

**THE UNIVERSAL HUMAN RIGHTS TO MARRY
AND TO FOUND A FAMILY:
THE YOGYAKARTA PRINCIPLES AND INTERNATIONAL TRENDS
AGAINST LGBTQ DISCRIMINATION IN THE FIGHT FOR
MARRIAGE EQUALITY***

*Maria Janina Ann Bordon***

ABSTRACT

The right to marry is among the major struggles of the Lesbian, Gay, Bisexual, Transgender and Queer (“LGBTQ”) people. For the Filipino LGBTQ, it is a right deserved, which remains elusive in a jurisdiction where it is impliedly prohibited by the Constitution and the Family Code. Luckily, the sporadic movement of human rights worldwide has slowly begun to perforate the steel walls of oppressive heteronormative practices, structures and institutions. In light of the developing global trend which liberally views LGBTQ marriage, and particularly, the emergence of the 2008 Yogyakarta Principles as soft law, there is reason to hope for the emergence of a human rights framework that would allow us to properly address the issue of LGBTQ marriage in the Philippines.

Proceeding with a legal analysis using an interdisciplinary approach, this paper hopes to push the discourse on LGBTQ rights to welcome a future that fully supports the LGBTQ’s rights to identity, to found a family, to personal happiness, and most importantly, the right to love.

I. INTRODUCTION

The struggle for marriage equality by the members of the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) community requires a careful approach into the intricacies of the construction and deconstruction of politicized identities, oppressive and unjustified heteronormative structures, and other philosophical elements that develop this phenomenon. The complexity of

* Cite as Maria Janina Ann Bordon, *The Universal Human Rights to Marry and to Found a Family: The Yogyakarta Principles and International Trends Against LGBTQ Discrimination in the Fight For Marriage Equality*, 88 PHIL. L.J. 848, (page cited) (2014).

** Junior Associate, Abad Alcantara Aquino Law. J.D., Ateneo de Manila Law School (2012); B.A. Political Science, Ateneo de Manila University (2008).

the phenomenon calls for a multi-dimensional, multi-disciplinary approach to answer the question: why is marriage equality still denied to the LGBTQ community in the Philippine jurisdiction in light of human rights, progressive international trends, and the Yogyakarta Principles¹? Why indeed do the distinctions between homosexual and heterosexual marriages in the Philippines persist even against the backdrop of resolutions recently passed in the United Nations, such as the 2011 Resolution on Human Rights, Sexual Orientation and Gender Identity (which affirms the principle of universality of human rights and its stance against violence and discrimination)² and the 2014 Resolution of the same title (which was supported by the Philippines along with 24 other countries),³ as well as the landmark speech by the US Secretary of State, Hilary Clinton, urging everyone to support LGBTQ rights since “gay rights are human rights”⁴? It will be maintained that sexual orientation, just like any personal circumstance such as race, color, sex, language, religion, political or other opinion, national or social origin, property, and birth or other status is fundamental to every human being,⁵ and that discrimination on the basis of such circumstance is unjustified.

The focal point of this study, however, is the right to marry, as “[m]arriage is the highest form of interpersonal commitment and friendship achievable between sexually attracted persons. Nothing in that definition requires that the sexually attracted persons who are conjoined in a committed, conjugal relationship must be heterosexual. Reproductive fertility is not the essence of a genuine marriage.”⁶ My main argument is that marriage equality is the larger freedom⁷ that can be claimed by the members of the LGBTQ individual, since

[l]egalization of gay marriage is a moral advance over mere civil rights legislation. For civil rights legislation tends to treat gayness as though

¹ INTERNATIONAL COMMISSION OF JURISTS, THE YOGYAKARTA PRINCIPLES (2008) [hereinafter “YOGYAKARTA PRINCIPLES”], available at http://www.yogyakartaprinciples.org/principles_en.pdf.

² H.R.C. Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (June 17, 2011).

³ H.R.C. Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Sept. 26, 2014).

⁴ Hilary Clinton, Speech presented at the United Nations Human Rights Headquarters, Geneva, Switzerland (Dec. 6, 2011).

⁵ ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 21 (1995).

⁶ Daniel Maguire, *The Morality of Homosexual Marriage*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 57 (Robert Baird & Stuart E. Rosenbaum eds., 1997). See also Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 757-761 (Mark Blasius & Shane Phelan eds., 1997).

⁷ Richard Mohr, *The Case of Gay Marriage*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 100 (Robert Baird & Stuart E. Rosenbaum eds., 1997).

it were a property, like having an eye color or wearing an earring, which one could have in isolation of people. But gay marriage is an acknowledgment that gayness, like loving and caring, is a *relational property, a connection between persons, a human bonding, one in need of tendance and social concern*.⁸

Similar to the clamor from numerous minorities in history, the LGBTQ people hope that justice prevails with regard their fight for equality.⁹ However, since some view marriage to be a patriarchal institution, not all members of the LGBTQ agree that marriage equality addresses the issue.¹⁰ Gay marriage, as argued, fails to affirm the LGBTQ identity and the “validation of many forms of relationships.”¹¹ The author, Paula Ettelbrick, however concedes that “[f]rom the standpoint of civil rights, certainly lesbians and gay men should have a right to marry.”¹² She alleges, however, that “obtaining [this] right does not always result in justice”¹³ since true liberation stems from being accepted and respected for the LGBTQ’s specific difference.¹⁴

Aside from the anti-assimilationist¹⁵ LGBTQ, there are also the “pragmatic go-slow activists” who likewise believe that “now is not the right time for equal marriage rights activism.”¹⁶

In this paper, I take the position that the denial of the right marry and found a family is blatant discrimination against the LGBTQ community.¹⁷ The Yogyakarta Principles ought to provide some clarity for those curious or misinformed regarding the LGBTQ and their inherent human rights.

The Yogyakarta Principles are a set of legal principles on the application of international law to human rights violations based on sexual orientation and

⁸ *Id.* (Emphasis supplied.)

⁹ Kate Kendell, *The Right to Marry, the San Francisco Experience, and Lessons Learned*, in 1 DEFENDING SAME-SEX MARRIAGE 116 (Mark Strasser ed., 2007).

¹⁰ Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 755-61 (Mark Blasius & Shane Phelan eds., 1997).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 761.

¹⁵ Robin Tyler & Andy Thayer, *The Gay Marriage Struggle: What's at Stake and How Can We Win?*, in DEFENDING SAME-SEX MARRIAGE: THE FREEDOM-TO-MARRY MOVEMENT, EDUCATION, ADVOCACY, CULTURE AND MEDIA 12 (Martin Dupuis & William A. Thompson, eds., 2007).

¹⁶ *Id.*

¹⁷ R. CLAIRE SNYDER, GAY MARRIAGE AND DEMOCRACY: EQUALITY FOR ALL 16 (2006).

gender identity. These principles seek to bring greater clarity and coherence to the state's human rights obligations. Drafted and signed in 2008 by several UN personalities and human rights experts, including Louise Arbour, Paul Hunt, Vitit Muntarbhorn, and Philip Alston,¹⁸ the Yogyakarta Principles "affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birthright."¹⁹

It is highly arguable that the Yogyakarta Principles is part of soft law, since it finds its basis on the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other human rights norms and practices.²⁰

As some sectors argue, marriage is a special contract, which the LGBTQ are entitled to enjoy. Thus, unions between individuals of the same-sex should be mandated and protected by the state. This claim is supported by Principle 24 of the Yogyakarta Principles, which refers to the right to found a family.

And yet, the urgency to address this issue is not apparent in Philippine society.²¹ As seen in the historical background of the Philippines in relation to the LGBTQ, the importance of the economy seemingly transcends all other issues, including this one in particular.²² But the existence of other problems²³ is no excuse for the State to deny recognition of same-sex couples.

In this paper, I seek to provide a profound, reflective view of the LGBTQ situation, including the reasons behind the discrimination.²⁴ I recommend the push for gay marriage to acknowledge the LGBTQ individuals'

¹⁸ Center for Women's Global Leadership, 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual and Transgender Rights, Mar. 26, 2007, available at http://www.cwgl.rutgers.edu/component/docman/doc_download/177-yogyapinciples2007eng?Itemid=.

¹⁹ YOGYAKARTA PRINCIPLES, *supra* note 1, at 7.

²⁰ *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, 618 SCRA 32, 79, Apr. 8, 2010.

²¹ JOMAR FLERAS, *Reclaiming Our Historic Rights: Gays and Lesbians in the Philippines*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 831 (1997).

²² Interview with Danton Remoto, Ateneo de Manila, Quezon City (Mar. 11, 2006). "We are a poor country. And we can interpret [the stratification of gays and lesbians] that way—which is, it is basically economical." *Id.*

²³ *Id.*

²⁴ FLERAS, *supra* note 21, at 831.

inherent rights—especially the right to identity,²⁵ the right to marry, and/or essentially, the right to found a family.²⁶

The Current Structures

While there is still much to lobby for in the Philippines, a few notable movements towards equality have been made, especially in the year 2014. Recently, an anti-discrimination bill, entitled “An Act Prohibiting Discrimination on the Basis of Sexual Orientation and Gender Identity and Providing Penalties Therefor”²⁷ is currently being deliberated in the House of Representatives.

A landmark ordinance prohibiting and penalizing discriminatory acts against homosexuals in the government and in the private sector has also been enacted by the Quezon City Council. In relation to this, the current Mayor of Quezon City has expressed his support for same-sex marriage and added that he plans to research his capacity in officiating same-sex weddings.²⁸

While these initiatives are admirable as they slowly destroy the walls of systematic oppression, as of this writing, the Philippines has still yet to legislate and recognize same-sex marriage.

“Homosexuality is not illegal in the Philippines. Homosexual men and women are tolerated but not accepted; they are still very much marginalized. The general attitude is patronizing.”²⁹ This statement best describes the current situation of the LGBTQ community. It precisely captures how the LGBTQ people are just there—acknowledged as such, but not granted the same rights as everyone else, leaving the LGBTQ in a state of limbo. Their recognized existence is clearly not enough for policy-making and law implementation.³⁰

“There is no systematic oppression of lesbian women and gay men. Thus, the seeming lack of systematic homophobia has resulted in the lack of systematic homosexual response. Isn’t a stereotype ‘systematic oppression?’”³¹ Initially, every LGBTQ individual is on his or her own, without much support

²⁵ YOGYAKARTA PRINCIPLES, *supra* note 1, at 11-12.

²⁶ *Id.* at 27-28. *See* princ. 24 (The Right to Found a Family).

²⁷ H. No. 110, 16th Cong., 1st Sess. (2013). An Act Prohibiting Discrimination on the Basis of Sexual Orientation and Gender Identity and Providing Penalties Therefor.

²⁸ Janvic Mateo, *QC Mayor Backs Same-Sex Marriage*, PHILSTAR.COM, Oct. 9, 2014, available at <http://www.philstar.com/metro/2014/10/09/1377969/qc-mayor-backs-same-sex-marriage>.

²⁹ FLERAS, *supra* note 21, at 831.

³⁰ *Id.*

³¹ *Id.*

from the state and with the condemning eyes of the Church, thereby leaving them at a disadvantage.³² Also, our jurisdiction does not have an anti-discrimination law, nor a gender recognition law (for the transsexuals) to protect the specific needs of the LGBTQ community.

In its struggle for equality, the LGBTQ community, has primarily found support from groups that have been formed over the past few years. The LGBTQ, therefore, have been made to rely more on “democratic” means, such as parades and rallies, to be heard.³³ Some LGBTQ individuals appear to Philippine society via entertainment, or other informal settings and avenues.³⁴

As for marriage, the state grants marriage for and between males and females only, and Philippine law, as it is, does not have much space for the identities of the LGBTQ.³⁵ Holistically speaking, the said systematic oppression subsists.³⁶ Each day of neglect of these rights, if viewed in the long run, equates to inhumane treatment. An accumulation of occurrences of society’s subtle tolerance and silence, ridicule and intolerance, in turn, results into recurring offenses against the LGBTQ people.³⁷ These are stealthy infractions³⁸ for the heteronormative eye, yet blatant ones for the more open-minded individuals. Initially, one would not think of the disparity between the treatment of homosexual and heterosexual couples as a human rights issue.³⁹ But is it really not a human rights issue? The neglect to address marriage and partnership issues originates from the very same discrimination manifested in gender-based violence, killings and other hate-crimes.⁴⁰ It is, therefore, exceptionally imperative to look closely at the root cause of the denial of marriage equality to protect equality for all people.

³² *Id.*

³³ *Id.* at 832.

³⁴ *Id.* at 829-31.

³⁵ “Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.” FAM. CODE, art. 1.

³⁶ FLERAS, *supra* note 21, at 831.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Robert Wintemute, *From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights*, in *SEX RIGHTS* 87 (Nicolas Bamforth ed., 2005).

⁴⁰ Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 *HUM. RTS. L. REV.* 207, 208 (2008). *See, generally*, Clinton, *supra* note 4.

If Filipinos are mindful of their historical roots⁴¹ and are aware of the modifiable legal standards for the sake of justice, they will realize that granting equality in marriage is not an impossibility, nor an inconsistency from culture.⁴²

The Yogyakarta Principles may just be the first internationally significant step for such movement towards equality.⁴³ These are merely principles which have not entered into force.⁴⁴ Notably, however, the spirit of these Principles reveals the universality of human rights since they are based on binding international law.⁴⁵ It can be argued that they will go a long way in terms of legal enforcement and application, until all the states grant equal protection for all.⁴⁶

Upholding the LGBTQ's right to marry would be the clearest manifestation of the state's acceptance of the existence of equality amongst the citizens.⁴⁷ The state's enforced homogenization of all the sexes and genders⁴⁸ is not, and never will be, equitable, fair, and just. In fact, the enforced homogenization of all identities⁴⁹ is a critical transgression against not only the LGBTQ, but against all Filipino citizens alike.

⁴¹ See, generally, FLERAS, *supra* note 21.

⁴² FLERAS, *supra* note 21, at 825.

⁴³ O'Flaherty & Fisher, *supra* note 40, at 248.

⁴⁴ *Id.* at 247.

⁴⁵ *Id.*

⁴⁶ Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, preamble (July 25, 1993) [hereinafter "Vienna Declaration"]. Adopted by the World Conference on Human Rights, the document partially reads:

The World Conference on Human Rights,

Considering that the promotion and protection of human rights is a matter of priority for the international community, and that the Conference affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights, in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner,

Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms [...]

⁴⁷ MARTHA C. NAUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (INALIENABLE RIGHTS SERIES) 154 (2010), cited in Kate Ericsson, Book Review, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* by Martha C. Nussbaum, 26 BERKLEY J. GENDER L. & JUST. 179, 185 (2010), available at http://genderlawjustice.berkeley.edu/wp-content/uploads/2011/04/Ericsson_Macro4.pdf. Compare with MAGUIRE, *supra* note 6.

⁴⁸ Yolanda Dreyer, *Hegemony and the Internalisation of Homophobia caused by Heteronormativity*, 63 HTS THEOLOGICAL STUD. 1 (2007).

⁴⁹ *Id.* at 2.

II. THE PHILOSOPHY AND HISTORY OF THE LGBTQ STRUGGLE

A. The Philosophy Behind the Fight for Gay Marriage

It has been repeatedly argued, especially by religious conservatives, that the LGBTQ's right to marry is not a human rights issue.⁵⁰ The philosophies that will be discussed in this section shall establish the realities of the LGBTQ individual in relation to globalization, queer theory, postcolonialism, human rights, and eventually, the right to marry. Is the desire for the right to marry based on globalized ideals, postcolonial structures, or universal human rights? Is the fight for marriage equality truly a human rights issue? If so, what is the meaning of human rights? To answer these questions, one has to deconstruct terms, structures and identities so as to facilitate the understanding of the LGBTQ fight for equality.

