children?

Same-sex coupling is a continuing struggle for recognition and protection within the framework of existing law which is not limited to issues affecting the same-sex couple as between themselves. More significantly, it encompasses the assertion by same-sex couples of their rights as "parents" to their children. In fact, the legal problems associated with same-sex parenting are more controversial than those pertaining to property relations because the issue of sexual orientation often becomes a crucial factor in judicial decisions.

Under the law, the relation of parents, on one hand, and their children, on the other, is known as paternity and filiation. This relation may arise from nature, that is, when it is derived by generation, or it may arise by fiction of law, in imitation of nature, as in adoption.[86] In the context of same-sex coupling and parenting, the issue of paternity and filiation arises when either or both same-sex partners has/have a biological child by a previous heterosexual union or when either or both partners adopt a child.

Paternity and filiation, in turn, give rise to parental authority which, under Art. 209 of the Family Code, includes "the caring for and rearing of unemancipated children for civic consciousness and efficiency and the development of their moral, mental and physical character and well-being."

The legal problems involved in same-sex parenting usually arise in the any of the following three situations:

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[86] 1 TOLENTINO, *supra* note 46 at 520; See also ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 228 (1988).

1. Child custody and visitation rights determinations

2. Second-parent adoption

3. Joint adoption

Certain substantial difficulties which face homosexual persons and same-sex couples involved in child custody and visitation disputes or adoption proceedings have been identified by some foreign authors. They say that these difficulties are due to erroneous judicial preconceptions regarding homosexuality and include the following: (1) a judicial equation of homosexuality with mental illness or mental instability; (2) assumption that a homosexual parent will "convert" children to homosexuality; (3) belief that homosexuals are prone to molest children; (4) fear that homosexuals will pass the HIV virus to children; and (5) concern that the child of a homosexual parent will be held up to societal scorn.[87]

a. Child custody and visitation rights determinations

Some foreign authors, particularly Swart, say that same-sex parenting issues most commonly arise in the context of custody and visitation determinations following the dissolution of a heterosexual relationship.[88] In our jurisdiction, this may occur when either of the former legally married spouses, to begin with, is homosexual and has entered into a committed same-sex relationship whether before or after an annulment, declaration of nullity of marriage, or legal separation. The said former spouses have biological children and the heterosexual spouse deprives or seeks to deprive the homosexual spouse of custody and/or visitation rights over them.[89]

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[87] Shaista-Parveen Ali, *Comment, Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013 (1989).

[88] Swart, *supra* note 31, at 1591.

[89] Under the FAMILY CODE, it must be noted that a custody case will not arise as between former unmarried heterosexual cohabitors because their children are illegitimate (FAMILY CODE, art. 165) and as such, parental authority over these children is vested in the mother (FAMILY CODE, art. 176). It necessarily follows that the mother will have custody over such children.

However, this will not preclude the grant of visitation rights to the putative father, in case said former unmarried heterosexual cohabitors separate. But this requires that the putative father must have recognized the child before the separation, otherwise, a legal difficulty will arise since in the case of illegitimate children, there is no presumption of putative paternity. In fact, the FAMILY CODE only provides for the modes of establishing filiation from the child's

In a larger perspective, the phrase "dissolution of heterosexual relationship," in which child custody and visitation cases arise, must be deemed to include a separation de facto, without a court decree, of the spouses. This is because after a separation de facto, one of the parents may bring a petition for deprivation of parental authority against the other which directly affects the latter's custody over the children.[90]

The issue of homosexuality of the parent who is deprived or is sought to be deprived of custody, visitation rights and/or parental authority in the above-mentioned situations comes into play because in these cases, the legal standard that courts apply is almost invariably the "best interest" of the child standard, which is both broad and vague, vesting enormous discretion on the trial judge.[91]

This discretion of trial court judges has been underscored by our Supreme Court when it held in *Lozano v. Martinez*[92] and in *Pelayo v. Laurin*[93] that:

> The determination of the person to whom care, custody, and control of the child in these cases should be awarded, is a matter within the sound discretion of the court, and unless there is an abuse of such discretion, the selection by the lower court will not be interfered with by the appellate court.[94]

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standpoint (FAMILY CODE, art. 175 in relation to arts. 172-173) but there is no mode whereby an illegitimate father can establish his putative paternity over the child.

[90] Grounds for suspension of parental authority under the FAMILY CODE:

Art. 231. The court in an action filed for the purpose or in a related case may also suspend parental authority if the parent or the person exercising the same:

(1) Treats the child with excessive harshness or cruelty;

(2) Gives the child corrupting orders, counsel or example;

(3) Compels the child to beg; or

(4) Subjects the child to or allows him to be subjected to acts of lasciviousness.

