PHILIPPINE INTER-COUNTRY ADOPTION LAWS AND THE FOREIGN HOMOSEXUAL COUPLE AS PROSPECTIVE ADOPTIVE PARENTS

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INTRODUCTION

Homosexuals have come a long way. From individuals historically subjected to condemnation and persecution systematic and nearly global in scale, they have come to slowly claim their place in the family of civilized humanity. They have excised homosexuality from official lists of medical diseases.[1] They have attained some success in disassociating homosexuality from criminality. They continue to join together as emergent socio-political groups that question homophobia and lobby for basic human respect and dignity.

And now homosexuals can marry in four independent and sovereign states—in unions legally identified and conceptualized as "Marriage." In 2001, three years after it allowed registered partnerships for homosexuals, the Netherlands legalized same-sex marriages by amending its civil code to read *"Een huwelijk kan worden aangegaan door twee personen van*

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The author wishes to thank his adviser in legal research, Dr. Raul C. Pangalangan, who told him to "think outside the box." The author also wishes to thank his professor in Family Law and Private International Law, Professor Elizabeth Aguiling-Pangalangan, a true pedagogue of the law in the grand manner.

[1] In 1967, homosexuality was removed by the American Psychiatric Association from its list of pathological diagnoses. Twenty-five years later, the World Health Organization followed suit, delisting homosexuality from the International Classification of Diseases in 1992. See Michael L. Tan, "Sickness and Sin: Medical and Religious Stigmatization of Homosexuality in the Philippines," in *Ladlad: An Anthology of Philippine Gay Writing*, ed. J. Garcia and D. Remoto (Manila: Anvil Publishing, 1994), p. 205.

verschillend of van gelijk geslacht" ("A marriage can be contracted by two people of different or the same sex"). In 2003, Belgium—with its predominantly Catholic populace—became the second country in the world to legalize same-sex marriage. On July 20, 2005, Canada enacted the Civil Marriage Act—a fitting legislative end to a series of judicial decisions upholding the so-called "Freedom to Marry." On July 3, 2005, by fiat of the Spanish Cortes, Spain—yet another predominantly Catholic country—became the fourth in the world to marry homosexuals. South Africa is expected to do the same by December of 2006.[2]

Elsewhere in the globe, diverse forms of legal recognition and protection for homosexual couples proliferate.[3] Usually legally not at par with the more established traditionally heterosexual marriage, they are varyingly called "Unregistered Cohabitation,"[4] "Stable Union,"[5] "Registered Partnership,"[6] "Civil Pact,"[7] "Civil Partnership,"[8] "Pacte Civil de Solidarite,"[9] "Civil Unions,"[10] "Domestic Partnerships,"[11] and "Reciprocal Benefits."[12] These forms give limited rights and protection to homosexual couples and are semantically different from marriage perhaps to avoid, as the cultural critic Camille Paglia crowed, the word's strong association with Judeo-Christian religious traditions.[13]

Truly, homosexuals have come a long way in their place in the human family.

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[2] http://en.wikipedia.org/wiki/Same-sex_marriage

[3] http://en.wikipedia.org/wiki/Homosexuality_laws_of_the_world

[4] In South Africa, Croatia, Hungary, and Portugal.

[5] In Andorra.

[6] In Denmark, Finland, Germany, Iceland, Luxembourg, Norway, Slovenia, and Switzerland.

[7] In France.

[8] In United Kingdom.

[9] In Guadeloupe, Martinique, and French Guiana.

[10] In Tasmania, New Zealand, the US states of Vermont and Connecticut, and the Argentinian provinces of Buenos Aires and Rio Negro.

[11] In Australia, and the US states of California, New Jersey, Maryland, and District of Columbia.

[12] In the US state of Hawaii.

[13] Camille Paglia, "Connubial Personae," in *Same-Sex Marriage: Pro and Con, A Reader*, ed. Andrew Sullivan (New York: Vintage Books, 1997), p. 139.

Andrew Sullivan believes that "(l)egalizing same-sex marriage would logically mean granting homosexuals adoption and parenting rights."[14] Surely one common consequence of a marriage or union, however denominated, is the raising of biological or adoptive children. It is at the least a very strong social and cultural expectation. In our own Family Code, for instance, parental authority, filial legitimacy, and adoption—all related to raising children—are some of the legally perceived consequences and incidents of a marriage. Would it therefore be farfetched and illogical to say that in countries that extend certain marital rights and protection to homosexual couples, they are likewise allowed to adopt children?[15]

Incidentally, at least six countries expressly allow homosexuals to adopt. Sweden, the Netherlands, Andorra, Spain, England and Wales, and Belgium expressly allow homosexuals, whether as individuals or as couples, to adopt children. Iceland, Norway, Germany, Denmark, France, and the State of Israel allow limited adoption rights to homosexuals in that they may only adopt the adopted or biological child of his or her spouse in a state-recognized union. In the United States, ten states allow adoption by openly homosexual couples.[16] The same is true in a number of territories in Australia.[17]

There are two kinds of adoption: local or domestic and international or inter-country. The latter,[18] despite the political controversy surrounding it and the complications it provokes from the interplay of different state legal systems, has become so widespread that the United Nations deemed it fit to regulate it. On May 29, 1993, 55 countries in the

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[14] *Same-Sex Marriage: Pro and Con, A Reader,* ed. and intro. Andrew Sullivan (New York: Vintage Books, 1997), p. 239.

[15] Interestingly, however, not all states that legalize same-sex marriages grant the right to adopt. Belgium allows homosexuals to marry but does not allow them to adopt.

[16] California, Massachusetts, New Jersey, New Mexico, New York, Ohio, Vermont, Washington state, Wisconsin, and Washington, D.C.

[17] http://en.wikipedia.org/wiki/Gay_adoption

[18] Under Philippine law, international or inter-country adoption is defined as the socio-legal process of adopting a Filipino child by a foreigner or a Filipino citizen permanently residing abroad where the petition is filed, the supervised trial custody is undertaken, and the decree of adoption is issued outside the Philippines. Rep. Act 8043, sec. 3 (a).

Seventeenth Session of the Hague Conference on Private International Law came together and unanimously approved the "Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption" ("the Hague Convention on Inter-Country Adoption" or "the Convention" for brevity).[19]

The Republic of the Philippines is a signatory to the Convention. Significantly, the Netherlands, Belgium, Canada, and Spain—the four independent states where same-sex marriages are legal—are likewise signatories.[20] Of the states where civil union or domestic partnership laws exist, only Croatia has not ratified or acceded to it.

These developments—i.e. the increasing number of states that grant marital and/or adoption rights to homosexual couples, the signatory status these states enjoy with the Hague Convention on Inter-Country Adoption—extrapolate to the likely situation that a homosexual couple from one of these states would want to avail of the Convention to adopt a foreign child.

THE PROBLEM, SCOPE AND LIMITATIONS

This paper investigates a hypothetical legal question: Can a foreign homosexual couple, granted by their state the right to adopt jointly and the

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[19] Joan Heifetz Hollinger, "Intercountry Adoption: Legal Requirements and Practical Considerations," in *Adoption Law and Practice* (New York: M. Bender, 2002), Chapt. 11, V.2.

[20] The signatory clause of the Convention reads: "The undersigned, Delegates of the Governments of Argentina, Australia,Austria, Belgium, Canada, Chile, China, Cyprus, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay and Venezuela, Member States, as well as the Delegates of the Governments of Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Haiti, the Holy See, Honduras, India, Indonesia, Kenya, the Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, the Philippines, the Russian Federation, Senegal, Sri Lanka, Thailand and Viet Nam participating as Invitees, convened at The Hague on 10 May 1993, at the invitation of the Government of the Netherlands, in the Seventeenth Session of the Hague Conference on Private International Law."

status of eligibility as inter-country adoptive parents, successfully avail of Philippine inter-country adoption laws and processes to adopt a Filipino child? Is the Philippine legal environment on inter-country adoption hospitable to such an adoption?[21]

This hypothetical question is complicated by the legal milieu surrounding homosexuality in the Philippines.

Philippine family law is cognizant only of heterosexual marriages.[22] Hence there are no same-sex marriages legally celebrated in the country. In the Family Code the homosexuality of a spouse is even a ground for the declaration of nullity of a marriage[23] or its annulment,[24] or legal separation.[25]

The Philippine legal system is not cognizant of "gay and/or lesbian rights" as a separate and actionable legal concept.