1. *Human Rights as Both Praxis and Telos with Ethical Considerations*

“Human rights movements involve both ‘progressive’ empowerment and disempowerment of the ‘State’. Human rights praxes thus remain deeply dilemmatic.”⁵¹ Structures and institutions have to be adjusted, in order to make room for what is just.⁵² Prospectively speaking, “what may constitute the future history of human rights depends on how imaginatively one defines, both in theory and movement, the challenges posed by the processes of globalization: already we are urged to appreciate the ‘need to relocate’ human rights in the ‘current processes of change.’”⁵³ Applying the theories formed in the name of human rights is the *praxis* element, while the movement towards a goal is the *telos* element, since “[h]uman rights’ becomes an expression that carries the burden of a transformative vision of the world, in which the state (and the community of state and the state-like global institutions) incrementally becomes ethical, governance just, and power [...] accountable.”⁵⁴

The principles behind human rights may be seen to establish normative implications based on ethical imperatives.⁵⁵ “The ethic of human rights insists on what communities and individuals *ought* to desire. [It] emerges as a tradition of critical morality by which the positive morality of human rights practices

⁵⁰ Wintemute, *supra* note 39.

⁵¹ UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS x (2002).

⁵² *Id.* at 79.

⁵³ *Id.* at 25.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 7.

themselves may be judged.”⁵⁶ Humans who are made to interact need ethical standards, as part of being in society. A core value is said to “command consensus.”⁵⁷

Respect toward the Other as a co-equal human is the groundwork for an ethic of human rights, furnishing *universally valid norms for human conduct* and the basic structure of a just society. That respect, as Emmanuel Levinas memorably reminds us, *does not consist of the ‘imperialism of the Same’*. Rather it consists of the *full recognition of human rights as a ‘sole source of solidarity among strangers’, conceding ‘one another the right to remain strangers’*.⁵⁸

This ethical stance, thus, commands every human being to respect the Other. From this standpoint, it is well acknowledged that since every human person is different from the Other, respect does not necessarily ground itself on Sameness. Therefore, respect is the recognition that the Other, as such, has the right to remain different.⁵⁹

2. *Sexual and Social Theory:*

The Challenge of Queer Globalization and the Nation

The globalization of academic and artistic disciplines, thus, provides a unified idea of basic freedom and equality.⁶⁰

Lesbian and gay studies is an emerging field that has its own centres (literature, sociology, cultural studies) and its margins (geography, law, politics, international relations). Parochialism can also result from working within narrow disciplinary frameworks that can lead to the failure to recognize the value of work in other disciplines. This issue is particularly salient for globalization, which John Tomlinson suggests, constitutes a challenge to traditional academic boundaries: ‘Globalizing phenomena are, of their essence, complex and multidimensional, putting pressure on the conceptual frameworks by which we have traditionally grasped the social world.’ [...] [Lisa] Duggan calls for greater recognition of work from disciplines other than English: ‘Queer studies must recognize the importance of empirically grounded work in history, anthropology, and social and cultural theory.’⁶¹

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (Emphases supplied.)

⁵⁹ *Id.*

⁶⁰ JON BINNIE, *THE GLOBALIZATION OF SEXUALITY* 1 (2004).

⁶¹ *Id.* at 8.

Jon Binnie, a Senior Lecturer in Human Geography at Manchester Metropolitan University, interrelates the different disciplines with policy-making institutions, such as the legislature or the government, and how these disciplines relate with other nations. It is very important to trace in other disciplines the different sexual identities (in history, anthropology, sociology, philosophy, then politics).⁶² Without rooting LGBTQ concerns to other disciplines, the simultaneous fights for LGBTQ rights would seem like baseless, fleeting utterances of dissidents.⁶³

Binnie also argues that “sexuality plays a role in the symbolic enclosure of space in nationalism,” and that “sexuality is key to the nation’s survival[.]”⁶⁴ Nonetheless, even when the author respects that national differences in the regulation and control of sexualities are important to reveal specific constructions of national identity and sexual cultures, thereby being sensitive with differences of existing nations, it is still necessary to acknowledge the difference between and among sexual dissidents;⁶⁵ otherwise, neglect of the differences will turn into a homogenization of the LGBTQ individuals,⁶⁶ which is practically the act of making them invisible.⁶⁷

Even in relating globalization to sexuality, the nation plays a key role in the interplay between the international and the local.⁶⁸

Unfortunately the complexity of debates on the relationship between globalization and the nation-state is not always reflected in the literature on queer globalization. Work on globalization of sexual cultures and economies often presumes the declining power of the state. Among the writers who have produced more nuanced theoretical work on nationalism and sexuality, Jarrod Hayes argues: ‘the globalization of capital has coincided not with a withering away of nationalisms, but with their intensification. While capital is certainly transnational, therefore, in many ways *identity is still rooted in the National.*’⁶⁹

Reliance on the nation is, therefore, inevitable.⁷⁰ The nation becomes the medium through which the local interacts with the international.⁷¹

⁶² *Id.*

⁶³ *Id.* at 1-8.

⁶⁴ *Id.*

⁶⁵ *Id.* at 12-13.

⁶⁶ Dreyer, *supra* note 48, at 13.

⁶⁷ BAXI, *supra* note 51, at 33.

⁶⁸ BINNIE, *supra* note 60, at 12.

⁶⁹ *Id.* (Emphasis supplied.)

⁷⁰ *Id.*

Does this render international law futile to some extent? If not, what purpose does international law have to effectuate equality principles if states may simply refuse to conform by invoking of state sovereignty and cultural relativism?⁷² What recourse may an aggrieved LGBTQ individual or community have when their very nation, the medium that they are made to depend on in the international arena, denies and strips them of their basic human rights?⁷³ International law provides for some means of recourse; however, this does not justify the nation's lack or refusal to protect its own citizens.⁷⁴

3. *Queer Postcolonialism*

"The study of the postcolonial nationalisms of the so-called Third World continues to be quasi-uniformly based on the presupposition of an unexamined totalizing signifier: universalized heterosexuality."

—Paula Bacchetta⁷⁵

Clearly, from a local standpoint, the problem does not lie so much on the international sphere, but on the domestic one.⁷⁶ Postcolonial Philippines, where its newfound independence is in contrast with the concept of a universalized sexuality,⁷⁷ might find it a bit more difficult to adapt to the solidifying trend of international standards for the LGBTQ individuals.⁷⁸ The Philippines' difficulty might not only be found in the government's or society's inability to comprehend such cosmopolitan identities,⁷⁹ but also the sheer and unadorned refusal to develop, either in the name of traditionalism,⁸⁰ Catholicism,⁸¹ or nationalism,⁸² and in failing to embrace all other identities (or

⁷¹ *Id.* at 28-30.

⁷² BAXI, *supra* note 51, at 93, 105, 113.

⁷³ *Id.* at 115.

⁷⁴ *Id.*

⁷⁵ *When the (Hindu) Nation Exiles Its Queers*, 61 SOCIAL TEXT 141 (1999).

⁷⁶ BAXI, *supra* note 51, at 89.

⁷⁷ BINNIE, *supra* note 60, at 67-68.

⁷⁸ BAXI, *supra* note 51, at 78.

⁷⁹ *Id.*

⁸⁰ *Id.* at 113.

⁸¹ FLERAS, *supra* note 21, at 826.

⁸² BINNIE, *supra* note 60, at 27.

homogenization resulting in homophobia);⁸³ it did not include certain identities in its strife for independence and self-determination as a people.⁸⁴

The gendered nature of the nation has been studied, for instance by Nagel (1998), who argues that in traditional models of nationalism, woman is equated with passivity and needs to be protected and safeguarded by men. [...] Thus defiling of the enemy's women is the defilement of the enemy nation and thereby a potent weapon. The control of women's sexuality is necessary for the successful completion of a war campaign. [...] This gender ideology of nationalism helps underpin the homophobic constructions of the 'good' and 'bad homosexual' discussed by Anna Marie Smith.

* * *

The discussion for the use of *rape as a weapon in war demonstrates the importance of the violent control of sex and sexuality. Thus the control over non-reproductive desire and sex has been fundamental to nationalist struggles.* This is particularly the case when the nation is seen to be under threat, as Carl Stychin argues: [it] does seem clear that when the nation state perceives a threat to its existence, that danger is frequently translated into sexualized terms. *Same sex sexuality is deployed as the alien other, linked to conspiracy, recruitment, opposition to the nation, and ultimately a threat to civilization.*⁸⁵

Therefore, seen through the lens of queer postcolonialism, sexual dissidents, or the LGBTQ, who do not fit within the gender roles are viewed with suspicion and are considered a threat to nation-building and self-determination.⁸⁶

Another phenomenon that should be focused on when it comes to queer postcolonialism is the global gay.⁸⁷

Conversely, counter-discourses associated with modern gay liberation movements are bound up with the same distinctly modern discourses around development, namely that certain countries are more 'developed' than others in terms of how they treat sexual diversity. Does the emergence of movements and cultures associated and linked to modern western lesbian and gay cultures prove the evidence of this thesis? Do such phenomena constitute a *global gay or global gay*

⁸³ Dreyer, *supra* note 48, at 13.

⁸⁴ BINNIE, *supra* note 60, at 19.

⁸⁵ *Id.* at 18-19. (Emphases supplied.)

⁸⁶ *Id.*

⁸⁷ *Id.* at 68.

consciousness—a kind of sexual political ‘trickle-down effect’ whereby these societies ‘copy’ movements and communities that have developed over a longer period elsewhere?⁸⁸

The “global gay” to which the author pertains seems to be a product of amalgamated international influences.⁸⁹ In the same book, another writer, Dennis Altman, presents the global gay as a form of false consciousness, in which agency and subjectivity to local symbolism and identity are denied to those striving to redefine imagery and symbolism pertaining to the self-determination of identity and space. In contrast, Jon Binnie argues against this, and says that there is a need for recognition of the allure of the global gay.⁹⁰

“There is a real danger of a new racism emerging whereby rights around *sexual diversity* become a marker of a nation’s level of development[—]that tolerance and recognition become a measuring point of a nation’s success at developing.”⁹¹ Perhaps this is why the global gay becomes very attractive to the postcolonial LGBTQ, or at least to those who feel the same sort of oppression, although this stance was critiqued by Jon Binnie, since it seems as if state tolerance or recognition seemingly equates to development.⁹²

The author does not dispute the existence of homosexuals and sexual diversity worldwide. What the author seeks to be mindful of is the subjectivity of such homosexual to his or her “ethnic” origin,⁹³ since what is progress as pegged by the West “obscures the very real and meaningful differences between nation-states [...] and the extent to which the rights that have been won are for the economically active few and reproduce distinctions between those who are socially included and excluded.”⁹⁴ The indication that a nation is “developed” is the state’s treatment towards LGBTQ and other minorities valued by human rights advocates.⁹⁵

The struggle of a postcolonial LGBTQ individual from the “Third World” is, therefore, far more complex than one from the First World or developed countries.⁹⁶ In postcolonial countries, what makes the struggle complex is the hybridity⁹⁷ of identity and institutions, or the soldiering on

⁸⁸ *Id* at 67-68. (Emphasis supplied.)

⁸⁹ *Id* at 68.

⁹⁰ *Id.*

⁹¹ *Id.* (Emphasis supplied.)

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 75.

⁹⁶ *Id.* at 70.

⁹⁷ *Id.* at 69.

towards independence and self-determination as a nation,⁹⁸ as foreign influences are eagerly, or sometimes angrily, dismantled into mere remnants, which are sadly still melded with new rising local institutions.⁹⁹

“To what extent is gay culture hybrid? [Has] gay culture [become] less diverse, less hybrid [and] in effect more homogenous?”¹⁰⁰ Jon Binnie poses this question to determine the influence of the hybridity of the global and the local. He quotes Sinfield’s argument that “[t]he hybridity of our subcultures derives not from the loss of even a mythical unity, but from the difficulty we experience in envisioning ourselves beyond the framework of normative heterosexism.”¹⁰¹

Jon Binnie quotes Robert Holton, and is similarly “suspicious of a single logic of a universal gay identity, or that tolerance of lesbian and gay communities [is] a marker of a country’s development.”¹⁰²

[H]istories of homosexuality often *read like narratives of progress towards the [Western] model of egalitarian homosexuality*, wherein both partners can be active as well as passive regardless of any masculine or feminine identification on either’s part. [...] Although such observations may have sociological or anthropological validity, they leave little room for dissidence and are remarkably similar to the narratives of progress that established between Europeans and the rest of the world a pseudoevolutionary hierarchy that justified the civilizing mission and, therefore, colonialism.¹⁰³

In a clearer light, Jon Binnie simplifies the logic by stating that

[t]he degree to which this developmental narrative of lesbian and gay rights has emerged alongside the development of the new racism is interesting. *The logic goes something like this: you are less developed than us because you treat your gays badly.* Thus the western state becomes guarantor of lesbian and gay rights versus the threat constituted by the savage brutal other[.]¹⁰⁴

In relation to postcolonial Philippines, it can be said that nationalist sentiments are either based on pre-colonial structures or colonial structures.¹⁰⁵

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* at 75.

¹⁰⁰ *Id.* at 69.

¹⁰¹ *Id.*

¹⁰² *Id.* at 75.

¹⁰³ *Id.* (Emphasis supplied.)

¹⁰⁴ *Id.* at 76. (Emphasis supplied.)

¹⁰⁵ Joshua Forrest, *Nationalism in Postcolonial States*, AFTER INDEPENDENCE: MAKING AND PROTECTING THE NATION IN POSTCOLONIAL AND POSTCOMMUNIST STATES 33 (Lowell W.

What is interesting about postcolonialism, however, is that there is still that desire of the postcolonial country to be all about the imperialist suggestions of identity and development.¹⁰⁶ The path towards a national identity now seems to be antithetical to the very nature of nation-building—since the colonized wanted independence,¹⁰⁷ but still aspired to be like their colonizers.¹⁰⁸ The postcolonial situation is, therefore, an ironic one.¹⁰⁹

Postcolonials, not only wrestle with identity and hybrid systems and institutions, but also with its own socio-economic development and governance.¹¹⁰ Various dimensions, such as, religion, history, politics, culture, media, economics, and other relevant dimensions, each define the postcolonial people, as these facets all piled together¹¹¹ and mixed with globalized ideals,¹¹² which therefore, leads to the construction of some sense of national identity.¹¹³ The multidimensional case of the postcolonial people makes it difficult to truly understand such animal without even deconstructing terms, notions, images and symbols, then profoundly comprehending these aspects that make up the postcolonial identity, more so with the queer postcolonial.¹¹⁴

However, even considering the degree of complexity of postcolonial Philippines, should such complexity be an excuse for states to not protect the inherent rights of the LGBTQ? More importantly, will the postcolonial LGBTQ of the “Third World” ever receive the protection they deserve? The Filipino LGBTQ are left with no choice but to rely on its own developing country to fight for them, and their rights as such.¹¹⁵ It is undeniable that “[t]here is an inextricable link between modernity, development, and sexual politics[.]”¹¹⁶ Will the refusal of the Philippines to adapt to global standards continue to be a barrier for equal rights?

4. *Modern’ Human Rights and Its Danger*

Barrington ed., 2006).

¹⁰⁶ BINNIE, *supra* note 60, at 67-85.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.* at 68.

¹⁰⁹ BAXI, *supra* note 51, at 111.

¹¹⁰ *Id.*

¹¹¹ BINNIE, *supra* note 60, at 8.

¹¹² *Id.* at 68.

¹¹³ BAXI, *supra* note 51, at 84.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 89.

¹¹⁶ BINNIE, *supra* note 60, at 75.

As asserted by certain modern and postmodern philosophers, the relative truth brings about the relativity of human rights.¹¹⁷ Human rights is, as argued, a “Western ideal” that is shoved into the Others’ faces, so as to portray and epitomize normative frameworks of human existence.¹¹⁸

The very notion of human rights (or the ‘rights of man’) is generally presented as the gift of the West to the rest. The non-Western traditions are usually considered bereft of notions of human rights. Neither did they experience the rise of capitalism with which the origins of ‘modern’ human rights is thought to be inextricably interlinked; nor did they attain the ‘flourishing of theoretical knowledge (savior) through which European humanity passed on its way towards its modernity’ [...]. Even today Third World theory and action is thought to be mimetic, picking up cognitive bits and pieces from the smorgasbord of the critique of Enlightenment from Marx, Nietzsche, Freud, Heidegger, Habermas, Rawls, Foucault or Derrida. Overall, human rights discursivity was and still remains, according to the narrative of origins, the patrimony of the West.¹¹⁹

The realm of human rights, as argued, falls weak in the face of a modern, relativist mindset.¹²⁰ “The ‘Enlightenment’ epoch that gave birth to liberal, ‘modern’ notions of human rights [...] in effect globalized Social Darwinism [...]. Communities in struggle and people in resistance have contested, often at the price of unspeakable human violation, these hegemonic versions of human futures and human rights.”¹²¹

The critique that human rights are primarily a Western concept and the fact that each nation is free to aspire to such or reject it threaten the concept of universality of human rights.¹²² Universality is questioned because cultural relativism is used as a justification to not implement policies recognizing human rights.¹²³ Human rights have, therefore, been seen as subject to personal construction, and not universal or essential.¹²⁴ “Critics of human rights essentialism remind us that the notion of ‘human’ is not pre-given [...] but constructed. This social construction of that ‘human’ is not necessarily human rights friendly. It often occurs with profound rights-denying impacts[.]”¹²⁵

¹¹⁷ BAXI, *supra* note 51, at 79.