If the degree of seriousness warrants, or the welfare of the child so demands, the court shall deprive the guilty party of parental authority, or adopt such measures as may be proper under the circumstances.

The suspension or deprivation may be revoked and the parental authority revived in a case filed for the purpose or in the same proceeding if the court finds that the cause therefor has ceased and will not be repeated."

[91] Swart, *supra* note 31, at 1592

[92] 36 Phil. 976 (1917).

[93] 40 Phil. 501 (1919).

[94] TOLENTINO, *supra* note 46, at 610.

The best interest of the child standard is enshrined in our laws and jurisprudence. The Family Code states that:

> In case of separation of parents, parental authority shall be exercised by the parent designated by the court. The court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.[95]

The unfitness of the parent may be by reason of moral depravity, habitual drunkenness, incapacity or poverty.[96] The Child and Youth Welfare Code provides that, "in all questions regarding the care, custody, education and property of the child, his welfare shall be the paramount consideration."[97]

In *Unson v. Navarro*,[98] our Supreme Court held that:

> In all controversies regarding the custody of minors, the sole and foremost consideration is the physical, educational, social, and moral welfare of the child, taking into account the respective resources and social and moral situations of the contending parents.

In American jurisprudence, some states have attempted to limit the discretion of trial judges by enumerating the factors that are appropriate for the judge to consider in such disputes but these factors are frequently as vague as the best interest standard itself. These factors include: capacity and disposition of the parties, ability of each of the parent, and moral fitness of the parties.[99]

Swart explains that

> due to the latitude permitted trial court judges in the application of the best interest standard, judges generally are free to consider the sexual orientation of parents involved in custodial or visitation disputes. When one of the parties to such dispute is lesbian or gay, that parent's sexual

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[95] FAMILY CODE, art. 213. See also art. 49 which states that: "During the pendency of the action for annulment, the court shall provide for the custody and support of the common children. The court shall give paramount consideration to the moral and material welfare of said children and their choice of the parent with whom they wish to remain. It shall also provide for appropriate visitation rights of the other parent."

[96] TOLENTINO, *supra* note 46, at 610.

[97] Pres. Decree No. 603 (1974), art 8.

[98] 101 SCRA 182 (1980).

[99] Swart, *supra* note 31.

> orientation frequently becomes an ever present, if not dominant, issue in the case. Consequently, numerous courts regularly deny custody to or restrict visitation rights of gay or lesbian parents. The sexual orientation of the homosexual parent and the perceived relevance of that orientation to the best interests standard frequently is the sole or primary basis for such decisions.[100]

The problem of the homosexual parent becomes more apparent when sexual orientation is equated to certain erroneous judicial preconception about homosexuality.[101]

A court decision denying custody or visitation rights and/or parental authority to the homosexual parent solely or primarily based on his/her sexual orientation will necessarily have a negative impact on the same-sex relationship which that parent has entered into as the child will not be allowed to stay in nor be exposed to the same-sex household. On the other hand, a decision favorable to the homosexual parent indicates tacit recognition or tolerance of the existence of the same-sex relationship in which that parent is involved.[102]

Under the Family Code, the separation of legally married spouses may be a result of a decree of absolute nullity of marriage, annulment or legal separation. There are important distinctions among these modes of separation as to their grounds and effects. The grounds for declaration of absolute nullity of marriage are outlined in arts. 35, 36, 37 and 38, Family Code. The grounds for annulment are enumerated in arts. 45 and 46 in relation to Art. 45 (3) where the consent of either party was obtained by fraud. The grounds for legal separation are enumerated in Art. 55.

As to the effects of these modes of separation, a reading of the Family Code seems to indicate a distinction between declarations of annulment and absolute nullity, on the one hand, and legal separation, on the other, regarding the issue of custody.

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[100] *Id.* at 1593.
[101] *Id.*
[102] *Id.* at 1594.

With respect to legal separation, the Family Code expressly states that: "The custody of minor children *shall be awarded to the innocent spouse*, subject to the provisions of Art 213 thereof."[103]

Whereas, in absolute nullity and annulment, the Code merely says that the final judgment in such cases shall provide for, among others, the custody of the common children;[104] and that during the pendency of the action, the court is mandated to determine, among others, the custody of the children giving paramount consideration to their moral and material welfare and their choice of the parent with whom they wish to remain, as well as to provide for appropriate visitation rights of the other parent.[105]

It is submitted that the foregoing distinction is more apparent than real because art. 63 (3) of the Code which expressly awards custody of the minor children to the innocent spouse in legal separation is still subject to the best interest of the child standard in art. 213. This means that if the homosexual spouse is able to establish by evidence that the "innocent spouse" is unfit to exercise parental authority as, for instance, the latter is suffering from any of the grounds for suspension or deprivation of parental authority in Art. 231, the former may have a valid claim for custody. Furthermore, it must be noted that Art. 63 (3) does not *per se* preclude visitation rights of the homosexual parent, even if the ground for legal separation is precisely that parent's homosexuality or lesbianism.[106] In fact, during the pendency of the action for legal separation, the provisions of Art. 49, on custody pending the action for annulment, are applicable.[107]

The foregoing provisions of the Family Code merely indicate that the law does not intend to prevent the homosexual parent from exercising custody/visitation rights or parental authority *per se*, even if the ground for annulment or legal separation is precisely that parent's sexual orientation. Rather, what is being underscored is the implicit grant of enormous discretion on the trial judge to determine such issues using the best interest standard.