On the other hand, homosexuality and homosexual acts are not illegal in the Philippines. We do not have sodomy laws. We do not criminalize or penalize consensual sexual acts between adults of the same sex. Neither do we have express laws that allow employment discrimination on the basis of sexual orientation.

It is also significant that Philippine law does not have a legal definition for the homosexual and homosexuality. For instance, despite its prominence in the Family Code as a destabilizing factor in a heterosexual marriage, neither the Family Code nor the Civil Code Revision Committee

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[21] This paper is not an advocacy piece on foreign "gay" adoptions. It is simply an attempt to discuss how the current Philippine inter-country adoption laws might respond to such an adoption.

[22] FAMILY CODE, art. 2. No marriage shall be valid, unless these essential requisites are present: (1) Legal capacity of the contracting paties who must be a male and a female; and (2) Consent freely given in the presence of the solemnizing officer.

[23] FAMILY CODE, art. 36—Void marriages on the ground of psychological incapacity.

[24] FAMILY CODE, arts. 45 and 46.

[25] FAMILY CODE, art. 55.

gives a workable definition for homosexuality.[26] Will this lack of definition prove to be a blessing or a bane for the Filipino homosexual?

The paper shall also serve as space to articulate some incidental issues the question provokes. For instance, are local homosexuals allowed to adopt under Philippine adoption laws? Would the recognition of the adoption by same-sex parents amount to a recognition of the marital tie between the same-sex parents, if they have one legally recognized by their home state?[27]

The paper addresses the hypothetical question to the Philippine Inter-Country Adoption Board (ICAB, for brevity) instead of to the regular courts. The ICAB is the central administrative agency in inter-country adoption and could be said to exclusively process inter-country adoptions in the country. Remarking on the adoption provisions of the Family Code, Judge Sempio-Diy states that adoption is always judicial and that it cannot be granted administratively.[28] Inter-country adoption emerges as the exception to this general rule. R.A. 8043 or the Inter-Country Adoption Law defines inter-country adoption as one where the decree of adoption is issued outside of the Philippines.[29] Zenaida N. Elepaño, Deputy Court Administrator of the Supreme Court, worriedly opined that R.A. 8043 in

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[26] See Jessica Abrenica, Amabelle Asuncion, Mona Francesca Katigbak, *Beyond Malakas and Maganda: Re-Welcoming Baybayan into the Filipino Family,* 75 Philippine Law Journal 680-751 (2001). This article fully discusses the difficulty of obtaining a viable definition of homosexuality and homosexuals in the Philippine legal system.

[27] The paper does not attempt to discuss the incidental question of whether a same-sex marriage legal in its state of celebration shall be recognized under Philippine law. Furthermore, this paper will not discuss the question of whether, assuming arguendo that homosexual foreign couples could legally adopt a Filipino child under Philippine inter-country adoption laws, they have legal standing to compel such an adoption.

[28] ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 290 (1995).

[29] R.A. 8043, sec. 3 (a)

effect takes inter-country adoption out of the jurisdiction of Philippine courts.[30]

The legislative journals also bare out that the drafters of the inter-country adoption statute intended for inter-country adoption to be primarily administrative.

> PROPOSED AMENDMENT OF SENATOR SHAHANI
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> .... On page 7, line 5, Senator Shahani proposed to insert the phrase PHLIPPINE REGIONAL TRIAL COURT HAVING JURISDICTION OVER THE CHILD THROUGH THE between the words "the" and "Board." She noted that the bill as worded would make the issue of adoption completely out of the jurisdiction of the judicial system.
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> At this juncture, Senator Gonzales inquired whether it was really the intent of the bill to make adoption a mere administrative procedure. He said that if it is a judicial function, Congress cannot vest such judicial power in an administrative body as it would violate the principle of separation of powers. However, he stated that for purposes of matching and other procedural matters, the application to adopt may still be coursed through the Board.
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[30] See Zenaida N. Elepaño, "Court Procedures and the Regional Trial Courts' Relationship with the ICAB," in *Legal Aspects of Inter-country Adoption*, ed. Concepcion Lim-Jardeleza and Gerrome Y. Apolona (Quezon City: institute of Judicial Administration, 1997), p. 51.

REMARKS OF SENATOR SHAHANI

Upon resumption, Senator Shahani stated that she would accept the idea that the adoption process is essentially administrative in nature; however, it does not mean that recourse to the courts should be waived. She believed that if the parents or relatives or adopted parents of the child believe that it would be to the child's interest to undergo the judicial procedure under Philippine laws, the application should be filed with the courts.

QUERY OF SENATOR ROCO

Senator Roco asked whether his impression was correct that adoption would be an administrative procedure both to Filipinos and foreigners but without prejudice to judicial proceedings.

Senator Rasul replied that it could be so provided in the bill.[31]

Sedfrey M. Candelaria, a member of the Inter-Country Adoption Board, has appreciated these exchanges to mean that the legislators had agreed that the inter-country adoption process would be essentially administrative in nature.[32]

The ICAB therefore would be more cognizable of the problem than the regular courts.

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[31] Journal of the Senate, Third Regular session, 1994-1995, 20 February 1995 (Monday), p. 218-220.

[32] Sedfrey M. Candelaria, "An Overview of the Inter-Country Adoption Act of 1995 (Republic Act No. 8043)" in *Legal Aspects of Inter-country Adoption*, p. 44.

The novelty of this hypothetical question is underscored by the Guidelines for Matching set by the ICAB. The said guidelines do not contain a protocol on how to deal with the applicant foreign homosexual couple.[33]

DOMESTIC ADOPTION LAWS AND THE FILIPINO HOMOSEXUAL ADOPTER

The hypothetical question of foreign homosexual couples adopting via Philippine inter-country adoption laws cannot be properly explored

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[33] ICAB Memorandum Circular No. 1, Series of 1998, reads:

Subject: Guidelines on Matching

(1) Childless couples are to be given priority over couples with biological children and/or with previous adoption. The needs of the child should always be the priority at all times. An honest appraisal of these needs is therefore imperative to determining, among others, if the child is to be entrusted to a childless family or to a family with children.

(2) Applicants with earlier dates of application are always to be given priority over later applicants.

(3) New applicants will be given priority only in cases of a special needs child whose needs cannot be met by any of the earlier applicants.

(4) Religious preferences of presents/CCAs are to be given consideration whenever possible. However, they shall not be the primary consideration in matching. Primary considerations shall be the needs of the child, the qualification of the couple being matched, the date of application and the fact of childlessness.

(5) Religious preferences will be given consideration in the case of an older child, three (3) years and above, since the child already has an orientation/exposure to religious activities.

(6) In the spirit of ecumenism, all religious are looked upon with favor including mixed religions within a family.

(7) ICAB will not refuse a couple who are not infertile but have chosen to adopt.

(8) Applicants with more than two (2) biological children will be accepted. However, they shall be informed upon application that they have lower priority in being matched with a child from the Philippines, unless matched with a special needs child.

(9) As agreed during the last Global Conference, there shall be no discrimination against working mothers or part-time housewives as against full-time housewives.

(10) Women between 45-47 years of age may still be matched with minors 0-3 years of age since it is still possible for women within this age bracket to bear children. Close attention shall be paid to child care plans in the review of families for approval. Guardianship plans shall be indicated as part of the child care plans.

(11) Smokers shall not be refused as prospective parents. However, they shall be informed that they have a lower priority in being matched with children from the Philippines as smoking is a health concern.

without some preliminary remarks on the Philippine domestic law on adoption. Can a Filipino, who is a Philippine resident and openly homosexual, domestically adopt a child, either as an individual or with a same-sex partner? How hospitable would the present legal environment be to such adoptions?

Can the Filipino homosexual individual adopt under domestic adoption laws?

The rules on Philippine domestic adoption are contained in the Domestic Adoption Act of 1988 (R.A. 8552) and, where applicable, the Family Code (E.O. 209) and the Child and Youth Welfare Code (P.D. 603). The primary law, however, is R.A. 8552.[34] It was approved on February 25, 1998.

As will be borne out by the following discussion, homosexuality does not seem to be an immediate and absolute bar against a homosexual adoptive parent under the primary adoption law.

R.A. 8552 applies to Philippine residents who wish to adopt a resident child. There are two general classes of individuals who may adopt under this law: Filipino citizens and aliens who have resided in the Philippines continuously for three years prior to their application to adopt.[35] Section 7 of the law sets the eligibility requirements for prospective adoptive parents. It reads:

Sec. 7. *Who May Adopt.* The following may adopt:

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[34] Prior to the enactment of R.A. 8552, Philippine laws on adoption were scattered in several laws. The Domestic Adoption Law represents a consolidation of these scattered provisions. See Elizabeth Aguiling-Pangalangan, "Proposed Domestic Adoption Law," in *Legal Aspects of Inter-country Adoption*, p. 83.