¹¹⁸ *Id.* at 24.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 79.

¹²¹ *Id.* at 25.

¹²² *Id.*

¹²³ *Id.* at 90-91.

¹²⁴ *Id.* at 77.

¹²⁵ *Id.*

Because of the relativist practice of postmodernism, it is said that “[i]n a poststructuralist, postmodern world, we are all ‘contingent persons’. Contingent persons may claim, if at all and with great difficulty, ‘universal’ human rights!”¹²⁶ Instead of humanizing the suffering of others, human suffering is merely theorized, in the modern framework, as opposed to the contemporary framework.¹²⁷

Very much like the assertions in the previous section on postcolonialism, Upendra Baxi notes:

Students of international law [...] are well aware of the problematic of identity as vehicle of power, from Kelsenite ‘constructive’ theory of recognition of states [...] to the travails of the right to self-determination. They know how that ‘*self is constructed, deconstructed, and reconstructed by the play of global power,*’ with the attendant *legitimation of enormous amounts of human misery* [...]. Increasingly de-territorialization of identity, at the end of the century, is said to be a *global social fact or human condition. Identities tend to become fluid, multiple, contingent, perhaps even to a point when an individual or the subject is viewed as ‘the articulation of an ensemble of subject positions,* construed within specific discourses and always precariously sutured at the intersection of subject positions.’¹²⁸

The danger in characterizing deconstruction or reconstruction of identity as relative is that it justifies discrimination.¹²⁹ “Making human suffering invisible was the hallmark of ‘modern’ human rights formations. Suffering was made invisible because large masses of colonized peoples were not regarded as human or because a considerable number of human beings were not regarded as not fully human, in need of tutelage.”¹³⁰

5. *Universality and Essentialism: ‘Contemporary Human Rights’*

Baxi makes an exceptionally significant distinction between modern and contemporary forms of human rights. This distinction is fundamental in defining human rights within the realm of universality. He says that the distinction is “focused on *taking suffering seriously*.”¹³¹

¹²⁶ *Id.* at 83.

¹²⁷ *Id.* at 83-90.

¹²⁸ *Id.* at 80-81. (Emphases supplied.)

¹²⁹ *Id.* at 18.

¹³⁰ *Id.* at 33.

¹³¹ *Id.* at 34.

In the ‘modern’ human rights paradigm it was possible to take human rights seriously without taking human suffering seriously. Outside the domain of the laws of war between and among the ‘civilized’ nations, ‘modern’ human rights regarded large-scale imposition of human suffering as *just* and *right* in pursuit of a Eurocentric notion of *human progress*. *That discourse silenced human suffering. In contrast, the ‘contemporary’ human rights paradigm is animated by politics of activist desire to render problematic the very notion of politics of cruelty.*¹³²

The contemporary view is that human rights are universal—that they transcend all cultural boundaries.¹³³ This is what also distinguishes contemporary from modern.¹³⁴ With contemporary praxis of human rights, “[i]t might be said with some justification that this essentialization of rights emerges in turn as an essentialist construction of human being, and of being human,” even if essentialization is complicated by relative constructions.¹³⁵

What is vital with contemporary praxis of human rights is that the primary authors of human suffering and human rights are the oppressed themselves, and not the West or the First World.¹³⁶ “The notion of universality is said to enact not merely new versions of essentialism about human nature but also to invoke the notion of metanarratives: global stories about power and struggle against power. This not merely denies difference but also monopolizes the ‘authentic narrative voice.’”¹³⁷

Baxi recommends that the demolition of “narrative monopolies” will help us acknowledge that the authorship of actual human rights lies within the people or communities¹³⁸ in the struggle against “illegitimate power formations and the politics of cruelty. The local, not the global, it needs to be emphasized, remains the crucial site of struggle for the enunciation, implementation, enjoyment and exercise of human rights.”¹³⁹

Human suffering is, therefore, humanized, rather than theorized.¹⁴⁰ “Theorizing repression does not [...] best happen by contesting Lacan, Derrida, or Foucault; it happens when the theorist shares both the nightmares and

¹³² *Id.* at 34-35. (Emphasis supplied.)

¹³³ *Id.* at 79.

¹³⁴ *Id.*

¹³⁵ *Id.* at 80.

¹³⁶ *Id.* at 89.

¹³⁷ *Id.* at 77.

¹³⁸ *Id.* at 79.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 90.

dreams of the oppressed. To give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights narratology.”¹⁴¹

Baxi further argues that if postmodern framework will not serve to further universal human rights, then it will pose as a threat to the future of human rights.¹⁴² Narration of human suffering provides a discourse between and among oppressed individuals and communities and social and political institutions.¹⁴³ This moral negotiation of suffering is hoped to be “made more inclusive, participatory, and just from the standpoint of those violated rather than that of the perpetrators.”¹⁴⁴

By accepting the fact that the individuals and communities in continuous struggle are the primary authors of human rights, a constant reflexive interaction with social and political institutions is bound to happen.¹⁴⁵

[T]he ‘contemporary’ paradigm of rights postulates, and progressively recognizes, that the notion of ‘human’ being, and being human, is itself a process of *continual redefinition*. In maintaining that slavery, racism, colonization, genocide, patriarchy, and violent social exclusion are per se illegitimate, the ‘contemporary’ paradigm not merely delegitimizes the old ways of dehumanization but also enables articulation of new forms of human identity through critical engagement with structures of social, political and economic domination.¹⁴⁶

This praxis must entail equality of discourse between institutions and individuals or communities, and even the educated and the indigenous.¹⁴⁷ “The logics of universality entail interdependence of human rights: every human person or being is entitled to an order of rights because every other person or being is so entitled to it. If this were not so, human rights would cease to have any ethical justification whatsoever.”¹⁴⁸

Without accepting that human rights are universal, human suffering is trivialized,¹⁴⁹ since “[s]uffering is ubiquitous to the point of being *natural* [...]”. Some forms of suffering are considered ‘necessary’ and some ‘unnecessary’.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 23.

¹⁴⁵ *Id.* at 23, 79.

¹⁴⁶ *Id.* at 79-80. (Emphases supplied.)

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.* at 105.

¹⁴⁹ *Id.* at 18.

Different cultural traditions weigh social suffering as ‘justified’ and ‘unjustified’, making the construction of suffering difficult.”¹⁵⁰

In the hierarchy of human rights,¹⁵¹ the future of human rights is contingent on our ability “not just to name an order of evil but in our ability to articulate a normative theory concerning the ethical unjustifiability of certain norms and formations of human suffering that the regime of radical evil incarnates.”¹⁵² The modern paradigm is a detrimental approach to the reality of human suffering,¹⁵³ since whether it speaks of “individual pain or as social suffering, [...] different religions and cultural traditions enact divergent hierarchies of ‘justification’ of experience and imposition of suffering, providing at times, and denying at others, language to pain and suffering.”¹⁵⁴ The modern paradigm also “scarcely pauses to notice subsequent developments”¹⁵⁵ of human rights.

Hence, when it comes to international agreements,¹⁵⁶ for instance, when treaties against acts of torture, genocide, cruelty, and the like, allow for reservation or derogation, “the community of states construct such transnational hierarchies, [and even] human rights praxis does so [too]. This makes human rights praxis at best *global* but not *universal*, with deep implications for the future of human rights.”¹⁵⁷ Therefore, some states find that discrimination and oppression is justified, precisely because of the modern human rights paradigm.¹⁵⁸

Under the contemporary human rights paradigm, however, “[d]iscrimination on the grounds of birth, sex, domicile, ethnicity, disability, sexual orientation, for example, counts as a violation of internationally proclaimed human rights.”¹⁵⁹ Because human rights are universal in character, its basis is found on “some higher or meta-justification [which draws upon] the power of ethical theory and moral reason.”¹⁶⁰ Also, the universality observes “the purported logic of aspiration, not always in the reality of attainment.”¹⁶¹

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 116.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 103.

¹⁵⁶ *Id.* at 117.

¹⁵⁷ *Id.* at 117-118.

¹⁵⁸ *Id.* at 18, 116.

¹⁵⁹ *Id.* at 84.

¹⁶⁰ *Id.* at 97.

¹⁶¹ *Id.* at 101.

In sum, the universality of human rights epitomizes the “universality of the collective human aspiration to make power increasingly accountable, governance progressively just, and the state incrementally more ethical.”¹⁶² Any derogation or an otherwise construction of any inherent human right is an insult to those entitled thereto and a serious retardation of the movement toward authentic progress and genuine universal ethics.¹⁶³

B. History of the LGBTQ Sector in the Philippines

Historically speaking, same-sex marriage is argued to be nothing new by historian John Boswell. His research reveals:

Laws governing same-sex marriage apparently date at least as far back as the Hittites, who ruled Asia Minor more than three thousand years ago. Cicero, whose knowledge of Roman law under the Republic was “exhaustive,” is quoted as considering same-sex marriage legally binding. By the time the Roman Republic became the Roman Empire, “(a)mong the lower classes informal (same-sex unions) may have predominated, but marriages between males or females were legal and familiar among the upper classes.” [...] Same-sex marriages continued and were well-known in the Roman Empire until the mid-fourth century. While the precise definition of marriage has varied from one community to another and from one era to the next, there is a tradition of Christian same-sex marriage ceremonies celebrating unions that were considered marriages in the same sense in which opposite-sex couples married. The tradition of same-sex marriage transcends thousands of years of human history.¹⁶⁴

These realities were existent in pre-statist and early statist societies.¹⁶⁵ Since contemporary statist societies have risen, norms became more uniform when it came to family structure and gender relations.¹⁶⁶ The “normative-heterosexual” paradigm dominated societal structures.¹⁶⁷ The Judeo-Christian cultures in Europe and the Americas, and the Islamic civilization have followed and maintained such normative-heterosexual paradigm.¹⁶⁸

¹⁶² *Id.* at 105.

¹⁶³ *Id.* at 117.

¹⁶⁴ Damslet writes synthesizing Boswell’s research, *cited in* HEINZE, *supra* note 5, at 32-33.

¹⁶⁵ HEINZE, *supra* note 5, at 32-33.

¹⁶⁶ *Id.* at 33.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 34.

Despite this, it is also necessary to determine local history and how such paradigm may have made its way in the Philippines. Hence, provided in this section is the local history so as to “trace the evolution and metamorphosis of homosexuality in the Philippines vis-à-vis the histories of the powers that be—the economic, religious and social realities and the world developments.”¹⁶⁹ It is vital to note the local history of the LGBTQ to realize that there was once a time when the Philippine society was less homophobic and more accepting.

1. Pre-colonial Era

Before the Spanish stepped on Philippine soil, there was a culture entirely different from the standards we have now, in terms of gender-bending, homosexual recognition.¹⁷⁰

The Philippines [was] populated by Indo-Malayan scattered tribes known as *balangays*. At the head of the tribe was the village chieftain. But exercising more de facto power than the chieftain [...] who was the shaman, the medicine man, the high priest, the overseer of sacred functions, and adviser [...] Power among tribal people is not perceived as political or economic, but supernatural and paranormal [...] [A] man whose nature inclined toward that of a woman,¹ called a *bayoguyin*, was assigned the role of the *babaylan*.¹⁷¹

Here, the writer, Jomar Fleras, explains the link between androgyny and/or transvestitism (or “transvestism”) and native religious beliefs.¹⁷² These *babaylans*, as written in Fray Juan Francisco de San Antonio’s chronicle, “were inclined to be like women and to all the duties of the feminine sex, were ‘ministers of the devil’ or ‘served as priests to hermaphrodite god’ of the Tagalogs (a Philippine ethnic grouping) prior to the Spanish Arrival.”¹⁷³

Transvestism, as found by Fleras was not particularly unique to Philippines.¹⁷⁴ He likened this practice to the Indonesian tribe called *Toraja Pamona* in Central Sulawesi, the *Makassarese* tribe in Southern Sulawesi, and the *Ngaju Dayak* in Borneo.¹⁷⁵ This said link between androgyny/homosexuality and religion¹⁷⁶ becomes crucial when it is used to argue for its morality as imposed by religion.

¹⁶⁹ FLERAS, *supra* note 21, at 825.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Animism was widely practiced before the Spanish came. Our ancestors worshiped a hermaphrodite god called *Bathala*, which literally means “man and woman in one.” The effeminate babaylan were also known to have married men and to have lived with them. It was considered a great honor for a family to have its young son cohabit with the elderly babaylan. However, the man-boy relationship would be terminated when the boy was ready to marry. After all, men were still needed to repopulate the tribe [...] what we may conclude from the available documents, is that before the Westernization of the Philippines, sex between people of the same gender was considered normal. Like most ancient societies, the *balangays* did not discriminate on the basis of sexual orientation.¹⁷⁷

The brief historical background¹⁷⁸ lays down a strong foundation for the effective questioning and destabilizing all the subsequent and present oppressive structures instituted by society.¹⁷⁹

During this time in the Philippines, “effeminate men and masculine women enjoyed powerful and respected positions in society.”¹⁸⁰ Another writer, J. Neil Garcia, said that instead of calling people who do these practices cross-dressers, they were actually “gender crossers.”¹⁸¹ These gender crossers “enjoyed a comparatively esteemed status in pre-colonial Philippine society simply because women enjoyed a similar status.”¹⁸² They were said to be “comparable to women in every way, except that they could not bear children. *Cronicas* tells us they were married to men, with whom they had sexual relations [...]. [B]eing men, they [also] had wives with whom they had their obligatory children.”¹⁸³ At the time, the Philippines was a matriarchal society; and those who are now modern day minorities, namely the homosexuals and the women, were, in fact, honored.¹⁸⁴

2. Spanish Era

¹⁷⁷ *Id.* (Emphasis supplied.)

¹⁷⁸ *Id.* at 825-826.

¹⁷⁹ *Id.* at 831.

¹⁸⁰ *Id.*

¹⁸¹ J. Neil Garcia, *Male Homosexuality in the Philippines: A Short History*, IAS Newsletter, Nov. 2004, available at http://www.ias.nl/sites/default/files/IIAS_NL35_13.pdf (last accessed Sept. 26, 2010).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Fleras notes that when the Spanish colonized the Philippines in the early sixteenth century, homophobia that was fast spreading throughout Europe was likewise transplanted locally.¹⁸⁵ The Spanish repressed and labeled immoral the homosexuality that Filipinos had taken so casually before.¹⁸⁶ Fleras blames Christian Europe's Catholic reformations since the Middle Ages.¹⁸⁷

This was the basis of the homophobia in the Philippines during the sixteenth century.¹⁸⁸ This led to the destruction of a culture honoring androgyny and femininity, as "[t]hey destroyed *anitos* (the gods of the flora and fauna) and they stripped the transvestite shamans of their authority."¹⁸⁹

The *babaylans*, however, were not punished because of their sexual identities,¹⁹⁰ "but, rather, because they represented the old religion. According to John Silva, "The Spanish priests were not only assiduous in writing about 'disgusting sodomites and servants of the devil'; they proceeded to crucify, burn at the stake, and savagely kill large numbers of *babaylans* who were men-lovers."¹⁹¹

The Spanish had a patent problem particularly with the males cross-dressing.¹⁹² "Male transvestism was especially condemned because it struck the very heart of European ideals of gender power relations. Male transvestism defied not only [...] moral but also social order. Unlike the pre-Spanish tribes, which had more flexible social organization, the new feudal structure introduced by the Spanish had rigid hierarchies: men and women were assigned specific, inflexible roles."¹⁹³

The effects of the Spanish influence were tremendously inequitable for women and homosexuals, as they were a demoted class of people, which allowed their victimization and slaughter.¹⁹⁴ "To escape social ridicule and to conform with family pressures, many men and women who loved their own sex were forced into marriage and procreation."¹⁹⁵

¹⁸⁵ FLERAS, *supra* note 21, at 826.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 827. The practice of homogenizing identities carries with it homophobic implications. See Dreyer, *supra* note 48.