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[103] FAMILY CODE, art. 63 (3) (emphasis supplied).
[104] FAMILY CODE, art. 50 (2).
[105] FAMILY CODE, art. 49.
[106] FAMILY CODE, art. 55 (6).
[107] FAMILY CODE, art. 62.

A careful scrutiny of the above-mentioned grounds for absolute nullity, annulment and legal separation reveals that homosexuality is a ground for legal separation[108] and also for annulment, but in the latter case, only if there was concealment of "homosexuality or lesbianism existing at the time of the marriage."[109] Noticeably, homosexuality is not a ground for declaration of absolute nullity, unless it is argued as falling under the ambit of Art. 36, Family Code, on psychological incapacity to comply with essential marital obligations.

Assuming *arguendo* that homosexual orientation is precisely the ground invoked in an action either for annulment or legal separation, it does not necessarily follow that the homosexual spouse should be automatically deprived of either custody/visitation rights or parental authority in the court decree of annulment or legal separation. This is because homosexual orientation is not specifically mentioned as a ground for the suspension or deprivation of custody/ visitation rights or parental authority.[110] Therefore, in an action for annulment or legal separation based on homosexual orientation, the court must still exercise its discretion in determining the custody/ visitation rights and/or parental authority issues by using the best interest standard in art. 231, and should not automatically deny nor restrict the same.

It must be emphasized that the grounds for the separation of spouses under the Family Code, which include homosexuality and lesbianism, are completely different from and have no relevance at all on the grounds for suspension or termination of parental authority. From this, it is submitted that while homosexual orientation may be viewed under the law as a behavior responsible for the severance of marital ties as between the legally married spouses, it does not follow that the same is destructive of the ties between parent and child.

This distinction is significant because it will prevent our courts from "erroneously" considering homosexual orientation as necessarily incompatible with the best interest standard, thus precluding an automatic denial of custody/ visitation rights and/ or parental authority to the homosexual parent.

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[108] FAMILY CODE, art. 55 (6).

[109] FAMILY CODE, art. 55 (6).

[110] FAMILY CODE, arts. 228, 229, 230, 231 (grounds for termination or suspension of parental authority).

The foregoing distinction paves the way for the possible employment by our courts of the "nexus test" which some US courts have developed in approaching child custody and visitation disputes.

> The nexus test dispenses with presumptions against gay or lesbian parents in the determination of custody or visitation rights. Instead, courts applying the nexus test require that a causal connection be shown between sexual orientation of the parent and harm to the child before custody is denied or visitation restricted on the basis of the sexual orientation of a parent. x x x In addition to its direct relevance to the resolution of custody and visitation disputes concerning gay and lesbian parents, the advent of the nexus test is significant in at least two other respects: (1) the test rejects the notion that homosexual persons are inherently unfit to assume familial roles and responsibilities; and (2) application of the test, particularly in the context of visitation restrictions, frequently requires the court to give tacit recognition to, or demonstrate a tolerance for, the existence of a homosexual relationship in which the gay or lesbian parent is or may be involved.[111]

To illustrate these effects, two noteworthy US cases, one involving a custody dispute and the other involving restriction of visitation rights are discussed below.

In *S.N. E. v. R.L.B*, [112] a divorced Alaska father sought to terminate the mother's legal custody and vest custody in him. He alleged that such a change would be in the child's best interest because, among other things, the mother "was a lesbian with radical political views." The trial court granted the custody including the following statement in its findings of facts: "Defendant has since the original decree significantly changed personally including a choice to live a homosexual lifestyle."

The Alaska Supreme Court reversed, specifically endorsing the nexus test. The court noted that although the trial record was "replete with evidence that the mother is a lesbian," creating a "taint apparent throughout the record," the record was devoid of any suggestion that the lesbian status of the mother had or was likely to have any adverse impact on the child. This status was thus insufficient to support the trial court's finding of a substantial change in circumstances warranting a change in custody.

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[111] Swart, *supra* note 31, at 1594.

[112] 699 P.2d 875 (1985); *See* Swart, *supra* note 3, at 1594 for the digest.