[35] R.A. 8552, sec. 7

(a) Any Filipino citizen of legal age, in possession of full civil capacity and legal rights and of good moral character, has not been convicted of any crime involving moral turpitude, emotionally and psychologically capable of caring children at least sixteen (16) years older than the adoptee, and who is in a position to support and care for his/her children in keeping with the means of a family. the requirement of sixteen (16) year difference between the age of the adopter and the adoptee may be waived when the adopter is the biological parent of the adoptee, or is the spouse of the adoptee's parent;

(b) Any alien possessing the same qualifications as above stated for Filipino nationals: *Provided,* That his/her country has diplomatic relations with the Republic of the Philippines, that he/she has been living in the Philippines for at least three (3) continuous years prior to the filing of the application for adoption and maintains such residence until the adoption decrees is entered, that he/she has been certified by his/her diplomatic or consular office or any appropriate government that he/she has the legal capacity to adopt in his/her country as his/her adopted son/daughter: *Provided, Further,* That the requirements on residency and certification of the alien's qualification to adopt in his/her country may be waived for the following:
   i. A former Filipino citizen who seeks to adopt a relative within the fourth (4th) degree of consanguinity or affinity; or
   ii. One who seeks to adopt the legitimate son/daughter of his/her Filipino spouse; or
   iii. One who is married to a Filipino citizen and seeks to adopt jointly with his/her spouse a relative within the fourth (4th) degree of consanguinity or affinity of the Filipino spouse; or

(c) The guardian with respect to the ward after the termination of the guardianship and clearance of his/her financial accountabilities.

The above requisites on parental eligibility do not take into consideration the sexual orientation of a prospective adoptive parent.

Thus is sexual orientation not a benchmark for eligibility; otherwise, the framers would have placed it in the primary law on domestic adoption. Unlike the U.S. state of Florida, which in its express ban against homosexual adoptive parents impliedly requires heterosexuality for prospective adoptive parents, the Philippines clearly does not require that an adoptive parent be of a certain sexual orientation.

Perhaps this inconsequentiality given to sexual orientation by R.A. 8552 is in harmony with the Philippine Civil Code provisions on civil capacity. Sexual orientation does not figure as an element of civil capacity. Neither heterosexuality nor homosexuality is listed as a cause of incapacity under Article 38 or as a limitation on capacity under Article 39 of the New Civil Code.[36]

Since the Philippine domestic adoption law does not expressly prevent homosexuals from adopting a child, it may be argued that the Filipino homosexual individual may successfully avail of the domestic adoption law since he or she needs only to satisfy the minimum requirements for parental eligibility set by R.A. 8552.

But according to one study, a likely problem that would surface for the homosexual individual planning to adopt under R.A. 8552 is satisfying

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[36] Article 38 of the NEW CIVIL CODE reads:

Minority, insanity, or imbecility, the state of being a deaf-mute, prodigality and civil interdiction are mere restrictions on the capacity to act, and do not exempt the incapacitated person from certain obligations, as when the latter arises from his acts or from property relations, such as easements.

Article 39 reads:

The following circumstances, among others, modify or limit capacity to act: age, insanity, imbecility, the state of being a deaf-mute, penalty, prodigality, family relations, alienage, absence, insolvency and trusteeship. The consequences of these circumstances are governed in this Code, other codes, the Rules of Court, and in special laws. Capacity to act is not limited on account of religious belief or political opinion.

its eligibility requirement of "good moral character."[37] Abrenica, Asuncion, and Katigbak have previously raised the question of whether a Filipino homosexual can legally adopt under the domestic adoption statute. In *Re-Welcoming Baybayan into the Filipino Family*,[38] the authors explored the general question of a homosexual's parental suitability within the eyes of the law. They investigated it from three legal angles: parental authority, custody and visitation of children, and adoption.

Their findings are not encouraging.

Beginning with the question of whether a homosexual may be legally deemed fit to exercise parental authority, the authors opine that the parental duties of giving moral example and instruction laid down by the Civil Code, Family Code, and the Youth and Child Welfare Code, are "potential obstacles to the retention of parental authority by homosexuals and lesbians primarily **because of the view that they are immoral** and therefore incapable of giving moral and spiritual guidance (emphasis mine)."[39]

On the question of whether a homosexual may be granted custody of and visitation rights with children, the authors, after analyzing American judicial prefigurations of the "Tender Years" and "Best Interest" doctrines and after citing two American cases, find that courts (American courts, that is) are inclined to grant custody and visitation rights to homosexual parents on the condition that their children are not exposed to the homosexual partner of such parent.[40]

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[37] Sec. 7. Who May Adopt. The following may adopt:

(a) Any Filipino citizen of legal age, in possession of full civil capacity and legal rights and of good moral character, xxx

[38] Jessica Abrenica, Amabelle Asuncion, Mona Francesca Katigbak, *Beyond Malakas and Maganda: Re-Welcoming Baybayan into the Filipino Family*, 75 PHILIPPINE LAW JOURNAL 680-751 (2001).

[39] Ibid., p. 725.

[40] Ibid., pp. 721-731. The authors cited *In re* J., S., and C., 324 A. 2d 90, 92, 97 (N.J. Super. 1974) and an unspecified case from cited book, DIANNE ROSEN, LESBIANISM: A STUDY OF FEMALE HOMOSEXUALITY 74 (1974).

Finally, on the question of whether a homosexual may adopt, the authors do note, as I note above, that the sexual orientation of a prospective adoptive parent is not usually taken into consideration in adoption. They write that parental eligibility is considered on a "case-to-case basis." However, after analyzing the eligibility requirements of R.A. 8552, Section 7, paragraph (a), the authors conclude:

> In this regard [i.e. R.A. 8552, sec. 7, par. (a)], homosexuals and lesbians may again find themselves at a disadvantage. One of the basic guidelines for eligibility is that the prospective adoptive parent must be of "good moral character." **Given that homosexuality and lesbianism are associated with immorality,** it would be possible to deny adoption, or to overthrow a grant of adoption, on the ground of the immorality of the prospective adopter.[41] (emphasis mine)

Concluding their discussion of homosexuality and parenting, Abrenica, Asuncion, and Katigbak still find a legal atmosphere averse to homosexual parenthood on the ground of homosexuality's equation with immorality. "In sum, the moral fitness arguments raised against homosexual parents are entirely based on the acceptance of the premise that homosexual and lesbian conduct is immoral."[42]

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[41] Ibid., p. 731.
[42] Ibid., p. 735.

Nevertheless, the authors manage to end on a hopeful note. Citing the American case of *In re Adoption of Evan*,[43] where an American court found it in the best interest of a child to be adopted by the lesbian partner of his biological mother, the authors exhorted the Philippine Supreme Court to "break new ground."[44] They urged the adoption of the so-called *Nexus* test in issues of parental authority, custody and visitation, and adoption. The test would require courts to establish a positive correlation between a parent's homosexuality and any feared adverse effects on the child, if the court is to deny parental authority, custody, visitation rights, or eligibility for adoption to the homosexual.[45] The test therefore avoids the immediate association of homosexuality with immorality but instead adopts a pragmatic and rational judicial approach to it.

Although there may be truth in the authors' observation that homosexuality is widely perceived by the general public to be immoral,[46] this observation is yet to have legislative or jurisprudential equivalence. We have no statute denouncing homosexuality as immoral. We have no known judicial decision declaring it as immoral. Specifically, there is no known judicial decision denying a Filipino homosexual parental authority, custody and visitation rights, or adoption on the ground of his or her homosexuality. Ultimately, there is no articulated and conclusive public policy against homosexuals and homosexuality. And this is why the authors' correlation between the public's perceived view of homosexuality as immoral and the denial of homosexual adoption rights is problematic. For this reason, while Abrenica, Asuncion, and Katigbak's conclusion that a homosexual could possibly be denied adoption rights on the ground of

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[43] 153 Mi Sc. 2d 844, 583 N.Y.S. 2d 997.

[44] Idem, p. 735.

[45] Ibid., p. 749.