The introduction of the Western “macho man” was the start of the intolerance towards the LGBTQ community and the women.¹⁹⁶ An entirely different social construct was thereby framed into the minds of the Filipino people, as they began to identify more with Western gender roles and identities.¹⁹⁷

3. American Colonial Era

The more secular influence of the Americans weaved in, but somehow modified, the Western gender norms,¹⁹⁸ which was already initiated by the Spanish.

Fleras states that the word “homosexual” was finally introduced to the English language in 1892.¹⁹⁹

The turn of the century witnessed the “invention of the homosexual,” that is, the new determination that homosexual desire was limited to certain identifiable individuals for whom it was an involuntary sexual orientation of some biological or psychological origin. Although identification not only of “deviance,” but also of the “deviant” may in some ways be liberating and a legitimizing of social relations, it can be also stigmatizing. This was clearly the case in *America at the turn of the century, when the seeds both of homosexual liberation and of homophobia were planted*.²⁰⁰

Although there are negative implications of the American power over the Filipinos, it cannot be denied that the individual was empowered to be expressive of him or herself.²⁰¹ The newfound freedom steadily empowered the LGBTQ to be more expressive with regard to their identities.²⁰² The rise of capitalism and industrialization motivated men and women to pull away from the bondage of their homes into industrial sites such as the markets and factories.²⁰³ “Under these conditions, men and women were given the opportunity to seek self-identity, and to discover their sexual and emotional attractions. Slowly, subcultures of gay men and, much later, of lesbian women, grew as homosexuals rediscovered themselves and each other.”²⁰⁴ In general,

¹⁹⁶ *Id.* at 829.

¹⁹⁷ *Id.*

¹⁹⁸ See Garcia, *supra* note 181.

¹⁹⁹ FLERAS, *supra* note 21, at 827. (Emphasis supplied.)

²⁰⁰ *Id.* (Emphasis supplied.)

²⁰¹ *Id.*

²⁰² *Id.* at 827-28.

²⁰³ *Id.* at 828.

²⁰⁴ *Id.*

society still “rejected the personhood that homosexual men and women were discovering, and tried to quash the homosexual’s struggle for self-identity by creating the stereotypes.”²⁰⁵

Intriguingly, it was the gay men who were first released from the societal pressure “because they were less bounded than women by social norms; also, since industrialized centers have traditionally been male spaces, gay male life developed significantly faster than lesbian subculture.”²⁰⁶ Cross-dressing also reemerged as a viable fashion statement for those who wanted to do so.²⁰⁷

Fleras also considers the economic factor of the lower class homosexuals by stating that “they were not as constrained by demands of society as the upper classes, who were expected to exhibit proper decorum in public.”²⁰⁸

It is admitted that there was a disparity between the men and women.²⁰⁹ The males were freer to be themselves than the females, since there are more social impediments for women confining them into a reduction of who they really are.²¹⁰

Aside from the inequality between males and females, there was also a clear-cut distinction between the lower class gay man and the upper class gay man.²¹¹ The lower class gay man was more flamboyant and feminine,²¹² while the upper class gay man was, and still is, more subtle and masculine.²¹³ Fleras adds:

According to oral accounts, lower-class transvestites working as laundry ‘women’ inside the American military bases would service the sexual needs of the GI[s]. They were not particularly pretty, but the Americans claimed, “We just cover their faces with the flag and fuck their asses.” Oral accounts also claim that the Americans introduced fellatio. Upper-class gay men found their own sexual expression within exclusive schools operating on the buddy and best friend system. Later

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

on, since there were no gay bars then, moneyed gay men began holding clandestine private parties, which turned into orgies.²¹⁴

It can be safely concluded that one of the major causes of these distinctions (the male and the female, and the lower-class and the upper-class) is the industrialization and capitalization of the Philippines.²¹⁵ The economic force made huge strides in defining identities.²¹⁶ Capital structures were more focused on profit and other secular activities, which made the Filipino community more of an aggregate of individuals, and less of an actual community.²¹⁷

J. Neil Garcia, also, comments on this development:

The American period, in which arguably the Philippines remains, saw the expansion of a newly empowered middle class, the standardization of public education, and the promulgation and regulation of sexuality by means of academic learning and the mass media[...]. We can reasonably surmise, following academic accounts of how Western psychology took root in the Philippines that this “sexualization” of local mentality, behavior and personality accompanied English-based education in America’s newly acquired colony in the twentieth century [...]. In other words, *by virtue of American colonialism and neo-colonialism, Filipinos have been socialized in Western modes of gender and sexual identity formation*, courtesy of sexualization that rode on different but complementary discourses of public hygiene, psychosexual development, juvenile delinquency, health and physical education, family planning, feminist empowerment, gay and lesbian advocacy, and corporally paranoid discourse of AIDS.²¹⁸

Stereotypes were, however, created by means of entertainment.²¹⁹ “As early as the 1920s, gay men were being portrayed as comic screaming queen characters and lesbian women were ridiculed as mannish, offensive dykes in stage-show vaudevilles.²²⁰ This trend would continue in the movies, and later, on television.”²²¹ Notwithstanding the rise of the individual identity, the Filipino was still familial²²² that it was considered

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Garcia, *supra* note 181, at ¶ 10-11. (Emphasis supplied.)

²¹⁹ FLERAS, *supra* note 21, at 828.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

[t]he worst stigmatization that homosexuals suffered during this era was the belief that it was ‘bad luck’ for a family to have a homosexual son or daughter. In response, homosexuals strove hard to prove their worth. They excelled in school, in the creative arts, and even in athletic competitions. They made money, sent their siblings to school, and took care of their parents during their old age. The end of World War II, the end of American occupation, and the beginning of the Republic witnessed the continuing struggle of homosexual men and women to forge their own subculture.²²³

From this passage, it is apparent that even if the economic force was the dividing line between the aforementioned distinctions, the economic force was technically the “way out” of the LGBT individuals. This means that their role in society had to have an economic function for the benefit of their respective families so they could have some validation as persons.²²⁴

Homosexuals were, by default, fixed at a position of disadvantage; hence, they had to work their way out of disapproving eyes of their families, friends, community, and country.²²⁵

4. *Feudal Macho Men and the Marcos Years*

The dictatorship of Ferdinand and Imelda Marcos (1965 – 1985) created a culture that reinforced macho feudalism, and this period was characterized by the general complicity with the ruling capitalist class, molded the psychology and sexuality of homosexual men and women.²²⁶ During Marcos’ rule, the stereotypes of sexual identities were rooted from feudal convictions.²²⁷ This feudal mode that Fleras discusses is about how the Filipinos subscribed to the macho icons for the males, and the chaste icons for the females.²²⁸

The strong are idolized while the weak are held in contempt. Those who dare contest these feudal roles are ridiculed and treated like outcasts. Homosexual men are called *bakla*, a condescending term that connotes physical and mental weakness, indecisiveness, frailty, unreliability, impotency, and emasculation. Lesbian women are called by the more innocuous term “tomboy,” which carries [the] imagery of boyish young girls who are able to outrun their brothers.²²⁹

²²³ *Id.* at 828-29.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 829.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

Not only is patriarchal mentality exalted, it was the prototype for the Filipinos ideal identity.²³⁰ Fleras describes this phenomenon as neocolonial.²³¹ The identities are no longer Western, but the Filipinos have localized what the West has left them.²³² The weak beings were women and homosexuals, because they were biologically and socially less than “men.” Human sexuality is viewed to be a phallogentric activity: the penis is perceived as imperative in engaging in a sexual act.²³³ “People regard it as normal for women to be attracted to men, and even understandable for men to be attracted to other men, but illogical for women to be attracted to women. Men do not consider lesbian women as serious threat to their own access to women’s sexual favor.”²³⁴

The effect of the neocolonialism played an important role in the identities and interactions of everyone.²³⁵ “According to Doreen Fernandez, ‘Many of the gay relationships are composed of couples of quite unequal social or intellectual standing. More frequently, one sees the patron-ward model, with one the dispense or bounty and the other in some form of dependent role, be it social or financial.’”²³⁶

This phallogentrism was now embedded in a web of economic, social, and sexual factors.²³⁷ Since these ideals are transformed and localized, the Filipino identity, while it was in its first stages of independence and nation building, tilted only to the favor of the males.²³⁸

In other words, while in the early stages nation building was occurring in the Philippines, the identities of men, women, and homosexuals started off in unequal standing.²³⁹ There was basically no room for women and homosexuals in policy-formation, since women were perceived weak and domestic, and homosexuals were mostly ridiculed or, at the very least, not taken seriously.²⁴⁰ Also, since there was only room for masculine and feminine gender identities, the coming out of the homosexuals was “with the concept of gender dysphoria: The gay man thought of himself as a woman trapped in a man’s body while the

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

lesbian woman envisioned herself with a trapped male soul that phallicized her. Thus, the homosexuals were considered neither male nor female, but members of the ‘third sex.’”²⁴¹ Although homosexuals were a class in itself, it does not mean that they were not subscribing to feudal conventions of the males and females.²⁴²

“Gay men portrayed themselves in media as ‘screaming queens’ who did nothing but gossip, act silly, and lust after men. Even the sexual revolution of the late 1960 did not free homosexuals but only made sure that women were available for the use of men.”²⁴³ This gained the LGBTQ some form of acceptance by society as a whole.

Fleras further elucidates:

General tolerance of homosexuals increased during the Marcos regime. Gay men became the court jesters. Imelda herself was said to be very fond of gay men; after all, these gay men came out with entertaining shows and antics that, like an ‘opium,’ made society forget about their bigger social realities of moral decay, poverty, and corruption. Families even started thinking of their homosexual son or daughter as good luck, for they contributed to the family income. Gay men and women saved their families from starvation by working as hairdressers, manicurists, fashion designers, peddlers, or even as prostitutes.²⁴⁴

Their beneficial function economically served as their approval in society, thereby resulting in tolerance.²⁴⁵ There were, of course, homosexuals who were brave enough to question, and defy the status quo.²⁴⁶ “We know of several of our brother[s] and sisters who have gone up to the mountains to wage an armed revolution against the oppressive ruling class. Their battle, however, was against the whole political system and not against the sexual feudalism that still enchained gay men and lesbian women.”²⁴⁷

5. *Feminism and Liberation*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 830.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

After the February 1986 Revolution that ousted Marcos, deconstruction of the feudal stereotype began.²⁴⁸

Gay men and lesbians started deconstructing and breaking away from the feudal stereotype imposed upon them by society. Now, it has become acceptable for gay men to be “butch” or for lesbian women to be “feminine.” Closet queens and dykes have slowly started to come out in the open. Relationships that are non-feudal and between persons of equal social status have become fashionable. We are also witnessing the emancipation of women in general. The new woman has gotten involved in the movement to obtain equality in rights, duties, freedom, responsibilities, and employment. The new woman has become a social and political actor. The rise of the new woman is now helping in lesbian woman’s struggle for self identity.²⁴⁹

It is seen here that women and homosexuals somehow come from the same level.²⁵⁰ They were both dethroned in their esteemed statuses, and they were both seen as the weaker beings in Philippine society.²⁵¹

It can be logically deduced, however, that women are, by default, easier to argue for when it comes to the granting of rights. Women are defined by biology.²⁵² “Beyond that, what is left is the biological female—an autonomous being who gains her identity by virtue of her own achievements and characteristics, not by virtue of whom she has a love relationship with.”²⁵³ Therefore, the existing dichotomy between men and women only left women with the sole argument that they are not weaker, hence, they should be equal to men.²⁵⁴ Seeking for equality as women is less complicated than seeking for equality as homosexuals.²⁵⁵ This is because many people still think and believe that homosexuality is an unnatural state of being.²⁵⁶

LGBTQ issues are definitely more complicated, since they engage the biological sphere, and yet go beyond questions of biology. Nonetheless, the

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 831.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 832.

²⁵² Anne Koedt, *Lesbianism and Feminism*, THE CWLU HERSTORY ARCHIVE, available at <http://www.uic.edu/orgs/cwluherstory/CWLUArchive/lesbianfeminism.html> (last visited Oct. 7, 2014).

²⁵³ *Id.* at ¶ 29.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

argument against male domination in the feminist movement is fundamental in furthering the LGBTQ cause.²⁵⁷

III. STATUS OF THE LGBTQ IN INTERNATIONAL LAW

Examining international principles in relation to the LGBTQ is important since the LGBTQ and other minority identities have been subject to neocolonial influences.²⁵⁸ This is vital in mapping where the Philippines is in terms of international law and human rights standards. The following, among other documents, principles, and declarations, lay the foundation for the Yogyakarta Principles. The trajectory to push for social progress leaves open the destruction of current structures that prevent the LGBTQ from having a full life free from discrimination.²⁵⁹

A. Universal Declaration on Human Rights (“UDHR”)

The UDHR Preamble states:

Whereas recognition of the *inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

* * *

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in *fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women* and have determined to promote social progress and better standards of life in *larger freedom*[,]²⁶⁰

Those who formulated the Yogyakarta Principles used similar principles stated in the UDHR and comprehensively compiled it with other jurisprudence and laws so as to tailor-fit the needs of the LGBTQ.²⁶¹

Article 1 of the UDHR states, “All human beings are born free and equal in dignity and rights[.]”²⁶² This is consequently the first sentence of the

²⁵⁷ *Id.*

²⁵⁸ See Garcia, *supra* note 181.

²⁵⁹ O’Flaherty & Fisher, *supra* note 40, at 207.

²⁶⁰ Universal Declaration on Human Rights [hereinafter “UDHR”], preamble, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). (Emphases supplied.)

²⁶¹ O’Flaherty & Fisher, *supra* note 40, at 207.

first principle in the Yogyakarta Principles.²⁶³ Article 2 of the UDHR entitles everyone to “[a]ll the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁶⁴ This, including the Vienna Declaration and Programme Action,²⁶⁵ also forms Principle 1 of the Yogyakarta Principles.²⁶⁶

Other articles in the UDHR such as the right to recognition before the law,²⁶⁷ the right to privacy,²⁶⁸ the right to found a family,²⁶⁹ the right to freedom of thought, conscience, and religion,²⁷⁰ the right to freedom of opinion and

²⁶² UDHR, art. 1.

²⁶³ YOGYAKARTA PRINCIPLES, *supra* note 1, princ. 1 (The Right to the Universal Enjoyment of Human Rights).

²⁶⁴ UDHR, art. 2.

²⁶⁵ Vienna Declaration, *supra* note 46, pt. I, ¶ 1.

The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

²⁶⁶ YOGYAKARTA PRINCIPLES, *supra* note 1, princ. 1.

²⁶⁷ UDHR, art. 6. “Everyone has the right to recognition everywhere as a person before the law.”

²⁶⁸ UDHR, art. 12. “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

²⁶⁹ UDHR, art. 16.

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

²⁷⁰ UDHR, art. 18. “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

expression,²⁷¹ and the right to participate in cultural life,²⁷² are all important provisions for the purpose of realizing that LGBTQ people are covered under the UDHR.

B. International Convention on Civil and Political Rights (“ICCPR”)

The Philippines became a signatory to the ICCPR on October 23, 1986 without any reservations.²⁷³

Article 26 states:

All persons are *equal before the law and are entitled without any discrimination to the equal protection of the law*. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.²⁷⁴

This provision ensures that everyone should be treated equally before the law. Jurisprudence has included “sexual orientation” under the word “sex,”²⁷⁵ and the Committee on Economic, Social, and Cultural Rights reveals that sexual orientation is included under the term “other status.”²⁷⁶

Article 2(1) states that the State Parties shall undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁷⁷

²⁷¹ UDHR, art. 19. “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

²⁷² UDHR, art. 27, ¶ 1. “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

²⁷³ International Covenant on Civil and Political Rights, Declarations and Reservations, UNITED NATIONS TREATY COLLECTION WEBSITE, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last accessed July 2, 2011).