By endorsing the nexus test, the Alaska Supreme Court rejected any presumption that homosexual parents are inherently unfit to assume familial roles and responsibilities. The Alaska Supreme Court also recognized the existence of the mother's ongoing lesbian relationship, implicitly accepting the view that a long-lasting committed relationship between the mother and her lesbian partner should weigh in favor of continuing custody in the mother."[113]

In *In re Marriage of Cabalquinto*,[114]the Washington Court of Appeals applied the nexus test to a visitation restriction placed upon a gay father. The visitation decree authored by the trial court provided that visitation would only be permitted under circumstances "where the father does not associate with his homosexual companion to the extent that the boy could get the idea that [the] two men are other than casual friends." Applying the nexus test, the appellate court invalidated the portion of the decree providing for this restriction, finding no support in the record for the proposition that unrestricted visitation would endanger the child's physical, mental, or emotional health. Thus, the Court of Appeals accepted the possibility that the father's gay companion would be a member of the household during terms of visitation - this household closely paralleling the stereotypical nuclear family, with the sole exception that the two intimately related adults in the household would be of the same gender.[115]

An analysis of prevailing Philippine jurisprudence on the best interest of the child standard taken in conjunction with the Family Code, indicates that there is no obstacle in our jurisdiction to the possible employment by our courts of the nexus test as an analytical tool in deciding child custody/visitation/parental authority disputes. This will not only enrich and advance our jurisprudence on the subject but, more significantly, the negative preconceptions regarding homosexuality vis-à-vis the child's best interest will be avoided. In turn, this will afford our courts the opportunity to recognize, albeit tacitly, the emergence of same-sex coupling and parenting in the Philippines.

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[113] *See* Swart, *supra* note 3, at 1594 for the digest.

[114] 178 P.2d 7 (1986).

[115] *Id.*, at 1596.

b. Adoption

Adoption is a juridical act which creates between two persons a relationship similar to that which results from legitimate filiation.[116] In the context of same-sex coupling, this definition of adoption is significant because it is gender-neutral and dispenses with the issue of sexual orientation. Some authors view adoption as a paradigm for the divergence of biological and legal parenthood.[117] Adoption demonstrates a mode of establishing legal parenthood which disregards the sexual orientation of the adoptive parent. To some extent, it disconnects the link between heterosexuality, marriage and parenting and debunks the heterosexual precondition to having and rearing children which, in turn, supports same-sex coupling and parenting.

Originally, adoption was considered mainly for the benefit of the adopter. The modern tendency, however, is towards the view that adoption is for the benefit of the children to be adopted.[118]

Thus, our Supreme Court said in *Daoang v. Mun. Judge of San Nicolas, Ilocos Norte*[119] that:

> Adoption used to be for the benefit of the adopter. It was intended to afford to persons who have no child of their own the consolation of having one, by creating through legal fiction, the relation of paternity and filiation where none exists by blood relationship.[120] The present tendency, however, is geared more towards the promotion of the welfare of the child."[121]

In *Bobanovic v. Montes*,[122] the Supreme Court reiterated that:

> Adoption statutes, being humane and salutary, hold the interest and welfare of the child to be paramount consideration. They are designed to... allow childless couples or persons to experience the joys of parenthood and give them legally a child in the person of the adopted

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[116] Lazatin v. Campos, 92 SCRA 250 (1979).

[117] See Hohengarten, *supra* note 54.

[118] TOLENTINO, *supra* note 46, at 554.

[119] 159 SCRA 369 (1988).

[120] Daoang v. Mun. Judge of San Nicolas, Ilocos Norte, 159 SCRA 369 (1988).

[121] Daoang v. Mun. Judge of San Nicolas, Ilocos Norte, 159 SCRA 369 (1988).

[122] 142 SCRA 485 at 498 (1986).

> for the manifestation of their natural parental instincts.[123] (emphasis supplied)

The Family Code provides certain limitations as to who may or may not adopt and as to who may or may not be adopted. The following provisions are pertinent:

> A person of age and in possession of full civil and legal rights may adopt, provided he is in a position to support and care for his children, legitimate or illegitimate, in keeping with the means of the family.
>
> Only minors may be adopted, except in the cases when the adoption of a person of majority age is allowed under this Title.
>
> In addition, the adopter must be at least sixteen years older than the person to be adopted, unless the adopter is the parent by nature of the adopted, or is the spouse of the legitimate parent of the person to be adopted.[124]
>
> The following persons may not adopt:
>
> (1) The guardian with respect to the ward prior to the approval of the final accounts rendered upon termination of their guardianship relation;
>
> (2) Any person who has been convicted of a crime involving moral turpitude;
>
> (3) An alien, except:
>
> (a) A former Filipino citizen who seeks to adopt a relative by consanguinity;
>
> (b) One who seeks to adopt the legitimate child of his or her Filipino spouse;

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[123] Bobanovic v. Montes, 142 SCRA 485 at 498 (1986).