[46] This is debatable. The Philippines has no recorded history of gay or lesbian bashing, no hate crimes targeted against homosexuals of the proportions of the Matthew Shepard murder in the U.S. during the Clinton years. In Philippine television, homosexual images or stereotypes that the mainstream is willing to accept abound: we have gay T.V. hosts, comedians, even gay beauty pageants on daily noon-time shows. Television viewers openly accept these images without the necessary abjuration or disdain that comes with viewing something that is "immoral."

immorality is apt and convenient, it is speculative. The "incidental issue" or legal question I pose above remains unanswered.

Perhaps an applicant adopter's homosexuality won't matter much if the child to be adopted were a relative by consanguinity. Pursuant to the declared policy of R.A. 8552 in favor of the child's placement within his or her extended family,[47] courts should favor the preservation of family ties and deem that a child is best reared by his or her own relatives, regardless of their sexual orientation. But what if there is no blood relation between the applicant homosexual adopter and the child? This is where the perceived conundrum on good moral character and homosexuality comes in. The issue then would become discretionary instead of strictly legal, its resolution relying more on a judge's biases than on extant laws. The issue would rest on a magistrate's ideological orientation in the liberal-conservative scale. It would rest on sympathies. A sympathetic court might grant adoption on the reasoning that homosexuality is not a stated disqualification under the law; an unsympathetic court might find homosexuality as anathema to "good moral character"—on non-legal grounds, I maintain—and deny the adoption.[48]

To the question of whether a Filipino homosexual individual can successfully avail of the Domestic Adoption Law to adopt a child, therefore, at best there is no easy or immediate answer.

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[47] R.A. 8552, sec. 2 (a) states: "It is hereby declared the policy of the State to ensure that every child remains under the care of his/her parent(s) and be provided with love, care, understanding and security towards the full and harmonious development of his/her personality. Only when such efforts prove insufficient and no appropriate placement within the child's extended family is available shall adoption by an unrelated person be considered."

[48] Such a decision is vulnerable to a challenge on the ground of abuse of discretion. Where is the legislative or judicial pronouncement that homosexuality is an indicia against "good moral character"?

Can the Filipino homosexual couple jointly adopt a child under domestic adoption laws?

While it is difficult to answer the question of an individual homosexual adopting, it is easy to answer the question of whether a homosexual **couple** may adopt under domestic adoption laws. The answer is no. The homosexual couple cannot jointly adopt under domestic adoption laws.

The law states that "married" couples must adopt jointly. Section 7, R.A. 8552, reads:

> Sec. 7. *Who May Adopt.* – The following may adopt:
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> x x x
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> Husband and wife shall jointly adopt, except in the following cases:
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> (a) if one spouse seeks to adopt the legitimate son/daughter of the other; or
> (b) if one spouse seeks to adopt his/her own illegitimate son/daughter; Provided, however, That the other spouse has signified his/her consent thereto; or
> (c) if the spouses are legally separated from each other.

The Family Code echoes this provision. Article 185 of the code reads:

> Art. 185. Husband and wife must jointly adopt, except in the following cases:
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> (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.

Given the imperative tone of the Family Code provision,[49] Judge Sempio-Diy comments that the general rule of joint marital adoption is pursuant to the ideal concept of joint parental authority over the child.[50]

Nowhere else in both the Domestic Adoption law and the Family Code is joint adoption provided for save in the above cited provisions. And it is spoken of only in reference to marital adoption. It may therefore be said that when these laws speak of joint adoption, they refer only to married people adopting jointly. Restated conversely, only married couples are allowed to adopt jointly. Hence, two individuals who wish to adopt a child must have a marital tie between them in order to be legally allowed to do so. Two friends cannot adopt a child jointly. Two neighbors cannot adopt a child jointly. Siblings cannot adopt a child jointly. A maternal grandmother and a paternal grandmother cannot adopt a child jointly And so on. The implied rule therefore reserves joint adoptions only for the legally married couple. [51]

Under Philippine law, who is the legally married couple? The Family Code defines marriage as that between a man and a woman.[52] Marriage is definitionally heterosexual. The Family Code is cognizant only of heterosexual marriages.[53] In which case, a homosexual couple, who cannot get married under Philippine law, cannot jointly adopt a child under domestic adoption laws.

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[49] Article 186, FAMILY CODE, reads:

In case husband and wife jointly adopt or one spouse adopts the legitimate child of the other, joint parental authority shall be exercised by the spouses in accordance with this Code.

[50] ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 287 (1995)

[51] This conclusion may be supported by Tolentino, albeit the esteemed jurist was commenting on an entirely different subject matter. Commenting on Article 187 of the Family Code, Tolentino said: "... an adopted child cannot have two adopting fathers or two adopting mothers. This is the meaning of paragraph (3) of the present article." 1 ARTURO M. TOLENTINO, CIVIL CODE OF THE PHILIPPINES, 560.

[52] Article 1, FAMILY CODE

[53] The paper does not attempt to discuss the incidental question of whether a same-sex marriage validly celebrated in a state where same-sex marriages are legal will be recognized under Philippine law.

In sum, on the question of whether a homosexual can domestically adopt a child, either as an individual or as part of a same-sex couple, while homosexuality is not an outright disqualification for parental eligibility under domestic adoption laws, the likely answer is still open-ended for the homosexual individual but certainly negative for the homosexual couple.

Now what of the Filipino homosexual couple's foreign counterpart, can they jointly adopt a Filipino child under present Philippine inter-country adoption laws?

FOREIGN HOMOSEXUAL ADOPTIVE PARENTS AND PHILIPPINE INTER-COUNTRY ADOPTION LAWS

As stated earlier, the paper investigates the question of whether a foreign homosexual couple, granted adoptive rights and declared eligible as adoptive parents for inter-country adoption by their state, can successfully adopt a Filipino child under our inter-country adoption laws.

The pertinent Philippine statute on inter-country adoption is R.A. 8043, or the Inter-Country Adoption Law. Its date of approval, June 7, 1995, is interestingly only a few days after the entry into force of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-Country Adoption. The Convention is the most authoritative source of standards and procedures in inter-country adoption.[54] Since the Philippines is a signatory to the Convention, pursuant to the incorporation doctrine of the Constitution, it is deemed part of the law of the land.[55]

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[54] Joan Heifetz Hollinger, p. (11-52).
[55] Sec. 2, Art. II, 1987 Constitution.

The Hague Convention on Inter-Country Adoption: Setting the Duties of Central Authorities

The Convention instructs all member-states to designate a central authority to facilitate inter-country adoption between member-states.[56] In addition, the Convention also specifies the duties of said central authorities.

In the Philippines the central authority is the Inter-Country Adoption Board (ICAB), an administrative agency created pursuant to R.A. 8043. The main purpose of the ICAB is to act as the central authority in matters relating to inter-country adoption.[57] As already discussed above,[58]

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[56] Article 6, HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION.

[57] The purposes of the ICAB are contained in Sec. 4 of R.A. 8043. It reads

> SEC. 4. The Inter-Country Adoption Board.- There is hereby created the Inter-Country Adoption Board, hereinafter referred to as the Board, to act as the central authority in matters relating to inter-country adoption. It shall act as the policy-making body for purposes of carrying out the provisions of this Act, in consultation and coordination with the Department, the different child-care and placement agencies, adoptive agencies, as well as non-governmental organizations engaged in child-care and placement activities. As such, it shall:
>
> a) Protect the Filipino child from abuse, exploitation, trafficking and/or sale or any other practice in connection with adoption which is harmful, detrimental, or prejudicial to the child;
>
> b) Collect, maintain, and preserve confidential information about the child and the adoptive parents;
>
> c) Monitor, follow-up, and facilitate completion of adoption of the child through authorized and accredited agency;
>
> d) Prevent improper financial or other gain in connection with an adoption and deter improper practices contrary to this Act;
>
> e) Promote the development of adoption services including post-legal adoption;
>
> f) License and accredit child-caring/placement agencies and collaborate with them in the placement of Filipino children;
>
> g) Accredit and authorize foreign adoption agency in the placement of Filipino children in their own country; and

the ICAB practically exclusively processes inter-country adoptions in the country. The paper's subject matter, therefore, may be whittled down to this question: How should the Inter-Country Adoption Board rule on the adoption application of a foreign homosexual couple legally recognized by its state and given the go-signal by said state to adopt via inter-country adoption?

The following discussion investigates why the ICAB should be bound by the finding of eligibility by a foreign state such that once the foreign state transmits to the ICAB its report on an adoptive couple's eligibility, it has no choice but to place such couple in its roster of adoptive parents with which to "match"[59] a child, regardless of whether the applicant couple is heterosexual or homosexual.