²⁷⁴ International Covenant on Civil and Political Rights [hereinafter “ICCPR”], art. 26, Dec. 16, 1966, 999 U.N.T.S. 171. (Emphases supplied.)

²⁷⁵ *Toonen v. Australia*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/50/D488/1992 (Apr. 4, 1994).

²⁷⁶ U.N. Committee on Economic Social and Cultural Rights, General Comment No. 20, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter “General Comment No. 20”].

²⁷⁷ ICCPR, art. 2(1).

Consequently, Article 2(2) states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.²⁷⁸

The provision on the right to protection from medical abuses²⁷⁹ is important, especially for intersex people, who “have been subject to involuntary surgeries in an attempt to ‘correct’ their genitals.”²⁸⁰

Those similar to the provisions of the UDHR are the right to recognition before the law,²⁸¹ the right to privacy,²⁸² the right to freedom of thought, conscience and religion with certain limitations,²⁸³ the right to freedom

²⁷⁸ ICCPR, art. 2(2).

²⁷⁹ ICCPR, art. 7. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

²⁸⁰ O’Flaherty & Fisher, *supra* note 40, at 213.

²⁸¹ ICCPR, art. 16. “Everyone shall have the right to recognition everywhere as a person before the law.”

²⁸² ICCPR, art. 17.

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

²⁸³ ICCPR, art. 18.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

of opinion and expression with certain limitations,²⁸⁴ and the right to found a family.²⁸⁵

C. International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

The Philippines has been a signatory to this treaty since June 7, 1974, without any reservations.²⁸⁶ Its provisions are similar to the abovementioned documents; however, the elements of economic, social and cultural considerations are applied. For instance Article 2 (1) and (2) state, respectively:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

²⁸⁴ ICCPR, art. 19.

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

²⁸⁵ ICCPR, art. 23.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

²⁸⁶ International Covenant on Economic, Social, and Cultural Rights, Declarations and Reservations, UNITED NATIONS TREATY COLLECTION WEBSITE,, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed July 2, 2011).

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.²⁸⁷

Similar to the UDHR provision, the right to participate in cultural life²⁸⁸ is also stated in this convention.

Article 2(2) above, which is also similar to some provisions under the UDHR and ICCPR, has reference to *other status*—encompassing sexual orientation and gender identity—as part of the coverage under the principle of non-discrimination and equality, which State Parties are obliged to enforce within their jurisdictions.²⁸⁹ General Comment No. 20 seeks to elucidate that there are certain forms of discrimination that should be eliminated: the formal discrimination and the substantive discrimination.²⁹⁰

The elimination of formal discrimination ensures “that a State’s constitution, laws, and policy documents do not discriminate on prohibited grounds.”²⁹¹ The elimination of substantive discrimination, on the other hand, would require paying adequate “attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the

²⁸⁷ International Covenant on Economic, Social and Cultural Rights [hereinafter “ICESCR”], art. 2(1)-(2), Dec. 16, 1966, 993 U.N.T.S. 3. (Emphasis supplied.)

²⁸⁸ ICESCR, 15.

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;
 (b) To enjoy the benefits of scientific progress and its applications;
 (c) To benefit from the protection of the moral and material interests

resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

²⁸⁹ See General Comment No. 20, *supra* note 276, at ¶ 32.

²⁹⁰ *Id.*

²⁹¹ *Id.* at ¶ 8a.

conditions and attitudes, which cause or perpetuate substantive or *de facto* discrimination.”²⁹²

D. UN Resolution on Sexual Orientation and Gender Identity²⁹³

Resolution 17/19 of the Human Rights Council serves to acknowledge the application of the UDHR, ICCPR, ICESCR, and other human rights documents to promote “universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in fair and equal manner.”²⁹⁴

E. “Free and Equal in Dignity and Rights”: Clinton’s Speech Addressed to the UN (December 6, 2011)

In honor of Human Rights Day on December 10, 2011, US Secretary of State Hilary Clinton gave a historic speech on how “gay rights are human rights.”²⁹⁵ Some members of the audience represented countries that criminalize homosexuality.²⁹⁶ Clinton reminded her audience that “[i]t should never be a crime to be gay,”²⁹⁷ and that religious or cultural traditions should not be used as an excuse to discriminate against the LGBTQ, because “human rights are universal and [they] cut across all religions and cultures.”²⁹⁸

She asserts that homosexuality is a “human reality,” and not merely a Western invention.²⁹⁹ She holds that progress, therefore, comes from honest discussion, putting oneself in the shoes of the LGBTQ individual, and also by changing domestic laws, which shall eventually eradicate discrimination against

²⁹² *Id.* at ¶ 8b.

²⁹³ H.R.C. Res. 17/19, *supra* note 2.

²⁹⁴ *Id.* at preamble. The initial draft of the document sought to “establish an open-ended intergovernmental working group to allow for transparent discussion on sexual orientation and gender identity.”²⁹⁴ It also requested the UN High Commissioner to study how “international human rights law can be applied to ensure zero tolerance on impunity for violence based discrimination.” H.R.C. Res. 17/..., U.N. Doc. A/HRC/17/L.9 (June 9, 2011), at ¶ 1.

²⁹⁵ BBC News, *Hilary Clinton declares ‘gay rights are human rights’*, BBC.co.uk, Dec. 7, 2011, available at <http://www.bbc.co.uk/news/world-us-canada-16062937> (last accessed January 23, 2012).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Dallasvoice, Video and Transcript of Secretary of State Hilary Clinton’s Speech Today on LGBT Rights, Dallasvoice.com, Dec. 6, 2011, available at <http://www.dallasvoice.com/transcript-secretary-state-hillary-clintons-speech-today-lgbt-rights-1096073.html>.

²⁹⁹ *Id.*

the LGBTQ.³⁰⁰ She then encourages everyone mobilize in doing their part, in the private sphere and the public sphere, in embracing LGBTQ rights as human rights.³⁰¹ She also reassures LGBTQ who are discriminated against everyday:

Wherever you live and whatever the circumstances of your life, whether you are connected to a network of support or feel isolated and vulnerable, please know that you are not alone. People around the globe are working hard to support you and to bring an end to the injustices and dangers you face.³⁰²

This significant speech, along with recent UN documents, manifests the urgency for change with regard to the LGBTQ rights.

IV. THE YOGYAKARTA PRINCIPLES

A. In General

The Yogyakarta Principles is a set of principles launched by human rights experts³⁰³ on the application of human rights law in relation to sexual

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ O'Flaherty & Fisher, *supra* note 40, at 233 n.136. The experts who adopted the Yogyakarta Principles are: Philip Alston (Australia), UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law, School of Law, New York University, United States of America; Maxim Anmeghichean (Moldova), European Region of the International Lesbian and Gay Association; Mauro Cabral (Argentina), Universidad Nacional de Cordoba, International Gay and Lesbian Human Rights Commission; Edwin Cameron (South Africa), Justice, Supreme Court of Appeal, Bloemfontein, South Africa; Sonia Onufer Correa (Brazil), Research Associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and Co-chair of the International Working Group on Sexuality and Social Policy (Co-chair of the experts' meeting); Yakin Erturk (Turkey), UN Special Rapporteur on violence against women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey; Elizabeth Evatt (Australia), former Member and Chair of the UN Committee on the Elimination of Discrimination Against Women, former Member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists; Paul Hunt (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor of Law, Department of Law, University of Essex, United Kingdom; Asma Jahangir (Pakistan), Chairperson, Human Rights Commission of Pakistan; Maina Kiai (Kenya), Chairperson, Kenya National Commission on Human Rights; Miloon Kothari (India), UN Special Rapporteur on the right to adequate housing; Judith Mesquita (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom; Alice M. Miller (United States of America), Assistant Professor, School of Public Health, Co-director of the Human Rights Program, Columbia University; Sanji Mmasenono Monageng (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island

orientation and gender identity.³⁰⁴ There were 29 experts coming from 25 countries representing all geographic regions.³⁰⁵ Among the experts were 1 former UN High Commissioner for Human Rights (Mary Robinson, also a former head of state), 13 current or former UN Human Rights special mechanism office holders or treaty body members, and 2 serving judges of domestic courts and a number of academics and activists.³⁰⁶

Because of numerous reports of human rights violations worldwide, such as torture, murder, rape, criminalization of homosexual acts, and other violence against people of the LGBTQ, the states convened to discuss the said principles for a “coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity.”³⁰⁷

B. Instances of Human Rights Violations

Guidelines on prohibition and prevention of torture and other cruel, inhuman or degrading treatment (African Commission on Human and Peoples’ Rights); Viti Muntarbhorn (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People’s Republic of Korea and Professor of Law, Chulalongkorn University, Thailand (Co-chair of the experts’ meeting); Lawrence Mute (Kenya), Commissioner of the Kenya National Commission on Human Rights; Manfred Nowak (Austria), Professor and Co-director of the Ludwig Boltzmann Institute of Human Rights, Austria, and UN Human Rights Council Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment; Ana Elena Obando Mendoza (Costa Rica), feminist attorney, women’s human rights activist, and international consultant; Michael O’Flaherty (Ireland), Member of the UN Human Rights Committee, Professor of Applied Human Rights and Co-director of the Human Rights Law Centre, School of Law, University of Nottingham, and Rapporteur for the development of the Yogyakarta Principles; Sunil Pant (Nepal), President of the Blue Diamond Society, Nepal; Dimitrina Petrova (Bulgaria), Executive Director, The Equal Rights Trust; Rudi Muhammad Rizki (Indonesia), UN Special Rapporteur on international solidarity, and Senior Lecturer and the Vice Dean for Academic Affairs, Faculty of Law, University of Padjadjaran, Indonesia; Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative, former President of Ireland, and former United Nations High Commissioner for Human Rights; Nevena Vuckovic Sahovic (Serbia and Montenegro), Member of the UN Committee on the Rights of the Child, and President of the Child Rights Centre, Belgrade, Serbia Montenegro; Martin Scheinin (Finland), UN Special Rapporteur on counterterrorism, Professor of Constitutional and International Law, and Director of the Institute for Human Rights, Finland; Wan Yanhai (China), founder of the AI ZHI Action Project and Director of Beijing AI ZHI XING Institute of Health Education, China; Stephen Whittle (United Kingdom), Professor in Equalities Law, Manchester Metropolitan University, United Kingdom; Roman Wieruszewski (Poland), Member of the UN Human Rights Committee, and Head of Poznan Centre for Human Rights, Poland; and Robert Wintemute (United Kingdom), Professor of Human Rights Law, School of Law, King’s College London, United Kingdom.

³⁰⁴ *Id.* at 207.

³⁰⁵ *Id.* at 233.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 207.

These violations are primarily why the Principles were reiterated and made applicable to the LGBTQ. These Principles have their basis on research of accounts worldwide on how LGBTQ individuals have been maltreated.³⁰⁸

These human rights violations take many forms, from denials of the right to life, freedom from torture, and security of the person, to discrimination in accessing economic, social and cultural rights such as health, housing, education, and the right to work, from non-recognition of personal and family relationships to pervasive interferences with personal dignity, suppression of diverse sexual identities, attempts to impose heterosexual norms, and pressure to remain silent and invisible.³⁰⁹

O’Flaherty and Fisher noted that in the *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, there are at least seven countries that maintain the death penalty for consensual homosexual practices, and that there are plentiful reports regarding those human beings killed such as multiple rape of a lesbian in Zimbabwe:³¹⁰

[A] gay man sprayed with gasoline and set on fire in Belgium, the murder of a transgender human rights defender in Argentina, a nail bomb explosion in a gay bar in the United Kingdom, killing three people and injuring dozens of others, the murder of gay rights activist by multiple knife wounds in Jamaica, prompting a crowd to gather outside his home, laughing and calling out ‘let’s get them one at a time’, and the recent execution-style murder of two lesbian human rights defenders in South Africa.”³¹¹

They added that, based on a report by Amnesty International, these instances were not prosecuted; hence, these acts go unpunished.³¹²

Discrimination against LGBTQ individuals does not have to manifest itself through violence.³¹³ It could also be through subtle, less tangible means,

³⁰⁸ *Id.* at 207-08.

³⁰⁹ *Id.* at 208.

³¹⁰ *Report of the Special Rapporteur on violence against women, its causes and consequences*, Commission on Human Rights, 58th Sess., Agenda Item 12 (a), U.N. Doc. E/CN.4/2002/83 (2002), at ¶ 102; *Report of the Special Rapporteur on violence against women, its causes and consequences*, Commission on Human Rights, 53rd Sess., Agenda Item 9 (a), U.N. Doc. E/CN.4/1997/47 (1997), at ¶ 8. *See also Report on Special Rapporteur on violence against women, its causes and consequences*, Human Rights Council, 4th Sess., Agenda Item 2, U.N. Doc. A/HRC/4/34 (2007), at n.11 *cited in* O’Flaherty & Fisher, *supra* note 40, at 209.

³¹¹ O’Flaherty & Fisher, *supra* note 40, at 208.

³¹² *Id.*

such as denial of personal and familial rights, employment protection, and the like.³¹⁴ It has even gone as far as “forcibl[e] confine[ment] in medical institutions, and subject[ion] to ‘aversion therapy,’ including electroshock treatment.”³¹⁵

Based on the Report of the Special Representative of the Secretary General on Human Rights defenders,³¹⁶ even those that fight for LGBTQ rights are threatened, as they have had “their houses and offices[] raided, [...] been attacked, tortured, sexually abused, tormented by regular death threats and even killed.”³¹⁷ These are only some of the reported instances of the said hate crimes. To this day, hate crimes against LGBTQ individuals persist around the globe.

C. Specific Plight of the Transgender

It is imperative to note that out of all the LGBTQ, transgender people are treated the harshest.³¹⁸ As one Canadian report underlines: “The notion that there are two and only two genders is one of the most basic ideas in our binary Western way of thinking. Transgender people challenge our very understanding of the world. And we make them pay the cost of our confusion by their suffering.”³¹⁹

There have been reports stating that transgender people have been “referred to by health professionals as ‘thing’, ‘it’ or ‘not a real man/woman.’”³²⁰

Intersex people are, of course, different from transgender people. However, as previously mentioned, people of the intersex were involuntarily coerced to undergo surgery to rectify their genitals.³²¹

D. The Yogyakarta Process

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 212.

³¹⁶ *Report of the Special Representative of the Secretary General on Human Rights defenders*, Human Rights Council, 4th Sess., Agenda Item 2, U.N. Doc. A/HRC/4/37 (2007) at ¶ 95, *cited in* O’Flaherty & Fisher, *supra* note 40 at 213, n.33.

³¹⁷ O’Flaherty & Fisher, *supra* note 40, at 213.

³¹⁸ *Id.* at 209.

³¹⁹ Barbara Findlay, *Outlaws & In-Laws: Your Guide to LGBT Rights, Same-sex Relationships and Canadian Law*, EGALÉ CANADIAN HUMAN RIGHTS TRUST n.9 (2003), *cited in* O’Flaherty & Fisher, *supra* note 40, at 209.

³²⁰ O’Flaherty & Fisher, *supra* note 40, at 213.

³²¹ *Id.*

There was much confusion regarding the treatment of LGBTQ people.³²² Nuances, such as conflicting laws and jurisprudence and proper political terms, i.e. whether to use the words “sexual orientation” or “gender identity,” or “lesbians,” “gays,” “transgender” or “transsexual,” or “sexual minorities,” have always been sources of quandary to many.³²³ In light of this context, the International Service, in 2005, facilitated a coalition of human rights NGOs for Human Rights and the International Commission of Jurists to develop the Yogyakarta Principles.³²⁴

A tripartite function³²⁵ of the principles was proposed, as well; meaning, first, the principles should constitute:

[A] mapping of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities. This exercise should be as inclusive and wide ranging as possible, taking account of the distinct ways in which human rights violations may be experienced in different regions of the world. Second, the application of international human rights law to such experiences should be articulated in as clear and precise as possible. Finally, the principles should spell out in some detail the nature of the obligation on States for effective implementation of each of the human rights obligations.³²⁶

The Principles were then launched on March 26, 2007 at a public event along with the main session of UN Human Rights Council in Geneva, which was attended by ambassadors, delegates, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, experts, and NGOs.³²⁷ After this, there were major efforts to disseminate the Yogyakarta Principles in as many avenues as possible.³²⁸ It is almost impossible, for now, to appreciate the impact of these Principles by its mere launch and dissemination, since initiatives are rarely reported internationally.³²⁹ However, the “present authors closely examine reactions within the context of various UN fora and take note of the more significant [...] reactions [to the principles].”³³⁰

E. The Principles

³²² *Id.* at 232.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 233.