[124] FAMILY CODE, art. 183; See also Pres. Decree No. 603 (as amended) art. 27.

(c) One who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter."[125]

The following may not be adopted:

(1) A person of legal age, unless he or she is a child by nature of the adopter or his or her spouse, or, prior to the adoption, said person had been consistently considered and treated by the adopter as his or her own child during minority.

(2) An alien with whose government the Republic of the Philippines had no diplomatic relations; and

(3) A person who has been already adopted unless such adoption has been previously revoked or rescinded."[126]

Same-sex couples encounter certain difficulties in adoption, which may occur when one of the same-sex partners seeks to adopt a child and the adoption is refused or opposed because of the preconceived notion that the homosexuality of the would-be adoptive parent and his/her partner will not redound to the child's best interest. [127]

No Philippine case has yet tackled this issue. In fact, the reality is that our courts have granted adoptions to avowed gays. However, in the event such a case is presented, the nexus test can be applied by analogy. Thus, the courts must show a causal connection in each particular case between the sexual orientation of the adopting parent and actual harm to the child to be adopted. The more controversial legal problems which directly implicate same-sex couples involve second-parent adoption and joint adoption.

i. Second-parent Adoption

Second-parent adoption occurs when a nonbiological parent adopts a child without causing a severance of the parental rights of the biological parent. It is analogous to stepparent adoption with the exception that the nonbiological

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[125] FAMILY CODE, art. 184

[126] See *id.* art. 187; See also Pres. Decree No. 603 (as amended) art. 30.

[127] See S. de Guzman, Can Gays Father?, PHIL. DAILY INQUIRER, June 16, 1996, p. D-1.

parent is not legally married to the biological parent.[128] It is potentially available when only one biological parent has a legal connection with the child, as when one of the biological parents has died or has otherwise severed legal ties to the child.[129] For instance, a lesbian mother who bears a child through artificial insemination with the sperm of a donor who has released all legal ties to the child may seek to establish parental rights in her partner.[130]

The purpose of both second-parent adoption and stepparent adoption is to allow the spouses and the same-sex couple, respectively, to exercise joint parental authority over the child sought to be adopted.

Under the Family Code, one of the effects of adoption is the termination of the parental authority of the natural parents, as such will be vested in the adopters, "except that if the adopter is the spouse of the parent by nature of the adopted, parental authority over the adopted shall be exercised jointly by both spouses."

Textually, this provision sanctions step-parent adoption in which the adopter is legally married to the biological parent of the child to be adopted because it prevents the termination of parental authority of the biological parent only if the adopter is the legal spouse of said biological parent. This implies that in cases when the adopter is not the spouse of the parent by nature of the adopted, the termination of parental authority of the biological parent will follow by operation of law. This implication poses a legal obstacle to second-parent adoption in the Philippines. The issue is as to the interpretation of the term "spouse." If such term is restrictively applied only to legally married couples, then a same-sex partner cannot, in effect, adopt the biological child of his/her partner without causing the severance of the latter's parental authority .

There is as yet no Philippine case in which the issue of second-parent adoption is squarely raised. In the event of such a case, our courts may address the issue either by restrictively construing the term "spouse" or by contextualizing it in the light of same-sex coupling.

It is submitted that a liberal interpretation of the term "spouse" so as to include a partner in a committed same-sex relationship, will allow our courts to

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[128] Swart, *supra* note 31, at 1597.

[129] *Id.*

[130] *Id.* at 1597; See note 102 therein

decide the issue by taking into account the realities of same-sex parenting. This approach is consistent with the objective of adoption to hold the interest and welfare of the child as a paramount consideration providing him with parental care and the protection of society and family in the person of the adopter.[131] The interest and welfare of the child will be enhanced if he has two legal parents jointly exercising parental authority, in the person of the same-sex couple, one of whom is his biological parent, both of whom will provide him with love, care, support, and protection. This can be achieved only if the same-sex partner of the child's biological parent is deemed included in the term "spouse" for purposes of allowing the former to adopt the child without severing the latter's parental authority. This will subsume same-sex second-parent adoption within the framework of stepparent adoption and its legal effects.

The interpretation suggested above is in accord with certain US cases which granted second-parent adoption to same-sex couples. Reference to these US cases, while not controlling, will shed light on how US courts have approached the issue. In the case of *In re adoption of Evan*, [132] in which a lesbian's petition to adopt a child born to her partner was granted, the New York State Court held that:

> The petitioners are a committed, time-tested life partnership. For Evan, [the child], they are a marital relationship at its nurturing supportive best and they seek second -parent adoption for the same reasons of stability and recognition as any couple might.[133]

The court concluded by remarking upon the appropriateness of considering social realities when making decisions concerning the modern family.[134] It said:

> Finally, this is not a matter which arises in a vacuum... [T]he myriad configurations of modern families have presented us with new problems and complexities that cannot be solved by idealizing the past... Here, this court finds a child who has... two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the

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[131] *Id.*

[132] 153 Misc. 2d. 844 (1992).