The Hague Convention not only directed the establishment of central authorities among member-states, it also laid down the duties of said central authorities. The following are the duties of central authorities as carefully specified by the Convention. Articles 4 and 5 of the Convention read:

> Article 4
>
> An adoption within the scope of the Convention shall take place only if the competent authorities of the **State of origin** –
>
> **a) have established that the child is adoptable;**
> b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

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h) Cancel the license to operate and blacklist the child-caring and placement agency or adoptive agency involved from the accreditation list of the Board upon a finding of violation of any provision under this Act.

[58] See the paper's discussion of its scope and limitations, p. 4.

[59] R.A. 8043 defines "matching" as the judicious pairing of the adoptive child and the applicant to promote a mutually satisfying parent-child relationship. Sec. 3, par. (g). From the perspective of the Convention, "entrusting" is the alternative word envisioned to describe the process.

c) have ensured that
   (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
   (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
   (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
   (4) the consent of the mother, where required, has been given only after the birth of the child; and
d) have ensured, having regard to the age and degree of maturity of the child, that
   (1) he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
   (2) consideration has been given to the child's wishes and opinions,
   (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
   (4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the **receiving State –**

a) **have determined that the prospective adoptive parents are eligible and suited to adopt;**
b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State. (emphasis supplied)

The Convention apportions two separate sets of duties on a central authority. These separate duties are alternately activated depending on whether the state of the central authority functions as the "receiving State" or as the "State of origin" in the inter-country adoption equation. The Convention does not define "receiving State" and "State of origin," but it is clear from its provisions that the "receiving State" is the state of the adoptive parent(s) (i.e. the state which shall receive the child) and the "State of origin" is the state of the child (or the state where the child will come from). Sometimes the former is called the "sending State."

The duties of a central authority when its state acts as State of origin or as receiving State are clearly and sharply delineated. Pursuant to article 4 (a), if a state serves as State of origin, its competent authority is tasked to establish the adoptability of the child subject of the adoption. On the other hand, pursuant to article 5 (a), if it serves as receiving State its competent authority shall determine the eligibility and suitability to adopt of the prospective adoptive parents.[60] In other words, the eligibility-determining or adoptability-establishing functions of a single competent authority are separate and are alternately activated depending on whether a state serves as a receiving State or as a State of origin.

Thus is a division of labor of sorts set between a State of origin and the receiving State in the inter-country adoption flow.

This division of labor is reinforced elsewhere in the Convention. In the chapter on the procedural requirements of inter-country adoption, Article 15 and 16 lay down:

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[60] Chapter II, Article 5 (a), HAGUE CONVENTION ... IN RESPECT OF INTERCOUNTRY ADOPTION.

Article 15

(1) **If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt,** it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.
(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

(1) **If the Central Authority of the State of origin is satisfied that the child is adoptable,** it shall –
   (a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
   (b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
   (c) ensure that consents have been obtained in accordance with Article 4; and
   (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed. (emphasis supplied)

Once more the Convention in the above provisions establishes that the central authority of the receiving State is to establish parental eligibility while the central authority of the State of origin is to establish child adoptability. Thus it can be said that even the procedure set by the Convention carefully relies on the separate duties of the receiving State and the State of origin. The so-called division of labor constitutes a critical flow in the inter-country adoption process.

One question arises. Is this division of labor rigid or flexible? May a confusion of duties be allowed such that a State of origin may also determine parental eligibility and a receiving State may also establish child adoptability?

Joan Heifetz Hollinger observes that "the Convention's language by itself does not indicate whether the prospective parent(s) have to be eligible and suited to adopt under the laws of the receiving or the sending country, or under the laws of both."[61] Hollinger's observation is premised on the presupposition that the Convention is unclear on whether a State of origin may still determine the eligibility of prospective adoptive parents under its laws.

It is difficult to agree with such an observation when the language of the Convention is very clear. Hollinger's observation rests on a misleading presupposition. The Convention is clear on the separate tasks of the receiving State and the State of origin. Its provisions repeatedly enumerate and delineate separate tasks for a central authority when its state is in the "receiving" or "sending" role. The Convention's language is clear: as per duties of a central authority, a receiving State cannot establish child adoptability; conversely, a State of origin cannot determine parental eligibility.

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[61] *Adoption Law and Practice*, §11-54. The context paragraph reads: "Receiving countries must ensure that adoptive parents have been appropriately counseled and determined to be 'eligible and suited to adopt' and that the child will be allowed to enter and reside permanently in the receiving country. (Article 5) Note, however, that the Convention's language by itself does not indicate whether the prospective parent(s) have to be eligible and suited to adopt under the laws of the receiving or the sending country, or under the laws of both."

If the Convention intended a confusion of duties, it would have expressly provided so. Significantly, the Convention does not impose an additional duty on the central authority of a State of origin to reassess or re-determine the finding of parental eligibility by the receiving State. Neither does the Convention expressly provide for the freedom of a member-state to legislate for a confusion of the two separate duties.

Indeed, an enforcement of this rigid separation of tasks is found elsewhere, in Article 14 of the Convention.

> Article 14
>
> > Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 14 works to compel prospective adoptive parents to apply only to their state of habitual residence, necessarily the receiving State. A prospective adoptive parent cannot apply to the child's State of origin. The article appropriately does not contemplate a situation wherein a prospective adoptive parents' habitual residence is also the habitual residence of the adoptive child. Otherwise, such adoption would no longer be inter-country, but domestic.

The effect of Article 14 is that in the normal flow of the Convention's prescribed inter-country adoption process, a State of origin cannot have the first opportunity to determine a prospective adoptive parent's eligibility. The article therefore is further proof that a State of origin cannot determine parental eligibility. It supports the conclusion that the division of labor in determining parental eligibility and establishing child adoptability between a receiving State and a State of origin, respectively, cannot be commixed.

Perhaps it may be argued that, by fiat of its sovereignty, a state needs no permission from the Convention to legislate for a fusion of the two alternate sets of duties of a central authority. That a state may legislate to authorize a central authority to determine parental eligibility or child adoptability regardless of the state's role in the inter-country adoption equation. That it may legislate not to be bound by the findings of another state with respect to parental eligibility or child adoptability. That it may legislate to re-evaluate or re-determine another state's finding of eligibility or adoptability. Then again, the Hague Convention explicitly disallows reservations.[62] Article 40 of the Convention reads: "No reservation to the convention shall be permitted."

Pursuant to this prohibition against reservations, member-states cannot or should not deviate from the Convention's prescribed procedure and set duties. Furthermore, this prohibition serves to cement the inflexibility of the division of labor between a receiving State and a State of origin.

It is conceivable that this rigid division of labor is the Convention's solemn nod to the private international law concept of the comity of nations. The U.S. case of *Hilton vs. Guyot* defines "comity of nations" as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[63] Hence, by preventing re-assessment of a member-state's findings, the principle of comity of nations obliges a member-state to recognize and honor without reservations the finding of parental eligibility or child adoptability of another member-state.

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[62] Esteemed statesman Jovito Salonga, citing the Vienna Convention on the Law on Treaties, defines a reservation in this wise: it is "a unilateral statement made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state." JOVITO R. SALONGA AND PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 139 (1992).

[63] 159 U.S. 113 (1895), cited in JORGE R. COQUIA AND ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS 3 (2000).

It is also conceivable that the division of labor so carefully placed by the Convention should work to lay to rest any question or controversy on the choice of law that shall govern parental eligibility and child adoptability. By strictly providing that parental eligibility is to be determined only by the receiving State, the Convention implicitly lays down that the law to determine such eligibility should be the law of the receiving State, not that of the State of origin. Likewise, the law to determine child adoptability should only be the law of the State of origin.[64]

Finally, it is conceivable that the division of labor was placed by the Convention to expedite the inter-country adoption process.

Thus are central authorities of States of origin prohibited from further assessing prospective adoptive parents already found eligible for inter-country adoption by the receiving State.