³²⁷ *Id.* at 237.

³²⁸ *Id.*

³²⁹ *Id.* at 238.

³³⁰ *Id.*

There are 29 main Principles, which are herein briefly outlined:

1. The Right to the Universal Enjoyment of Human Rights;³³¹
2. The Rights to Equality and Nondiscrimination;³³²
3. The Right to Recognition Before the Law;³³³
4. The Right to Life;³³⁴
5. The Right to Security of the Person;³³⁵
6. The Right to Privacy;³³⁶
7. The Right to Freedom from Arbitrary Deprivation of Liberty;³³⁷

³³¹ YOGYAKARTA PRINCIPLES, princ. 1. "All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."

³³² Princ. 2. "Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status."

³³³ Princ. 3. "Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity."

³³⁴ Princ. 4. "Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity."

³³⁵ Princ. 5. "Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group."

³³⁶ Princ. 6. "Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others."

³³⁷ Princ. 7. "No one shall be subjected to arbitrary arrest or detention. Arrest or

8. The Right to Fair Trial;³³⁸
9. The Right to Treatment with Humanity while in Detention;³³⁹
10. The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment of Punishment;³⁴⁰
11. The Right to Protection from All Forms of Exploitation, Sale and Trafficking from Human Beings;³⁴¹
12. The Right to Work;³⁴²
13. The Right to Social Security and other Social Protection Measures;³⁴³
14. The Right to an Adequate Standard of Living;³⁴⁴
15. The Right to Adequate Housing;³⁴⁵
16. The Right to Education;³⁴⁶

detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.”

³³⁸ Princ. 8. “Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity.”

³³⁹ Princ. 9. “Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.”

³⁴⁰ Princ. 10. “Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.”

³⁴¹ Princ. 11. “Everyone is entitled to protection from trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity. Measures designed to prevent trafficking shall address the factors that increase vulnerability, including various forms of inequality and discrimination on the grounds of actual or perceived sexual orientation or gender identity, or the expression of these or other identities. Such measures must not be inconsistent with the human rights of persons at risk of being trafficked.”

³⁴² Princ. 12. “Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.”

³⁴³ Princ. 13. “Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity.”

³⁴⁴ Princ. 14. “Everyone has the right to an adequate standard of living, including adequate food, safe drinking water, adequate sanitation and clothing, and to the continuous improvement of living conditions, without discrimination on the basis of sexual orientation or gender identity.”

³⁴⁵ Princ. 15. “Everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.”

³⁴⁶ Princ. 16. “Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.”

17. The Right to Highest Attainable Standard of Health;³⁴⁷
18. Protection from Medical Abuses;³⁴⁸
19. The Right to Freedom of Opinion and Expression;³⁴⁹
20. The Right to Freedom of Peaceful Assembly and Association;³⁵⁰
21. The Right to Freedom of Thought, Conscience, and Religion;³⁵¹
22. The Right to Freedom of Movement;³⁵²
23. The Right to Seek Asylum;³⁵³
24. The Right to Found a Family;³⁵⁴
25. The Right to Participate in Public Life;³⁵⁵

³⁴⁷ Princ. 17. “Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”

³⁴⁸ Princ. 18. “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”

³⁴⁹ Princ. 19. “Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.”

³⁵⁰ Princ. 20. “Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.”

³⁵¹ Princ. 21. “Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.”

³⁵² Princ. 22. “Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person’s entry, egress or return to or from any State, including that person’s own State.”

³⁵³ Princ. 23. “Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.”

³⁵⁴ Princ. 24. “Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.”

³⁵⁵ Princ. 25. “Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies

26. The Right to Participate in Cultural Life;³⁵⁶
27. The Right to Promote Human Rights;³⁵⁷
28. The Right to Effective Remedies and Redress;³⁵⁸ and
29. Accountability.³⁵⁹

Each Principle is expanded by international laws and principles, mainly from the UDHR, the ICCPR, and the ICESCR, which are already binding on the State Parties. Other international conventions and principles come from the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),³⁶⁰ the Vienna Declaration and Programme Action,³⁶¹ International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”),³⁶² and other treaties, resolutions, declarations and reports. There are also enumerated duties of the states so as to enforce the said Principle:³⁶³

Principles 1 to 3 set out the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law [...]

affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and military, without discrimination on the basis of sexual orientation or gender identity.”

³⁵⁶ Princ. 26. “Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.”

³⁵⁷ Princ. 27. “Everyone has the right, individually and in association with others, to promote the protection and realisation of human rights at the national and international levels, without discrimination on the basis of sexual orientation or gender identity. This includes activities directed towards the promotion and protection of the rights of persons of diverse sexual orientations and gender identities, as well as the right to develop and discuss new human rights norms and to advocate their acceptance.”

³⁵⁸ Princ. 28. “Every victim of a human rights violation, including of a violation based on sexual orientation or gender identity, has the right to effective, adequate and appropriate remedies. Measures taken for the purpose of providing reparation to, or securing adequate advancement of, persons of diverse sexual orientations and gender identities are integral to the right to effective remedies and redress.”

³⁵⁹ Princ. 29. “Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.”

³⁶⁰ Convention on the Elimination of All Forms of Discrimination against Women [hereinafter “CEDAW”], G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (Sept. 4, 1981).

³⁶¹ Vienna Declaration, *supra* note 46.

³⁶² International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter “ICERD”], G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1966).

³⁶³ YOGYAKARTA PRINCIPLES, *supra* note 1.

Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention. Principles 12 to 18 set out the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health. Principles 19 to 21 [emphasize] the importance of the freedom to express oneself, one's identity and one's sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others. Principles 22 and 23 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas. Principles 28 and 29 affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.³⁶⁴

Principle 2 (rights to equality and nondiscrimination)³⁶⁵ is similar to that of the ICCPR, which shall be discussed later.

In Principle 3,³⁶⁶ it is elaborated, thus:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. *Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.* No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization [*sic*] or hormonal therapy, as a requirement for legal recognition of their gender identity. *No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.*³⁶⁷

As for enforcement, the states are asked to ensure that all persons are "accorded legal capacity in civil matters without discrimination on the basis of sexual orientation or gender identity[.]"³⁶⁸ The states are to also respect those

³⁶⁴ O'Flaherty & Fisher, *supra* note 40, at 234-35.

³⁶⁵ YOGYAKARTA PRINCIPLES, Principle 2.

³⁶⁶ Principle 3. The Right to Recognition Before the Law.

³⁶⁷ *Id.* (Emphases supplied.)

³⁶⁸ *Id.*

who are sexually transitioning and to legally recognize them once the transition has terminated.³⁶⁹

Principle 21 reasserts the right to freedom of thought, conscience, and religion, regardless of sexual identity. Under this principle of protected thought and conscience, it is said that these rights may likewise “not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.”³⁷⁰ Individuals are to be free from “coercion or [...] imposition of beliefs.”³⁷¹

Principle 24 speaks about how every person has the right to found a family. This is a very important principle because here, it is recognized under this principle that “[e]veryone has the *right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms.* No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.”³⁷² This principle finds its basis mainly on Article 16 of the UDHR,³⁷³ Article 5(d)(iv) of the ICERD on the right to marriage and right of choice of spouse,³⁷⁴ Article 23 of the ICCPR,³⁷⁵ Article 16 of the CEDAW

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See YOGYAKARTA PRINCIPLES, *supra* note 1, at 56 n.154. National court judgments finding the exclusion of same-sex relationships from legal recognition through marriage to be discriminatory, *inter alia*: Minister of Home Affairs v. Fourie et al. (Constitutional Court of South Africa, 2005); Halpern et al. v Attorney General of Canada et al. (Court of Appeal for Ontario, 2003); Barbeau v. British Columbia (Attorney General), 2003 BCCA 251; Goodridge v. Dept. of Public Health, 440 Mass. 309 (Supreme Judicial Court of Massachusetts, 2003). The following countries allow for same-sex marriage: Canada, Belgium, Netherlands, South Africa, Spain, United States (state of Massachusetts); the following countries allow for same-sex civil unions or registered partnerships: Andorra, Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, New Zealand, Norway, Portugal, Slovenia, Sweden, Switzerland, United Kingdom. Same-sex civil unions or registered partnerships are allowed in certain regions/states of the following countries: Argentina, Australia, Brazil, Mexico, United States.

³⁷³ UDHR, art. 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

³⁷⁴ ICERD, art. 5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

regarding equal and reciprocal rights and obligations of spouses,³⁷⁶ and other regional conventions, such as the European Convention on Human Rights (“ECHR”) and its Five Protocols³⁷⁷ and the American Convention on Human

(d) Other civil rights, in particular:

* * *

(iv) The right to marriage and choice of spouse[.]

³⁷⁵ ICCPR, art. 23.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

³⁷⁶ CEDAW, art. 16.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

³⁷⁷ European Convention on Human Rights [hereinafter “ECHR”], Sept. 3, 1953, art. 14, 213 U.N.T.S. 222 (1953).

Rights.³⁷⁸

These Principles are a “positive road to full equality for lesbian, gay, bisexual, and transgender people around the world. Each principle is accompanied by detailed recommendations to states on how to end discrimination and abuse.”³⁷⁹

As these are already existing principles in international law, the Yogyakarta Principles merely reiterate what states should be implementing to reduce, if not eliminate, human rights violations against the LGBTQ.

V. SOURCES OF INTERNATIONAL LAW AND THE STATUS OF THE YOGYAKARTA PRINCIPLES UNDER INTERNATIONAL LAW

A. Sources of International Law, In General

The Statute of the International Court of Justice contains the sources of international law. Interestingly, Article 38(1) of the Statute,³⁸⁰ does not really pertain to sources. “Rather, Article 38 is primarily a directive to the Court on how it should resolve conflicts brought before it.”³⁸¹

On the other hand, the Restatement of Law of Foreign Relations Law of the United States³⁸² is “more direct in enumerating the sources of International Law.”³⁸³

1. A rule of international law is one that has been accepted as such by the international community of states
 - a. in the form of customary law;
 - b. international agreement;
 - c. by derivation from general principles common to the major legal systems of the world.

2. Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

³⁷⁸ American Convention on Human Rights [hereinafter “American Convention”] July 18, 1978, art. 1(1), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978).

³⁷⁹ Center for Women’s Global Leadership, *supra* note 18, at 2.

³⁸⁰ ICJ STAT. art. 38.

³⁸¹ JOAQUIN BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 10.

³⁸² AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (3D) OF FOREIGN RELATIONS OF LAW OF THE UNITED STATES (1987), § 101.

³⁸³ BERNAS, *supra* note 381, at 10.

3. International agreements create law for the states parties thereto and may lead to the creation of customary international law which such agreements are intended for adherence by states generally and are in fact widely accepted.³⁸⁴

General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreements, may be invoked as supplementary rules of international law where appropriate.³⁸⁵

B. Customary Law

Custom or customary international law means a “general and consistent ‘practice of states followed by them from a sense of legal obligation[.] This statement contains the two basic elements of custom: the material factor, that is how states behave, and the psychological or subjective factor, that is, why they behave the way they do.’”³⁸⁶

Without *opinio juris*, “or the belief that a certain form of behavior is obligatory,”³⁸⁷ practice cannot be considered as part of customary international law despite the humanitarian consideration of such practice.

The Martens Clause in humanitarian law is an exception to this rule. It states:

Until a more complete code of laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations as they result from the *usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.*³⁸⁸

It is, however, about international humanitarian law, which deals with the laws of war, and not international human rights law.

It is arguable that the UN resolutions on sexual orientation and gender identity are also customary law. Even if resolutions are considered merely recommendatory, they can also be a “reflection of what has become customary

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 11. (Emphasis supplied.)

law,”³⁸⁹ especially if they are supported by all states.

Taking into consideration the small margin by which the 2011 Resolution won, i.e. by a 23-19-3 vote, and the reason why the 19 dissenting countries did so,³⁹⁰ it is foreseeable that division and friction among the states regarding LGBTQ rights will continue. Nonetheless, it is a huge accomplishment to have the LGBTQ cause furthered by the UN, especially as the most recent 2014 Resolution against discrimination won by a 25-14-7 vote. What is most important is that finally, there is international recognition of the LGBTQ identity and their rights against discrimination and violence.³⁹¹

C. Status of the Yogyakarta Principles Under International Law

The Yogyakarta Principles do not have the status of a treaty. The Yogyakarta Principles at most started out under the category of a “teaching of highly qualified writers and publicists,”³⁹² since they were written and compiled by human rights experts.³⁹³ The Principles, technically, are merely persuasive, and the ICJ is “generally reluctant to refer to writers but they are often taken into consideration.”³⁹⁴

It is arguable, however, that the Yogyakarta Principles are soft law. This argument stems from the fact that the Yogyakarta Principles merely compile the principles (e.g. UDHR) and binding treaties (e.g. ICCPR and ICESCR) and make them specific enough to apply to the LGBTQ.³⁹⁵

Although soft law’s flexibility can be a favorable characteristic, the same flexibility can also be its weakness: unlike treaties and customary law, there is much difficulty in addressing the breaches of obligations supposedly imposed by soft law,³⁹⁶ since they do not provide for their parties specific rights and duties.

³⁸⁹ BERNAS, *supra* note 381, at 21.

³⁹⁰ Frank Jordans, *UN Gay Rights Protection Resolution Passes*, HUFFINGTONPOST.COM, June 17, 2011 available at http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-_n_879032.html (last accessed July 3, 2011).

³⁹¹ *Id.*

³⁹² BERNAS, *supra* note 381, at 19.

³⁹³ O’Flaherty & Fisher, *supra* note 40, at 207.

³⁹⁴ BERNAS, *supra* note 381, at 19.

³⁹⁵ O’Flaherty & Fisher, *supra* note 40, at 214.

³⁹⁶ BERNAS, *supra* note 381, at 21.

Such “hortatory’ or ‘programmatory’ rules cannot produce expected legal effects regardless of the form of the act in which they were stipulated.”³⁹⁷

Viewed by some authors as *lex ferenda*,³⁹⁸ or “a proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force,”³⁹⁹ soft law “express or reveal the tendencies in the future development of general customary law. But they cannot transform into customary law as such, unless followed or replaced by more specific provisions, reflecting the precise will of their authors to create legal rights and duties.”⁴⁰⁰ Nevertheless, categorization under soft law does not prevent states from implementing such laws.

VI. SURVEY OF MARRIAGE LAWS FOR THE LGBTQ

A. Domestic Legal Setting

1. 1987 Philippine Constitution

The Constitutional policy on the family bases itself on solid nationalistic ground as it says that “[t]he State recognizes the Filipino Family as the foundation of the Nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.”⁴⁰¹

The family, as the basic unit of society, is defined as “a group of individuals related by blood, marriage, or adoption.”⁴⁰² As may be gleaned from the definition, present laws do not give the LGBTQ a chance to found their families as supposedly an inherent human right as affirmed by international law, since the local definition of “family” is only possible by blood, marriage, or adoption and regrettably, the Philippine definition of “marriage” specifically provides that is shall be only between “a man and a woman.”⁴⁰³

Delving in further with the intent of the framers of the Constitution when it comes to familial relations, the Records of the Constitutional

³⁹⁷ V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 238-39 (2007).

³⁹⁸ *Id.* at 239.

³⁹⁹ BLACK’S LAW DICTIONARY (9th ed., 2009).

⁴⁰⁰ DEGAN, *supra* note 397, at 239.

⁴⁰¹ CONST. art. XV, § 1.

⁴⁰² MERRIAM WEBSTER DICTIONARY OF LAW 188 (1996).