[133] *Id.* at 847.

[134] Swart, *supra* note 31, at 1597.

> very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.[135]

In a representative District of Columbia case,[136] "each of two women partners was already the legal parent of one child, one by birth, and the other by adoption. Both the local Department of Human Services and the court found that adoptions of each child by the other partner would be in the best interests of the children, for whom the two women already functioned together as parents. The only possible bar to the adoptions emerged from a statute that appeared to mandate the termination of all parental rights of a biological parent upon adoption of his or her child by someone else, the only exception being for stepparent adoptions, i.e., cases in which the adopter is the spouse of the biological parent.[137] The court overcame this statutory hurdle by finding that an adoption by a same-sex partner resembled the stepparent adoptions authorized by statute, and the non-birth mother was therefore allowed to adopt the children without extinguishing the parental rights of the birth mother.[138]"

Following *In re Evan*, the judge in *In re adoption of Caitlin*[139] allowed lesbian partners, each the biological mothers of two children conceived through artificial insemination, to adopt each other's children.

ii. Joint Adoption

The purpose of same-sex second-parent adoption which is to allow joint exercise of parental authority in furtherance of the child's best interests likewise applies to same-sex joint adoption. However, in same-sex joint adoption, two situations are possible. First, when neither of the same-sex partners is the biological parent of the child. Second, when one of the same-sex partners is the biological parent of the child but the filiation is illegitimate.

The Family Code governs joint adoption. It provides that:

> Husband and wife must jointly adopt, except in the following cases:

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[135] *Id.* at 1598.

[136] Adoption of Minor (T.), No. A-269-90, 1991 WL 219598 (D.C. Super. Ct. Aug. 30, 1991), cited in Hohengarten, *supra* note 54 at 1522.

[137] *Id.*

[138] *Id.*

[139] See Arsenault, *supra* note 34, at 840.

(1) When one spouse seeks to adopt his own illegitimate child, or

(2) When one spouse seeks to adopt the legitimate child of the other.[140]

Since this provision only mentions "husband and wife", then how can same-sex joint adoption be justified?

There is as yet no Philippine case in which this issue is squarely raised. But in the event of such a case, a possible objection to same-sex joint adoption may be based on Art. 185, since a same-sex couple cannot be considered husband and wife under the law.

However, a scrutiny of art. 185 shows that the law merely makes it mandatory that husband and wife adopt jointly, with two exceptions. The law does not directly nor indirectly prohibit other forms of joint adoptions, such as that by same-sex couples. What Art. 185 prohibits by implication is for either husband or wife to adopt alone, other than in the two exceptions therein. It is, thus, necessary to clarify what Art. 185 prohibits and what it does not. An examination of our jurisprudence on mandatory joint adoption between husband and wife will be useful in addressing this objection to same-sex joint adoption.

In *Republic v. CA*,[141] spouses James Anthony Hughes, an American ,and Lenita Mabunay Hughes, a Filipino later naturalized as an American, were not allowed to adopt jointly the nephews and nieces of Lenita despite art. 185 which required husband and wife to jointly adopt, because the alien husband is under a legal impediment to adopt and he does not fall under any of the exceptions allowing aliens to adopt under art. 184. He cannot fall under art. 184 (c) because he is not married to a Filipino as Lenita is already a naturalized American. Lenita by herself could have been allowed to adopt her nephews and nieces but since art. 185 requires joint adoption, she cannot be allowed to adopt alone.

In *Republic v. Toledano*,[142] joint adoption was not allowed for the same reason as in *Republic v. CA*. Here, the Supreme Court said that mandatory joint

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[140] FAMILY CODE, art. 185.

[141] 227 SCRA 401 (1993).

[142] 233 SCRA 13 (1994).

adoption between husband and wife is in consonance with the concept of joint parental authority which is the ideal situation.[143]

The foregoing cases underscore the rationale for joint adoption which is the joint exercise of parental authority. They do not, in any way, advert to a possible bar or obstacle to same-sex joint adoption. Furthermore, the Minutes of the Civil Code Revision Committee merely reiterate the rationale for joint adoption but do not state nor imply any objection to same-sex joint adoption. In the Minutes, it is said that Justice Reyes commented that "if they allow husband and wife to adopt separately, family trouble might arise."[144] Justice Caguioa suggested that they make it "mandatory that husband and wife must jointly adopt since if they allow one to adopt only with the written consent of the other, it would go against the concept of joint parental authority."[145]

It is submitted that under the foregoing explanation, a same-sex couple may be allowed to jointly adopt a child in the same manner as a married heterosexual couple does, except that same-sex couples do so by choice while married heterosexuals must do so by mandate of law.