Therefore, when the Philippines serves as a State of origin, once the ICAB receives a report of an adoptive parents' eligibility from a receiving State, pursuant to the Convention it should be bound by such a finding. It can no longer re-assess the eligibility of adoptive parents endorsed by the other state. And when a foreign homosexual couple, granted adoptive rights and declared as eligible adoptive parents for inter-country adoption by their state, applies to adopt a Filipino child, the ICAB, pursuant to the inter-country adoption procedure envisioned by the Convention (indeed, pursuant even to the principle of comity of nations behind such procedure), has no choice but to honor the receiving State's

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[64] As will be discussed later on, however, there is usually a disjuncture between the Convention's prescriptions and the municipal inter-country adoption laws of its member-states. For instance, in the United States it is a common problem that children who had been found legally free for adoption (presumably under the law of the State of origin) are later found to not satisfy the "orphan" definition of U.S. immigration law, and are thus denied entry into the country. (See Elizabeth Bartholet, "International Adoption: Overview," in *Adoption Law and Practice* (New York: M. Bender, 2002), §10.03 [2] [c].) This common problem in U.S. inter-country adoption law perhaps belies the Convention's attempts to streamline choice of law in determining child adoptability by exclusively assigning the law of the State of origin to it, precisely because U.S. immigration law is also used to determine child adoptability. Apparently, the finding of child adoptability established by a foreign state is not given full faith and credit by U.S. immigration officials.

finding of eligibility and automatically place such adoptive parents in its roster of adoptive parents with which it can "match" a Filipino child.

The Hague Convention on Inter-Country Adoption and the Philippine Inter-Country Adoption Law

The purpose behind the Philippine Inter-Country Adoption Law is to meet the opportunity offered by inter-country adoption: the placement of a child—for whom a suitable adoptive family cannot be found in the Philippines—in a permanent family that gives a child the sense of emotional and psychological stability.[65]

The official name of R.A. 8043 is "An act establishing the rules to govern inter-country **adoption of Filipino children**, and for other purposes" (emphasis mine). The name says it: R.A. 8043 contemplates only the Philippines as a State of origin, **sending** adoptive children for foreign adoptive parents, not **receiving** them for Filipino adoptive parents. The title of the law discloses, perhaps, how our legislators knew, subconsciously or otherwise, that in inter-country adoption the Philippines would basically play the role of a State of origin. Our legislators perhaps were only too cognizant of our country's Third World*liness* and knew its place in the natural socio-economic flow of inter-country adoption: rich First World countries adopt children from poor Third World countries, not the other way around. Third World countries *send*, First World countries *receive*.

The Philippine delegate to the Drafting Committee of the Hague Convention on Inter-Country Adoption, Lourdes Balanon,[66] states that

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[65] Sponsorship Speech of Senator Dominique Coseteng, Journal of the Senate, Third Regular Session, 1994-1995, 15 February 1995 (Wednesday), p. 57.

[66] Lourdes G. Balanon served as Consultant Reporter for the psychosocial aspects of inter-country adoption.

Philippine municipal laws must be harmonized with the provisions of the Convention.[67]

How does R.A. 8043 harmonize with the song of the Convention?

It goes flat. Despite its title's reference to the Philippines as a State of origin, R.A. 8043 does not reflect the strict separation of duties set by the Convention between receiving States and States of origin. R.A. 8043 still provides for eligibility requirements for prospective adoptive parents seeking to adopt a Filipino child. Section 9 reads:

> SEC. 9. *Who May Adopt.*- Any alien or a Filipino citizen permanently residing abroad may file an application for inter-country adoption of a Filipino child if he/she;
>
> (a) is at least twenty-seven (27) years of age and at least sixteen (16) years older than the child to be adopted, at the time of application unless the adoptor is the parent by nature of the child to be adopted or the spouse of such parent;
> (b) if married, his/her spouse must jointly file for the adoption;
> (c) has the capacity to act and assume all rights and responsibilities of parental authority under his national laws, and has undergone the appropriate counseling from an accredited counselor in his/her country;
> (d) has not been convicted of a crime involving moral turpitude;
> (e) is eligible to adopt under his/her nation law;

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[67] Lourdes G. Balanon, "Protecting Children's Rights through the Hague Convention on the Protection of Children and International Cooperation in Respect of Inter-country Adoption," in *Legal Aspects of Inter-country Adoption*, p. 4.

Ms. Balanon, however, would probably disagree with my conclusion that the ICAB is bound by the Convention's strict division of labor between receiving States and States of origin. She would also likely disagree with my views on the effect of the Convention's "no-reservations" provision. Commenting on the inter-country adoption process under the Convention, she states that "the requirements set in Chapter II (on the duties of competent authorities) are just the minimum requirements and the Contracting States remain at liberty to add other conditions or requirements." Ibid., p. 8.

(f) is in a position to provide the proper care and support and to give the necessary moral values and example to all his children, including the child to be adopted;
(g) agrees to uphold the basic rights of the child as embodied under Philippine laws, the U.N. Convention on the Rights of the Child, and to abide by the rules and regulations issued to implement the provisions of this Act;
(h) comes from a country with whom the Philippines has diplomatic relations and whose government maintains a similarly authorized and accredited agency and that adoption is allowed under his/her national laws; and
(i) possesses all the qualifications and none of the disqualifications provided herein and in other applicable Philippine laws.

R.A. 8043 thus authorizes the ICAB to determine both child adoptability and parental eligibility even when the Philippines is the State of origin. The Implementing Rules and Regulations of the ICAB likewise contain a provision similar to Section 9 above, enumerating the qualifications of "who may adopt."[68] This is a clear disharmony with the duties specified by the Convention for the central authority of a State of origin.

An opposite view might submit that R.A. 8043 had already amended the Convention pursuant to the Latin maxim of *Lex posterior derogate priori*—that R.A. 8043, being the more recent municipal law, supervenes the Convention (also a municipal law under the incorporation doctrine). That it now authorizes the ICAB to re-evaluate parental eligibility. However, as already noted above, pursuant to its "no-reservations" provision, the Convention does not permit member-states to exclude or modify the legal effect of its provisions.

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[68] Section 9, Implementing Rules and Regulations of the Inter-Country Adoption Law.

Nevertheless, it becomes apparent that dissonance between the Convention and the municipal laws of its member-states is at times more of the general rule than the exception. Indeed, pundits on inter-country adoption sometimes write with the expectation that municipal laws shall in varying degrees be different from and intractable to the Convention. Joan Heifetz Hollinger observes that even among its member-states, "the Convention may not have much effect on existing practices and customs unless the parties are determined to use their new central authorities and procedures to alter the current highly commercialized and in some instances, corrupt intercountry adoption market."[69] Professor Elizabeth Bartholet writes: "Some countries may ratify the Convention based on good faith belief that it is a good idea, but have trouble taking the bureaucratic steps necessary to make it effective, thus locking themselves out of the international adoption business."[70]

THE FOREIGN HOMOSEXUAL COUPLE AND THE PARENTAL ELIGIBILITY CHECKLIST OF R.A. 8043: PASS OR FAIL?

Whether R.A. 8043 contravenes the Hague Convention or not, the reality is it allows the ICAB to assess parental eligibility even when the Philippines acts as a sending state.[71]

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[69] Hollinger, p. 11-56.

[70] Elizabeth Bartholet, "International Adoption" from *Litigation and Administrative Practice Course Handbook Series*, Practising Law Institute, PLI Order No. 7583, December, 2005.

[71] Section 10 of the ICAB's Implementing Rules and Regulations of the Inter-Country Adoption Law reads:

> Section 10. *Functions of the Secretariat.* The functions of the Secretariat shall be the following:
>
> xxx
>
> (b) review and process applications, matching proposals, placement, and all documents requiring action by the board;
>
> xxx

The following section discusses why even if R.A. 8043 goes against the Convention—and authorizes the ICAB to refuse to be bound by another state's finding of parental eligibility—such should not automatically mean that the homosexual couple can still be legally rejected as adoptive parents under R.A. 8043.

Looking at Section 9 of R.A. 8043, it is significant that sexual orientation is again not made a factor of parental eligibility.[72]

It has been discussed earlier why the "good moral character" requirement imposed by the Domestic Adoption Law on prospective adoptive parents should not be appreciated as an automatic bar against homosexual applicants.[73] Since there is a lack of a legislative or judicial pronouncement on the "immorality" of homosexuality, a decision denying adoption to a homosexual applicant on the ground that his or her homosexuality makes the homosexual parent incapable of giving moral example and instruction to the adoptive child, would not have an extant judicial or legislative basis to stand on.

Requisites that are in favor of the gay foreign couple under the Inter-Country Adoption Law are paragraphs (c) and (e) of Section 9.

> SEC. 9. Who May Adopt.- Any alien or a Filipino citizen permanently residing abroad may file an application for inter-country adoption of a Filipino child if he/she;
>
> xxx
>
> c) has the capacity to act and assume all rights and responsibilities of parental authority under his national laws, and has undergone

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[72] Perhaps the drafters of our adoption laws never seriously envisioned homosexuals adopting. Senator Ernesto Maceda did voice his concern over adoptions made by homosexuals—whom he generalized as pedophiles, provoking wide-spread protests—but the issue was never taken up further in the Senate (Journal of the Senate, Third Regular session, 1994-1995, 20 February 1995, p. 223). Perhaps the rest of the legislators, knowledgeable of our extended family culture and homosexuality's place in Pinoy culture and the *pamilya*, did not consider homosexuals—family members themselves—adopting children as a threat to Philippine family life.