⁴⁰³ FAM. CODE, art. 1.

Commission reveal that the family, as included as one of the rights of a human person, is a main concern of the country.⁴⁰⁴

MS. NIEVA. [...] The rights of the person, however, have a fundamental social dimension in the institution of family. The family as a natural society exists prior to the State or any other community. Thus, Pope John Paul II has rightly said that the future of humanity passes by way of family. From this it follows the family possesses, as given by the Author of nature Himself, certain inherent and inalienable rights which are intrinsic to its very existence and perpetuity. Many cultures, particularly in highly technologized countries, have become desensitized to His deeply human realities. In some countries, in fact, it appears that the family as a basic and fundamental institution has ceased to be a priority concern of the State. While history affirms the family's indispensable role as primary educator, economic provider, cultural mediator and spiritual formator, the rights of the family are often ignored and even undermined by legal social and economic structures and programs.

*We Filipinos are truly a family-centered culture and this is one of our real strengths as a nation. We are poor in many ways but not in our instinctive love and commitment to family life. Our core family values may yet prove to be our greatest contribution to the rest of the contemporary world where family life has been continually eroding.*⁴⁰⁵

* * *

As we draft our new Constitution, we have this singular opportunity and responsibility to explicate our commitment to the Filipino family through safeguarding its *inalienable rights* and enhancing its *total development in all spheres of life—social, economic, political and spiritual*.⁴⁰⁶

The sponsorship speech of Commissioner Nieva mentions teachings of Pope John Paul II, and how God is the author of family.⁴⁰⁷ Her speech inevitably rests on religious foundations,⁴⁰⁸ which seemingly delimits the definition of family.

However, the Constitution is written for future generations. Even during the Constitutional Convention it was said that “[w]e are not writing it for

⁴⁰⁴ V RECORD CONST. COMMISSION, Proposed Resolution No. 542, Sept. 24, 1986.

⁴⁰⁵ *Id.* at 36. Sponsorship Remark of Commissioner Nieva. (Emphasis supplied.)

⁴⁰⁶ *Id.* at 37. (Emphasis supplied.)

⁴⁰⁷ *Id.* at 36.

⁴⁰⁸ *Id.*

the present.”⁴⁰⁹ Even if Commissioner Nieva and Commissioner Nolledo acknowledged that there are also different types of families existing outside the Catholic realm or definition of “family,”⁴¹⁰ the LGBTQ’s right to found a family or to marry is patently not within the framers’ contemplation of the Constitutional definition of “family.”⁴¹¹ The framers obviously meant that marriage and family life is basically for heterosexual couples, even if these couples are of other religions.⁴¹² The framers declared that the envisioned “family” in the present Constitution is not based mainly on Christian bias as they claim.⁴¹³

As pointed out by Commissioner Gascon, the basis of family should be love and partnership.⁴¹⁴ But again, even if the framers intended to respect all

⁴⁰⁹ *Id.* at 38.

⁴¹⁰ *Id.*

MR. NOLLEDO Thank you. In Section 1, we talk of the Filipino family, what is the composition of the Filipino family.

MS. NIEVA There are different models, I think.

⁴¹¹ *Id.* at 39.

⁴¹² *Id.*:

MR. NOLLEDO May I ask the Commissioner a more detailed question. Am I right if I say that we are adoption the provision of Article 217 of the Civil Code of the Philippines which states:

Family relationships shall include those:

- (1) Between husband and wife;
- (2) Between parent and child;
- (3) Among other ascendants and their descendants;
- (4) Among brothers and sisters.

MS. NIEVA. Basically, yes, that would be the definition of a Filipino family.

* * *

MR. BENNAGEN. May I know the understanding of the committee on the word “marriage,” since there seems to be a premise here that that is left unstated?

MS. NIEVA. Generally, I think the accepted definition of marriage is union of man and woman.

⁴¹³ *Id.* at 54.

MR. BENNAGEN. Is it not merely Christian middleclass bias?

MS. NIEVA. We are saying that other cultures may have traditional models of marriage and family life, and we respect them.;

* * *

MR. BENZON. Nevertheless, I am against any concept that smacks of Catholic doctrine in the Constitution[...]

⁴¹⁴ *Id.* at 44.

existing families and that the basis of family is love and partnership,⁴¹⁵ it is still extremely evident that the LGBTQ was not given much space, in terms of family life and marriage, in the Constitution.

Of course, the Constitution also concedes in Article II that “[t]he State values the dignity of every human person and guarantees full respect for human rights.”⁴¹⁶ Since the right to found a family is, according to international law, an essential human right,⁴¹⁷ how does one then reconcile the heteronormative limitations envisaged in the Constitution and the right that is internationally pronounced as inherent to all human beings?⁴¹⁸

2. *Family Code*

The Family Code provides:

ARTICLE 1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with the law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequence and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within limits provided by this Code.⁴¹⁹

The inviolability of marriage as provided in the Constitution is highlighted in this provision.⁴²⁰ Yet, again, this definition reflects what traditional and religious sentiments deem as what marriage is and ought to be.⁴²¹

Although the law does not explicitly exclude gay marriage in the list of void marriages in a relational category,⁴²² the very definition of marriage as being between a man and a woman connotes the prohibition.⁴²³

MR. GASCON. Mr. Presiding Officer, may I respond to that. Basically, I believe that one of the basic things that we should encourage in the development of a family is love and partnership, and I think the success of the family is based on that – the proper values encourage within the home.

⁴¹⁵ *Id.*

⁴¹⁶ CONST. art. II, § 11.

⁴¹⁷ UDHR, art. 16; ICCPR, art. 23, CEDAW, art. 16; ECHR, art. 12; YOGYAKARTA PRINCIPLES, princ. 24.

⁴¹⁸ *Id.*

⁴¹⁹ FAM. CODE, art. 1.

⁴²⁰ CONST., art. XV, § 2.

⁴²¹ Michael Stevenson & Markie Oliver, *Deconstructing Arguments Against Same-sex Marriage* in 3 DEFENDING SAME SEX MARRIAGE 77-89 (Martin Dupuis and William Thomson eds., 2007).

⁴²² FAM. CODE art. 37 prohibits marriage:

1. Between ascendants and descendants of any degree; and

Jurisprudence also mentions that it is an essential marital obligation to “procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage.”⁴²⁴

There are cases in which those filing for annulment have invoked homosexuality as a basis for psychological incapacity under Article 36 of the Family Code;⁴²⁵ hence, imputing that homosexuals are psychological incapacitated to perform essential obligations of marriage.

In *Chi Ming Tsoi v. Court of Appeals*, the petitioner invoked homosexuality, therefore, making him psychologically incapacitated to perform essential marital obligations:

The plaintiff claims, that the defendant is impotent, a *closet homosexual* as he did not show his penis. She said, that she had observed the defendant using an eyebrow pencil and sometimes the cleansing cream of his mother. And that, according to her, the defendant married her, a Filipino citizen, to acquire or maintain his residency status here in the country and to publicly maintain the appearance of a *normal man*.⁴²⁶

2. Between brothers and sisters, whether full or half-blood.

Art. 38 prohibits marriage:

1. Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;
2. Between step-parents and step-children;
3. Between parents-in-law and children-in-law;
4. Between the adopting parent and the adopted child’
5. Between the surviving spouse of the adoptive parent and the adopted child;
6. Between the surviving spouse of the adopted child and the adopter;
7. Between an adopted child and a legitimate child of the adopter;
8. Between the adopted children of the same adopter;
9. Between parties where one, with the intention to marry the other, killed that other person’s spouse or his or her own spouse.

⁴²³ FAM. CODE, art. 1.

⁴²⁴ *Chi Ming Tsoi v. Court of Appeals*, G.R. No. 119190, 266 SCRA 324, 333, Jan. 19, 1997.

⁴²⁵ FAM. CODE, art. 36. “A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.”

⁴²⁶ *Chi Ming Tsoi*, 266 SCRA at 327. (Emphases supplied.)

The Supreme Court held that the non-consummation, regardless of who refuses whom in an invitation to intercourse, renders the marriage void.⁴²⁷ They reasoned thus:

While the law provides that the husband and the wife are obliged to live together, observe mutual love, respect and fidelity, the sanction therefor is actually the “spontaneous, mutual affection between husband and wife and not any legal mandate or court order[.]” Love is useless unless it is shared with another. Indeed, no man is an island, the cruelest act of a partner in marriage is to say “I could not have cared less.” This is so because an ungiven self is an unfulfilled self. The egoist has nothing but himself. In the natural order, it is sexual intimacy which brings spouses wholeness and oneness. Sexual intimacy is a gift and a participation in the mystery of creation. It is a function which enlivens the hope of procreation and ensures the continuation of family relations.⁴²⁸

Assuming that Chi Ming Tsoi was indeed a homosexual, the law would not seem to mind, since what is deemed to be important, according to this jurisprudential standard, is a person’s ability to perform essential marital obligations, such as mutual love, respect, and sexual intercourse.⁴²⁹ According to the Supreme Court, this is the “natural order” of things.⁴³⁰ As seen in this case, there is the subtle, yet disturbing claim that homosexuals are not normal, which also could be found in other cases.

Lesbianism was also used as a ground under psychological incapacity in the case of *Agraviador v. Agraviador*,⁴³¹ where the petitioner husband alleged that his wife was psychologically incapacitated to perform marital obligations since she was carefree and irresponsible.⁴³² She refused to have sex with the petitioner, and she had an affair with a lesbian.⁴³³ The trial court ruled:

Without contradiction the recitation by Petitioner and the findings of the doctor show that Respondent is indeed suffering from “Mixed Personality Disorder” that render her incapable of complying with her marital obligations. Respondent's refusal to commit herself to the

⁴²⁷ *Id.* at 332-33. “Catholic marriage tribunals attribute the causes to psychological incapacity than to stubborn refusal. Senseless and protracted refusal is equivalent to psychological incapacity. Thus, the prolonged refusal of a spouse to have sexual intercourse with his or her spouse is considered a sign of psychological incapacity.”

⁴²⁸ *Id.* (Citations omitted.)

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Agraviador v. Agraviador*, G.R. No. 170729, 637 SCRA 519, Dec. 8, 2010.

⁴³² *Id.* at 524, 533.

⁴³³ *Id.*

marriage, her tendencies to avoid a close relationship with Petitioner, *preferring to be with her lover and finally abandoning their home for a lesbian, a disregard of social norm, show that she was never prepared for marital commitment in the first place. This incapacity is deeply rooted from her family upbringing with no hope for a cure.*⁴³⁴

The Court of Appeals, however, reversed the ruling, and the Supreme Court affirmed the Court of Appeals’ finding that there is “no sufficient basis to annul the marriage” based on the totality of evidence presented to prove the gravity and incurability of the wife’s incapacity.⁴³⁵

Under Articles 45⁴³⁶ and 46,⁴³⁷ the marriage may be annulled if any of the spouses finds out that his or her spouse is a homosexual or a lesbian, and that fact was concealed at the time of marriage.⁴³⁸

⁴³⁴ *Id.* at 526-27. (Emphasis supplied.)

⁴³⁵ *Id.*

⁴³⁶ FAM. CODE art. 45.

A marriage may be annulled for any of the following causes, existing at the time of the marriage:

* * *

(3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;

* * *

(5) That either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable[.]

⁴³⁷ FAM. CODE art. 46.

Any of the following circumstances shall constitute fraud referred to in Number 3 of the preceding Article:

(1) Non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude;

(2) Concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband;

(3) Concealment of sexually transmissible disease, regardless of its nature, existing at the time of the marriage; or

(4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage.

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage.

⁴³⁸ *Id.*

In *Almelor v. Regional Trial Court of Las Piñas*,⁴³⁹ the respondent wife sought to annul the marriage with her husband because he was allegedly a homosexual.⁴⁴⁰ He was alleged to be a strict disciplinarian to his children, and that he has an inexplicable deep attachment to his mother.⁴⁴¹ She noticed that her husband was particularly close with male companions, since she “caught him in an indiscreet telephone conversation manifesting his affection for the male caller.”⁴⁴² She also found “pornographic homosexual materials in his possession. Her worst fears were confirmed when she saw Manuel kiss another man on the lips.”⁴⁴³

The ground initially used by the wife was psychological incapacity under Article 36, but the RTC nullified the marriage on the under Article 45 instead, as it ratiocinated:

A careful evaluation and in-depth analysis of the surrounding circumstances of the allegations in the complaint and of the evidence presented in support thereof [sic] reveals that in this case [sic] there is more than meets the eyes [sic].

Both legally and biologically, homosexuality [...] is, indeed, generally incompatible with heterosexual marriage. This is reason enough that in this jurisdiction [sic] the law recognizes marriage as a special contract exclusively only between a man and a woman [...] and thus when homosexuality has trespassed into marriage, the same law provides ample remedies to correct the situation (Article 45(3) in relation to Article 46(4) or Article 55, par. 6, Family Code). This is of course in recognition of the biological fact that no matter how a man cheats himself that he is not a homosexual and forces himself to live a normal heterosexual life, there will surely come a time when his true sexual preference as a homosexual shall prevail in haunting him and thus jeopardizing the solidity, honor, and welfare of his own family.⁴⁴⁴

The Supreme Court held that the RTC committed grave abuse of discretion because it took into account the homosexuality, and not the concealment of the fact, which actually is what is required under the Family Code.⁴⁴⁵

⁴³⁹ *Almelor v. Regional Trial Court of Las Piñas*, G.R. No. 179620, 563 SCRA 447, Aug. 26, 2008.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 450.

⁴⁴² *Id.* at 451.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 454-55.

⁴⁴⁵ *Id.* at 451, 468-69.

Verily, the lower court committed grave abuse of discretion, not only by

Although the law does not prohibit the marriage of LGBTQ individuals per se, the concealment of the fact of being LGBTQ becomes a ground for annulment of marriage,⁴⁴⁶ which logically implies that the law looks at the LGBTQ individual with disfavor.

It has been said in an American case that “common sense and modern psychiatric knowledge concur as to the incompatibility of homosexuality and the subsistence of marriage between one so afflicted and a normal person.”⁴⁴⁷ Again, it is found here that there is the imputation that the offended spouse is normal and that the LGBTQ spouse is not. A commentary noted in the case argued that if someone has “developed a well-established homosexual pattern, the probabilities are that he will not have a genuine desire for marriage. It is doubtful that the interests of the individual concerned, or of society, are well served by contracting marriage with a homosexual.”⁴⁴⁸

Under Philippine Law however, if the homosexuality or lesbianism occurs after the marriage, such fact would be a ground for legal separation, under Article 55.⁴⁴⁹ The LGBTQ individual is categorized with those who resort

solely taking into account petitioner's homosexuality per se and not its concealment, but by declaring the marriage void from its existence.

This Court is mindful of the constitutional policy to protect and strengthen the family as the basic autonomous social institution and marriage as the foundation of the family. The State and the public have vital interest in the maintenance and preservation of these social institutions against desecration by fabricated evidence. Thus, any doubt should be resolved in favor of the validity of marriage.

⁴⁴⁶ FAM. CODE, art. 46.

⁴⁴⁷ *H. v. H.*, 59 N.J Super. 227 (1959).

⁴⁴⁸ *Id.* at n.2. See GEORGE HENRY, ALL THE SEXES 583-586 (1955).

⁴⁴⁹ FAM. CODE, art. 55.

A petition for legal separation may be filed on any of the following grounds:

- (1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner;
- (2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;
- (3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement;
- (4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;
- (5) Drug addiction or habitual alcoholism of the respondent;
- (6) Lesbianism or homosexuality of the respondent;
- (7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;
- (8) Sexual infidelity or perversion;

to violence, those who are corrupt enough to engage a family member in prostitution, those who are criminals, who are drug addicts or drunks, those who are sexual infidels, those who attempt to kill his or her spouse, and those who abandon his or her spouse.⁴⁵⁰ It is argued that the categorization is unjustified,⁴⁵¹ because it diminishes the view that LGBTQ individuals are also normal people who just happen to be discriminated against because of their sexual orientation.