Mandatory joint adoption between husband and wife frequently occurs when neither of them is the child's biological parent. But such adoption may also occur when one of the spouses is the child's biological parent but the filiation is illegitimate, as will be explained below.

The exceptions to mandatory joint adoption between husband and wife are exclusive. In particular, exception no. 2 of Art. 185 applies only "when one spouse seeks to adopt the legitimate child of the other." By necessary implication, when one spouse seeks to adopt the illegitimate child of the other, the adoption must be joint. The effect, as intended by the law, is not only to prevent a severance of parental authority of the biological parent of the illegitimate child, but more importantly, it is to raise the status of the child from illegitimate to

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[143] Republic v. Toledano, 233 SCRA 13 (1994).

[144] 3 MINUTES OF THE CIVIL CODE REVISION COMMITTEE MEETINGS 12 (July 27- Dec. 14, 1985).

[145] 5 MINUTES OF THE CIVIL CODE REVISION COMMITTEE MEETINGS 18 (April 4- Dec. 19, 1987).

legitimate, with respect to his biological parent, while at the same time the child becomes the adopted child of the other spouse.[146]

The two situations when same-sex joint adoption may occur, as aforesaid, are similar to mandatory joint adoption between husband and wife. But since same-sex joint adoption is by choice, there seems to be a difference between such kind of joint adoption compared with mandatory joint adoption between husband and wife when the child sought to be adopted is the illegitimate child of one of the parties in both unions. This difference is sometimes cited as an objection to same-sex joint adoption but it is unpersuasive for the following reason:

In the case of husband and wife, the adoption of such illegitimate child must always be joint under Art. 185. Whereas, in the case of a same-sex couple, they may either choose to proceed by joint adoption, with the same consequences as that in the case of mandatory joint adoption between husband and wife, or, they may proceed by second-parent adoption, in which case, only the same-sex partner who is the non-biological parent of said child will adopt him, thus, retaining the child's illegitimate filiation with his biological parent. This consequence can easily be avoided when a same-sex couple jointly adopts, if their particular circumstances fall under the aforesaid situation.

Another possible objection that may be raised against same-sex joint adoption is as to whose surname the adopted child will use. Under the Civil Code, "an adopted child shall bear the surname of the adopter."[147]

Some argue that since the same-sex couple-adopters have presumably different surnames, then confusion will arise as to whose surname the child will use. If such is the case, then same-sex joint adoption is not possible.

This argument is unpersuasive for the following reasons:

First, such argument presumes that the alleged "confusion" in the use of surnames affects only same-sex joint adopters, which is false. Such "confusion" may also affect mandatory joint adoptions between husband and wife because it is possible that the wife -adopter elects to retain and use her maiden surname, which is presumably different from that of the husband-adopter, as under the law a

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[146] See FAMILY CODE, art. 189 (1) which states that the rights of the adopted child are similar to a legitimate child.

[147] CIVIL CODE, art. 365.

married woman may do so.[148] If such is the case, should the joint adoption be disallowed? The argument is self-defeating.

Second, such "confusion" is more apparent than real as it may be legally avoided. This can be done by allowing the adopted child to use the surname of either of the same-sex adopters provided that whichever surname is chosen, such must be registered in the Civil Registry, so as to prevent the child from using two surnames alternatively. In this, case, much will depend upon the agreement of the same-sex adopters as to whose surname the adopted child will use. As long as the surname is that of either of them, Art. 365 is already complied with. Hence, the alleged "confusion" does not take place. This counter-argument is also applicable to joint adoption by husband and wife.

It must be noted that that law on surnames was formulated by the Code Commission in order to avoid confusion in the use of surnames.[149] Therefore, in considering situations as those mentioned-above which seem to create a "confusion" in the use of surnames, an interpretation that reconciles rather than defeats the purpose of the law on surnames must be adopted, such as that advanced in the arguments discussed above.

IV. CONCLUSIONS AND RECOMMENDATIONS

In sum, the author proposes that the following measures be adopted to secure legal protection to the property relations and parental rights of the same-sex couples:

A. Property Relations

1. In case the same-sex couple enters into a cohabitor's contract to govern their property relations, our courts must not automatically strike down such contracts on the ground that the consideration is contrary to law, morals,

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[148] See CIVIL CODE, art. 370: A married woman *may* use:
(1) Her maiden first name and surname and add her husband's surname, or
(2) Her maiden first name and her husband's surname, or
(3) Her husband's full name, but prefixing a word indicating that she is his wife, such as "Mrs."