[73] R.A. 8552, sec. 7 (a).

> the appropriate counseling from an accredited counselor in his/her country;
> xxx
> e) is eligible to adopt under his/her nation law;

Indeed, a homosexual couple coming from a country that recognizes adoption rights and grants the status of parental eligibility to homosexuals should easily satisfy these requirements.

Overbroad "Disqualifications": The Confusion Wrought by Section 9(i)

The last requirement of parental eligibility under R.A. 8043 might be controversial. Section 9, paragraph (i), reads

> SEC. 9. Who May Adopt.- Any alien or a Filipino citizen permanently residing abroad may file an application for inter-country adoption of a Filipino child if he/she;
>
> xxx
>
> i) possesses all the qualifications and none of the disqualifications provided herein and in other applicable Philippine laws.

Applicable Philippine laws would include domestic adoption laws such as the Domestic Adoption Law (R.A. 8552) and the Family Code and Child and Youth Welfare Code provisions on adoption.

It has been discussed earlier why the homosexual couple is disqualified to domestically adopt under both the Domestic Adoption Law and the Family Code on the argument that only heterosexual married couples are allowed to jointly adopt a child under said laws. There is a question, however, as to whether such a disqualification should be

immediately and absolutely construed as "a disqualification in other applicable Philippine laws" in Section 9, paragraph (i), such that it is likewise an effective disqualification under R.A. 8043. Stated differently, the significant question is, are disqualifications under other laws automatically disqualifications under R.A. 8043?

At first blush, the immediate reason hastens, yes. Yet it must also be considered that paragraph (i) is a strange and confusing provision. It is strange and confusing because it is an often occurring fact that despite an applicant's disqualification under the Domestic Adoption Law or the Family Code, he or she can still successfully adopt a Filipino child through the Inter-Country Adoption Law.

This usually happens with alien applicants.

Under the Family Code, the general rule states that alienage is a disqualification for adoption. Article 184 generally states that an alien cannot adopt. The only exceptions provided are aliens who are either former Filipino citizens or are married to a Filipino spouse, and seeking to adopt a relative. Afterwards the Family Code goes on to provide that aliens who cannot adopt under the exceptions may still do so via inter-country adoption.[74] Judge Sempio-Diy specifically refers to R.A. 8043 as the pertinent inter-country adoption law.[75]

On the other hand, under the Domestic Adoption Law (R.A. 8552), the only aliens allowed to adopt are those who have resided in the Philippines continuously for three years prior to their application for

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[74] Art. 184 of the Family Code reads:

Art. 184. The following persons may not adopt: xxx

(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; or

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

Aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoption as may be provided by law.

[75] Sempio-Diy, p. 295.

On the other hand, under the Domestic Adoption Law (R.A. 8552), the only aliens allowed to adopt are those who have resided in the Philippines continuously for three years prior to their application for adoption.[76] This effectively disqualifies aliens who have not been Philippine residents within the specified period, those who have been Philippine residents for less than three years. But curiously, however, unlike the Family Code, the Domestic Adoption Law does not contain a similar provision stating that aliens who are so disqualified for not meeting the residency requirement can still adopt under inter-country adoption statutes. This is significant because the absence of such a provision should work to absolutely bar disqualified aliens under R.A. 8552 from adopting, even under R.A. 8043.

Since the non-satisfaction of the three-year residency requirement for aliens is a disqualification under the Domestic Adoption Law, and since the said law does not refer such aliens to try to adopt under the Inter-Country Adoption Law, this disqualification under R.A. 8552 should result to a disqualification under R.A. 8043. Such result would only be pursuant to Section 9, paragraph (i), of R.A. 8043, which states that a prospective adoptive parent must possess "all the qualifications and none of the disqualifications in ... applicable Philippine laws." Indeed, the said paragraph does not make a distinction as to what kind of disqualification

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[76] R.A. 8552, Sec. 7 (b). The full requisites of an alien adopting under R.A. 8552 reads: "Any alien possessing the same qualification as above stated for Filipino nationals: Provided, That his/her country has diplomatic relations with the Republic of the Philippines, that he/she has been living in the Philippines for at least three (3) continuous years prior to the filing of the application for adoption and maintains such residence until the adoption decree is entered, that he/she has been certified by his/her diplomatic or consular office or any appropriate government agency that he/she has the legal capacity to adopt in his/her country, and that his/her government allows the adoptee to enter his/her country as his/her adopted son/daughter: Provided, further, That the requirements on residency and certification of the alien's qualifications to adopt in his/her country may be waived for the following:

(i) a former Filipino citizen who seeks to adopt a relative within the fourth (4th) degree of consanguinity or affinity; or

(ii) one who seeks to adopt the legitimate son/daughter of his/her Filipino spouse; or

(iii) one who is married to a Filipino citizen and seeks to adopt jointly with his/her spouse a relative within the fourth (4th) degree of consanguinity or affinity of the Filipino spouse."

under applicable Philippine laws should be a disqualification under R.A. 8043. Since the law does not distinguish, neither should we.

This reading would absolutely bar resident aliens whose residency does not reach the three-year residency requirement from adopting even under R.A. 8043. Such a reading, however, might serve to nullify the purpose of inter-country adoption, which is the placement of Filipino child—implacable in domestic adoption—in an appropriate, if foreign, and loving home. Such could not have been the intent behind Section 9, paragraph (i).

But the practical reality is, as Zenaida N. Elepaño noted (and even encouraged), aliens disqualified under the Domestic Adoption Law may and do proceed to apply under the Inter-Country Adoption Law with success.[77] Thus the anomalous but true situation of an applicant "disqualified" under the Domestic Adoption Law but successfully adopting a Filipino child under the Inter-Country Adoption Law. This is why Section 9, paragraph (i) is a confusing and strange provision.

It may be said therefore that Section 9, paragraph (i) was poorly constructed. It refers to "disqualifications" in applicable laws wholesale, without distinction. Given this confusion and the anomaly it results to, should a disqualification under applicable Philippine laws like the Domestic Adoption Law still automatically mean a disqualification under the Inter-Country Adoption Law? The weakness of Section 9, paragraph (i), causes it to collapse on itself, calling to question its effectivity.

Parental Eligibility as Status

Still, Section 9, paragraph (i), also refers to "qualifications" in applicable Philippine laws. Applicable laws would immediately include the qualifications in R.A. 8043 and in other adoption laws.

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[77] Zenaida N. Elepaño, in *Legal Aspects of Inter-country Adoption*, p. 155.

Since inter-country adoption is within the area of private international law (indeed, the Hague Convention on Inter-Country Adoption was approved during the Seventeenth Session of the Hague Conference on Private International Law), it is submitted that applicable Philippine laws should include not just domestic adoption laws but also precepts from Philippine private international law, specifically its rules on personal status. Therefore, "qualifications" brought about by said rules on personal status must also be given weight in assessing the eligibility of a prospective adoptive parent.

Under Philippine private international law, the term personal status is appreciated to include both condition and capacity. It embraces matters of family law, including marriage, divorce, separation, and significantly, adoption.[78] It is part of and is governed by a person's personal law.[79] Philippine conflict of laws experts generally agree that status has a universal character. Justice Coquia and Professor Aguiling-Pangalangan state that personal law follows a person wherever he may go.[80] Judge Sempio-Diy states that "When a certain status is created by the law of one country, it is generally recognized all over the world."[81]

Is not parental eligibility or suitability to adopt a kind of personal status? When a state finds a person eligible to adopt for purposes of inter-country adoption, shouldn't such eligibility to adopt while sustained by that state constitute universal status and must therefore be recognized all over the world? Arthur Nussbaum, commenting on Personal Law, associates status with "other lasting legal relations of a person."[82] Isn't the filial relationship established between the child and parent in adoption a lasting legal relation of a person?

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[78] JORGE R. COQUIA AND ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS 238 (2000).

[79] Alicia V. Sempio-Diy, "Handbook on Conflict of Laws" (Quezon City: MPC Printers, 2004), p. 29.

[80] Idem, p. 155.

[81] Idem, p. 30.

[82] Arthur Nussbaum, *Principles of Private International Law* (New York: Oxford University Press, 1943), p. 140.