[149] REPORT OF THE CODE COMMISSION at 51 *cited* in TOLENTINO, *supra* note 46, at 672.

and/or public policy. Rather, it is suggested that the "narrower and more precise" standards in *Marvin v. Marvin*, as applied to same-sex couples in *Whorton v. Dillinghamm*, which requires a court to inquire first whether or not the contract consideration is meretrecious sexual service or whether or not such contract is supported by consideration independent of sexual service, before deciding whether or not to enforce the same, be applied and adopted.

2. In case the same-sex couple did not enter into an express cohabitor's contract, it is suggested that our courts apply the rules on implied contracts in relation to Art. 147 and Art. 148 of the Family Code in order to give effect to the reasonable expectations of the parties.

3. In both case, it is suggested that our courts should not automatically apply the *pari delicto* doctrine to refuse a grant of relief to either of the same-sex cohabitors.

B. Parental Rights

1. In case of custody/visitation right/parental authority disputes, it is suggested that our courts employ the "nexus test" which requires that before custody/visitation right/parental authority is denied or restricted, there must be a showing of a causal connection between the homosexual orientation of the parent and actual harm to the child.

2. In case of second parent adoption, it is suggested that our courts adopt a liberal interpretation of the term "spouse" under Art. 189(2) of the Family Code so as to allow a same-sex partner to fall under the term, for purposes of permitting him/her to adopt the biological child of the other same-sex partner without causing a severance of the latter's parental authority over the child, with the result that both will exercise joint parental authority.

3. In case of joint adoption, it is suggested that our courts adopt a liberal interpretation of the Family Code which does not expressly prohibit other forms of joint adoptions other than that between husband and wife, so as to allow same-sex couples to jointly adopt.

The foregoing recommendations highlight the active role of judicial power in the attempt to advance and protect the rights of same-sex couples within the framework of existing law.

However, the intervention of the Legislature is also important as the possible enactment of a domestic partnership law or a same-sex marriage law will provide more concrete and tangible benefits to same-sex couples.

Domestic partnership is defined as a business or political recognition of two adults seeking to share benefits normally conferred upon married couples. In its simplicity, domestic partnership is one step more than cohabitation, but one step less than marriage. Its essential ingredient is a business or government recognition of benefits conferred on a non-marital adult couple of the same or opposite sex because of conformity with a procedure established by the business or government.[150]

On the other hand, a same-sex marriage law is perhaps the most radical measure that can be proposed considering the highly conservative cultural and religious climate in the Philippines. But at least, it has been demonstrated in Part I of this paper that an analysis of the constitutional provisions on marriage and the family reveals that the framers of the constitution did not intend to prohibit the legislature from passing a same-sex marriage law or an amendment to the present language of the Family Code limiting marriage to a "man and a woman" should succeeding Congresses so decide.

In the US, the pros and con of same-sex marriage have been discussed within the gay movement itself. Stoddard says that same-sex couples must be permitted to marry basically to allow them to enjoy the same benefits enjoyed by their heterosexual counterparts.[151] On the other hand, Ettelbrick argues that same-sex marriage will not actually be beneficial to the gay movement as it merely seeks to cast homosexuals into the heterosexual mould with the attendant oppression that results in the process due to the subordination of the role of one (wife) to that of another, thus perpetuating the culture of patriarchy and male-domination.[152]

Some legal arguments for same-sex marriage include an invocation of the right of privacy[153] and the equal protection clause. In the US, the equal protection

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[150] See R. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

[151] See T. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK (Fall 1989).

[152] See P. Ettelbrick, *Since When is Marriage a Path to Liberation?*, (OUT/LOOK Fall 1989).

[153] See Hohengarten, *supra* note 54.

argument, in particular, proceeds by analogy from the case of *Loving v. Virginia*[154] where the US Supreme Court determined that two individuals in love are similarly situated as any other two individuals in love, regardless of race, such that denial of marriage based on race offends the equal protection clause. This argument has since been invoked by analogy by homosexual advocates to buttress the claim of allowing same-sex marriage based on equal protection.[155]

The foregoing arguments and proposed measures are alternatives and prospects for same-sex couples and, to a larger extent, for the gay movement. It is hoped that the foregoing discussion of the property relations and parental rights of same-sex couples in the Philippines, as attempted by this legal paper, has shed some light on how same-sex couples and homosexuals, as actors in the system, can invoke black-letter law to legitimize their operational code. This will certainly allow our existing laws to address such rights and thus evolve as an effective mechanism of dispute-settlement thereby maintaining order and stability in the legal system while at the same time adjusting to emerging realities that confront the modern family.

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[154] 388 U.S. 1 (1967).

[155] See Zambrowicz, *supra* note 42, at 932.