This premise should work to make the ICAB, pursuant to our country's commitment to both the Hague Convention on Inter-Country Adoption and the principles of private international law on personal status, more bound therefore to recognize parental eligibility established by a receiving State, even if that status of eligibility is given to a foreign homosexual couple.

John Falconbridge, however, in his comments on personal status and capacity in English private international law, would make a distinction between "status" and the so-called "incidents of status." According to Falconbridge, under English law personal status is believed to be of universal character, and should be recognized everywhere, even in a state where no similar status is given by its municipal law. However, he proceeds to discuss how the "incidents of status" do not possess the same universal character of status. For him it does not follow that all the "incidents of a status" should likewise also be recognized or given effect everywhere.[83]

By Falconbridge's reasoning, therefore, even if we accept the premise that parental eligibility conveyed by one state is a status that follows a person everywhere, there would still be uncertainty on whether the incidents of such parental eligibility would be recognized in another given state. Applied to our hypothetical problem of the homosexual couple given by its state parental eligibility for purposes of inter-country adoption and attempting to adopt a Filipino child, it may perhaps be argued that actual matching with a foreign child is an incident of such status that cannot be recognized or given effect in this jurisdiction.

Nevertheless, even if Falconbridge's views on status and "incidents of status" are so adopted in this jurisdiction, it should still be noted that in Philippine law, as discussed above, there is no articulated public policy against homosexuality, no effective damning public policy against homosexuals, as would legally thwart such an incident of status of parental eligibility conveyed on a homosexual adoptive couple by their home state.

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[83] John Falconbridge, *Essays on the Conflict of Law, 2nd ed.* (Toronto: Canada law Book Company, Limited, 1954), p. 121.

The foreign homosexual couple's status as eligible adoptive parents should still be honored as to make the incidents of such a status effective here.

Inter-Country Adoptive Parents:
A Recognition of Same-Sex Marriage?

Would the ICAB's approval and thus recognition of an adoption by a foreign homosexual couple amount to recognition of the same-sex marriage of the adoptive parents, if they are so married under the laws of their state? It is submitted that it would not. Article 26 of the Convention enumerates what recognition of an adoption under the Convention would entail.[84] The article does not state that recognition of the adoption would also include recognition of the marital tie between the adopting parents.

Commenting on this provision, Lourdes G. Balanon said that the recognition of an adoption may be refused by a member-state if the adoption would be contrary to its public policy. An incidental question is, may the Philippines refuse to recognize the familial ties between an adopted child and his or her adoptive homosexual parents on the ground that such an adoption (finalized in a foreign state) is manifestly contrary to its public policy? As noted above, the Philippines has no articulated public policy on homosexuals. It is submitted that such an adoption would still be entitled to recognition in this member-state.

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[84] Article 26, HAGUE CONVENTION ... IN RESPECT OF INTERCOUNTRY ADOPTION, reads Article 26

1. The recognition of the adoption includes recognition of (a) the legal parent-child relationship between the child and his or her adoptive parents; (b) parental responsibility of the adoptive parents of the child; (c) termination of a pre-existing legal relationship between the child and his or he rmother and father, if the adoption has the effect in the Contracting State where it was made. xxx

OTHER CONSIDERATIONS IN INTER-COUNTRY ADOPTION BY A FOREIGN HOMOSEXUAL COUPLE

The ICAB should consider that pursuant to R.A. 8043, the decree of adoption will be issued by the foreign state, [85] necessarily the receiving State or the State of habitual residence of the foreign adoptive parents. This means that in an adoption of a Filipino child by a foreign homosexual couple granted adoptive or marital rights by their home state, the adoption and its effects would be carried out in a state and society with no significant negative problems or issues with homosexuals and the families of homosexual parents. Its people can live with the difference. A state that has given marital or adoptive rights to homosexuals has effectively declared that same-sex parenthood is equal to differently-sexed parenthood. Questions within that state of whether it is in the best interest of a child to be placed in a homosexual family had already been answered and researched positively by its legislature.

Indeed, there are numerous studies the ICAB can peruse to inform itself on same-sex parenting.[86] One study even concludes that lesbian parents are more conscientious than heterosexual parents.[87]

The ICAB should also consider that the place of the most significant relationship in inter-country adoption would be the receiving State, the State of the parents, since there is a reasonable expectation that there is where the child would be raised and live his or her life as an adult. Inter-country adoption, essentially, is the transplantation of a child from one nation and culture to another. Not only would such an adoption severe

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[85] Sec. 3, R.A. 8043. It reads: "Inter-country adoption refers to the socio-legal process of adopting a Filipino child by a foreigner or a Filipino citizen permanently residing abroad where the petition is field, the supervised trial custody is undertaken, and the decree of adoption is issued outside the Philippines."

[86] See Charlotte Patterson, "Children of Lesbian and Gay Parents: A Summary of Research Findings," from "Lesbian and Gay parenting: A Resource for Psychologists, *American Psychological Association*, 1995.

[87] David K. Flaks et al., "Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parent and their Children," from DEVELOPMENTAL PSYCHOLOGY 31, NO. 1 (1995).

the child's legal ties with his or her biological parents, it would also severe the child's ties with his or her native land, giving way for the child to forge new ties with the adoptive land. This is yet another point in favor of giving binding effect to the finding of parental eligibility by the said receiving State.

END REMARKS

The practice of adoption itself is changing. The typical adoption merely involves the placement of an infant to a childless couple within the same country. Now, adoption is more complex.

—Lourdes G. Balanon (1997)

To begin with, a personal note. What first got me started on this topic was a magazine article on two openly homosexual men and their adoptive child. Steven Boullianne and Olivier de Wulf are Belgian nationals and California domiciliaries. They have been together for 13 years when in 2001, through the efforts of the Department of Social Services of the City of San Francisco (whose lawyers, Steven enthuses, are experts at managing Family Law for gay and lesbian households), they were able to legally adopt a healthy baby male of African-American descent. They plan to raise Laurent in France.[88]

Truly, the concept of adoption has changed. Whereas in 1997 Balanon pointed to single-parent adoption, step-adoptions, special-children adoption, and adoptive parents with their own biological children to illustrate her point,[89] in a few years the concept of adoption further evolved, stepped forward, and now in some parts of the world, homosexuals are legally adopting and raising and caring for children.

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[88] Joe Whitmore, "Two Men and a Baby: How one couple made their dreams come true in nine months," *Hero*, April 2001: 48.

[89] Lourdes Balanon, in *Legal Aspects of Inter-Country Adoption*, p. 2.

The grant of adoptive rights to homosexual parents in certain parts of the globe reflect the emerging changes in the way municipal laws view, appreciate, and interact with homosexuality and their homosexual nationals. These developments in homosexual rights in different state systems present additional complexities for private international law, and provoke questions that could never have been considered before.

As to the question of whether a foreign homosexual couple—enjoying marital status or parental eligibility in their home state—may adopt a Filipino child, at first blush there appears to be a "blankness" in our laws on how to meet the question. This is apparent in the guidelines of the ICAB Matching Committee which does not even contain a protocol on how to deal with an applicant foreign homosexual couple. Indeed, there are numerous "interstices" in Philippine laws in so far as homosexuals are concerned. Our statutes on adoption are no exception. I ask again, is this a blessing or a bane for the homosexual?

It appears to be a blessing. There is an absence of a compelling legal basis for the denial of the application of a homosexual individual or couple to adopt a Filipino child through inter-country adoption. As discussed above, the Hague Convention on Inter-Country Adoption, mindful of international comity, can allow such an adoption. And pursuant to our primary inter-country adoption statute and other adoption laws, homosexuality is not a badge against parental eligibility. Sexual orientation simply does not matter in our adoption laws.

But would it be fair to allow the foreign homosexual couple to adopt a Filipino child when, as discussed earlier, their local counterpart—the Filipino same-sex couple—cannot?

Even if there are no legal obstacles to such an adoption, the foreign homosexual adoptive parents might be subject to a practical, more "final," hindrance. In the course of my research for this paper, I visited the Philippine Inter-Country Adoption Board a number of times and got to talk

to a social worker.[90] Our discussions on inter-country adoption were lively and engaging. The social worker however entertains strong doubts on the subject of this paper. She disclosed that even if it were legally permissible for a homosexual adoptive couple to adopt a Filipino child, "*mahihirapan kaming bigyan sila ng bata.*" She says that their partner Philippine orphanages would never agree to such an adoption.

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[90] The social worker refuses to be identified for this paper.