Looking at the present Family Code, it can be concluded that there is truly no room for the LGBTQ individual to be protected as a spouse. These legal circumstances glaringly go against universal standards of human rights.⁴⁵²

3. Revised Penal Code

The first paragraph of Article 350 of the Revised Penal Code (“RPC”) penalizes those marriages contracted despite the existence of a legal impediment.⁴⁵³ Article 352 also penalizes those who perform or administer illegal marriage ceremonies.⁴⁵⁴ There is no jurisprudence on prosecuting illegal marriages between LGBTQ couples. Even so, the provisions criminalizing marriages that are not part of the legal norm may be dangerous territory for the LGBTQ individuals. This just shows how the State is well within its powers to stay rigid in terms of the definition and legality of marriage.

4. Jurisprudence on LGBTQ Rights

The treatment towards the LGBTQ in the Philippines, where being gay is neither illegal nor accepted, but merely tolerated at best,⁴⁵⁵ is manifested by certain Supreme Court decisions.

(9) Attempt by the respondent against the life of the petitioner; or

(10) Abandonment of petitioner by respondent without justifiable cause

for more than one year.

⁴⁵⁰ *Id.*

⁴⁵¹ BAXI, *supra* note 51, at 18.

⁴⁵² UDHR, *supra* note 260.

⁴⁵³ REV. PEN. CODE, art. 350. “*Marriage contracted against provisions of laws.* — The penalty of prison correccional in its medium and maximum periods shall be imposed upon any person who, without being included in the provisions of the next proceeding article, shall have not been complied with or that the marriage is in disregard of a legal impediment.”

⁴⁵⁴ REV. PEN. CODE, art 352. “*Performance of illegal marriage ceremony.* — Priests or ministers of any religious denomination or sect, or civil authorities who shall perform or authorize any illegal marriage ceremony shall be punished in accordance with the provisions of the Marriage Law.”

⁴⁵⁵ FLERAS, *supra* note 21, at 831.

In *Silverio v. Republic*,⁴⁵⁶ a certain Rommel Jacinto Dantes Silverio, a transsexual (male-to-female), petitioned to change his name to “Mely” and his sex from “male” to “female” in his birth certificate, since he felt as if he had always been trapped in a man’s body since childhood. Although the lower court granted the petition and stated that “granting the petition would be more in consonance with justice and equity”⁴⁵⁷ and that “no harm, injury or prejudice will be caused to anybody in the community,”⁴⁵⁸ the Republic of the Philippines through the Office of the Solicitor General appealed the decision to the Court of Appeals, which overturned the lower court’s decision since it lacked legal basis. The Supreme Court’s decision, as penned by Justice Renato Corona, agreed with the Court of Appeals. The *ponencia* interestingly, quoted a bible verse and the fable of Malakas and Maganda at the very beginning of the decision.⁴⁵⁹ The Supreme Court stated that Republic Act No. 9048 or the Clerical Error Law does not sanction such changing of names and sexes, since such change is not encompassed by the definition of “clerical or typographical error.”⁴⁶⁰

The Court also stated that a person’s sex is an essential factor in marriage and family relations, and that there is no law governing those who had their sexual reassignment operations, nor the consequence of such operation.⁴⁶¹ It was obvious from the preliminary quotations⁴⁶² that the decision is tainted with religious and cultural bias. Citing a legal ratio was seemingly a mere formality.

⁴⁵⁶ *Silverio v. Republic*, G.R. No. 174689, 537 SCRA 373, Oct. 22, 2007.

⁴⁵⁷ *Id.* at 382.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 380.

⁴⁶⁰ Rep. Act No. 9048, § 2 (3). “Clerical or typographical error” refers to a mistake committed in the performance of clerical work in writing, copying, transcribing or typing an entry in the civil register that is harmless and innocuous, such as misspelled name or misspelled place of birth or the like, which is visible to the eyes or obvious to the understanding, and can be corrected or changed only by reference to other existing record or records: *Provided, however, That no correction must involve the change of nationality, age, status or sex of the petitioner.* (Emphasis supplied.)

⁴⁶¹ *Silverio v. Republic*, G.R. No. 174689, 537 SCRA 373, 391, 393, 395, Oct. 22, 2007.

⁴⁶² *Id.* at 380.

When God created man, He made him in the likeness of God; He created them male and female. (Genesis 5:1-2)

Amihan gazed upon the bamboo reed planted by Bathala and she heard voices coming from inside the bamboo. “Oh North Wind! North Wind! Please let us out!” the voices said. She pecked the reed once, then twice. All of a sudden, the bamboo cracked and slit open. Out came two human beings; one was a male and the other was a female. Amihan named the man “Malakas” (Strong) and the woman “Maganda” (Beautiful). (The Legend of Malakas and Maganda).

In *Republic v. Cagandahan*,⁴⁶³ however, an androgynous person named Jennifer Cagandahan possessed both male and female biological parts.⁴⁶⁴ She is, therefore, an intersex individual. However, her female parts did not develop as she grew older, and her body was producing male hormones, e.g. androgen.⁴⁶⁵ This was a condition called Congenital Adrenal Hyperplasia.⁴⁶⁶ Hence, she felt more like a male rather than a female.⁴⁶⁷ She then prayed to have her birth certificate corrected by changing her name from “Jennifer” to “Jeff,” and her sex from “female” to “male.”⁴⁶⁸ The Regional Trial Court granted the petition and stated that based on his actions and feelings as a male person, he is, nonetheless “a normal person and wants to be acknowledged and identified as a male.”⁴⁶⁹

The Office of the Solicitor General elevated the case on appeal, but the Supreme Court, as supported by medical testimony said:

In deciding this case, we consider the compassionate calls for recognition of the various degrees of intersex as variations which should not be subject to outright denial. ‘It has been suggested that there is some middle ground between the sexes, a ‘no-man’s land’ for those individuals who are neither truly ‘male’ nor truly ‘female.’ The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but *this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.*⁴⁷⁰

The overall implication of this case is the openness of the Court and other legal systems to an individual’s right to identity as dictated by his or her conscience.

5. *The Problem with Ang Ladlad v. COMELEC*

In the case of *Ang Ladlad LGBT Party v. Commission on Elections (COMELEC)*,⁴⁷¹ Justice Del Castillo started off with a quotation saying that “[f]reedom to differ is not limited to things that do not matter much. That

⁴⁶³ Republic vs. Cagandahan, G.R. No. 166676, 565 SCRA 72, Sept. 12, 2008.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 78.

⁴⁷⁰ *Id.* at 86. (Emphasis supplied.)

⁴⁷¹ Ang Ladlad LGBT Party v. Comm’n on Elections, G.R. No. 190582, 618 SCRA 32,

would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order,” by Justice Robert A. Jackson in the case of *West Virginia State Board of Education v. Barnette*. *Ang Ladlad* solidified all citizens’ basic right to freedom as protected by the Constitution.⁴⁷²

In the *Ang Ladlad* case, the political party filed a Petition for Registration with the COMELEC so that it can represent the LGBTQ of the Philippines as marginalized and under-represented sector in the country. However, the COMELEC rejected the petition on moral grounds by stating that Ang Ladlad tolerates immorality based on the Bible, Koran, and some other internet sources on the issue.⁴⁷³ Hence, the party sought relief from the Supreme Court. The Court ordered the Office of the Solicitor General to file a Comment in behalf of the COMELEC, but the OSG sided with Ang Ladlad.⁴⁷⁴

The Commission on Human Rights also advocated for Ang Ladlad saying that the COMELEC violated principles of the Constitution, the UDHR, and the ICCPR.⁴⁷⁵ The Supreme Court granted the petition of Ang Ladlad, by stating that it complied with all the legal requirements under Republic Act No. 7941, and that the refusal to register Ang Ladlad was based on religious grounds which is against the Constitution, as it also cited *Estrada v. Escritor*.⁴⁷⁶ COMELEC’s failure to elaborate on the social ills brought about by the LGBTQ community violated the Equal Protection clause. It was held that the COMELEC may not infringe on Ang Ladlad’s right to expression and association, and that although the Court is not prepared to accept the Yogyakarta Principles as binding just yet, the denial of the COMELEC decision remains to be in flagrant violation the UDHR and the ICCPR.⁴⁷⁷

Even if the denial of Ang Ladlad’s registration is a violation of international law’s standard of non-discrimination, the Supreme Court, in essence, hampers other “human rights” claims.⁴⁷⁸

We also hasten to add that not everything that society—or a certain segment of society—wants or demands is automatically a human right. This is not an arbitrary intervention that may be added to or subtracted at will. It is unfortunate that much of what passes for

⁴⁷² *Id.* at 45.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Estrada v. Escritor*, A.M. No. P-02-1651, 492 SCRA 1, June 22, 2006.

⁴⁷⁷ *Ang Ladlad LGBT Party*, 618 SCRA 32, 78-80, Apr. 8, 2010.

⁴⁷⁸ *Id.*

human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims that international law obliges states to sanction these innovations. This has the effect of diluting real human rights, and is a result of the notion that if ‘wants’ are couched in ‘rights’ language, then they are no longer controversial.⁴⁷⁹

This inclusion—limiting the legal benefits given to the LGBTQ—was obviously written so as not to mistake the granting of other possible rights to the LGBTQ. This problematically confines LGBTQ rights only in terms of political representation, and not of any other right.⁴⁸⁰ Some may categorize gay marriage as a “want” and not as a human right.⁴⁸¹ It was as if the Supreme Court implied that it was not ready to tackle such issue as it carefully released its decision and distinguished what could be capricious demands to human rights.

The Supreme Court, in its slightly liberal yet still conservative decision, seemed to be aware of the international trend of pushing for gay rights, and pegged international law’s innovations as a dilution of real human rights.⁴⁸²

Although the LGBTQ found relief with this case in terms of legislative representation, the Supreme Court’s classification of the Yogyakarta Principles weakens its effect in the Philippine jurisdiction. The Court specifically said:

Using even the most liberal of lenses, these *Yogyakarta Principles*, consisting of a declaration formulated by various international law professors, are[,] at best[,] *de lege ferenda* [...] and do not constitute binding obligations on the Philippines. Indeed, so much of contemporary international law is characterized as “soft law” nomenclature, i.e., international law is full of principles that promote international cooperation, harmony, and respect for human rights, most of which amount to no more than well-meaning desires, *without the support of either State practice or opinio juris*.⁴⁸³

De lege ferenda is defined as “a proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force.”⁴⁸⁴ This classification, in effect, is not given much persuasive weight⁴⁸⁵ so as to bind the Philippines to implement it. Again, jurisprudence made it more difficult for

⁴⁷⁹ *Id.* at 78.

⁴⁸⁰ Wintemute, *supra* note 39, at 87.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.* (Emphases supplied.)

⁴⁸⁴ BLACK’S LAW DICTIONARY, *supra* note 399.

⁴⁸⁵ DEGAN, *supra* note 397, at 429.

the LGBTQ people to use these Principles directly applicable in this jurisdiction. Nonetheless, the importance of the Yogyakarta Principles cannot be neglected.⁴⁸⁶

B. Foreign Setting

1. *Benefits of Marriage*

Inevitably, one will ask why marriage rights should be granted to LGBTQ. Aside from the facts that it is “the highest form of interpersonal commitment and friendship achievable between sexually attracted persons,”⁴⁸⁷ it is the “whole manner and communion of life, and maintains its value and indissolubility, even when offspring are lacking.”⁴⁸⁸

Also, as it was in some states in the US:

There are a few legal protections for same-sex couples. Their sexual acts are illegal in most states. They may not file joint income tax returns, claim each other as deductions, qualify as dependents on insurance policies, collect a ‘spouse’s’ Social Security, or, in some cases, be named as life insurance beneficiaries. We have mentioned the difficulty with adoption. Gays and lesbians may be barred from visitation with their own biological children, and they experience difficulty gaining custody in divorce proceedings.⁴⁸⁹

It is also noted by Daniel Maguire that by virtue of marriage, couples “nourish and develop their wedlock by pure conjugal love and undivided affection.”⁴⁹⁰

In the Philippines, because same-sex marriage is not allowed, LGBTQ couples suffer from the lack of benefits in terms of taxes,⁴⁹¹ insurance benefits,⁴⁹² succession,⁴⁹³ exculpating or mitigating circumstances under criminal law,⁴⁹⁴ governmental benefits,⁴⁹⁵ remedial law benefits and privileges,⁴⁹⁶ and other benefits heterosexual married couples get to enjoy in their lifetime.

⁴⁸⁶ BERNAS, *supra* note 381, at 21.

⁴⁸⁷ MAGUIRE, *supra* note 6, at 57.

⁴⁸⁸ *Id.* at 63.

⁴⁸⁹ DOUGLAS CARL, *Counseling Same-sex Couples*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 53 (Robert Baird & Stuart E. Rosenbaum eds., 1997).

⁴⁹⁰ Maguire, *supra* note 6, at 57.

⁴⁹¹ TAX CODE, §§ 24(A), 86, 99.

⁴⁹² INS. CODE, § 10.

⁴⁹³ CIVIL CODE, arts. 887, 897.

⁴⁹⁴ REV. PEN. CODE, arts. 13, 15, 20, 247, 290, 332.

Unlike some foreign countries which recognize same-sex unions (or at least domestic partnerships), the Philippines has no law, other than certain general rights provisions, enabling same-sex couples to live amongst the rest of the citizenry who enjoy these said benefits.

2. Laws

Currently, there are 19 countries, excluding a few more states in the United States and Mexico, that have successfully passed laws granting full marriage rights, and not merely domestic partnerships and civil unions, to same-sex couples: Argentina, Belgium, Canada, Denmark, the Netherlands, New Zealand, Norway, South Africa, Spain, Sweden,⁴⁹⁷ and more recently, Brazil, France, Iceland, Luxembourg, and Portugal.

Even if violence against South African LGBTQ people is still prevalent, South Africa is one of the most advanced countries in terms of same-sex marriage and such other civil rights.⁴⁹⁸ The South African Constitution has been in effect since 1996. It particularly states: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.”⁴⁹⁹

The prohibition against discrimination against the LGBTQ led to the decision of the Constitutional Court in 2005 where same-sex marriage was adjudged to be a constitutional right, and the Civil Union Act of 2006.⁵⁰⁰ The basis of legalizing such marriages is their equal protection clause.⁵⁰¹ It was found that same-sex couples, like heterosexual ones, are likewise capable of sharing love, and deserve the protection of the state.⁵⁰²

⁴⁹⁵ Rep. Act No. 8282 (1997), §§ 8-9, 15. Philippine Social Security Act of 1997.

⁴⁹⁶ RULES OF COURT, Rule 130, § 22.

⁴⁹⁷ Christy Glass, Nancy Kubasek & Elizabeth Kiester, *Toward A 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT'L L. 132, 140, (2011).

⁴⁹⁸ *Gay Rights: The World Should Recognize Gay Rights as Human Rights*, LATIMES.COM, June 6, 2011, available at <http://articles.latimes.com/2011/jun/06/opinion/la-ed--gayrights-20110606>.

⁴⁹⁹ S. AFR. CONST. Ch. 2, § 9(3). (Emphasis supplied.)

⁵⁰⁰ Minister of Home Affairs and Another v. Fourie and Another, 2005 ZACC 19; 2006 (3) BCLR (CC); 2006 (1) SA 524 (CC) (S. Afr.).

⁵⁰¹ S. AFR. CONST. § 9(1). “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

⁵⁰² Minister of Home Affairs and Another v. Fourie and Another, 2005 ZACC 19; 2006 (3) BCLR (CC); 2006 (1) SA 524 (CC) (S. Afr.).

In 2011, the United States, only had seven states that have legalized same-sex marriage: Massachusetts (since 2003, based on the case *Goodridge v. Department of Public Health*),⁵⁰³ Connecticut (since 2008), Iowa (since 2009), Vermont (since 2009), New Hampshire (since 2010), District Columbia (since 2010), and New York (2011).⁵⁰⁴ Since 2011, a great number of states have already legalized same-sex marriage, including California, Colorado, Delaware, Hawaii, Idaho, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. Soon, other states such as Alaska, Arizona, Kansas, South Carolina, and Wyoming will join the list.⁵⁰⁵

In Europe, a good number of countries now allow same-sex marriage. However, although, there are a number of nations allowing these types of unions, the European Court ruled that gay marriage is not a universal human right due to the social and cultural connotation of marriage.⁵⁰⁶

Even if Denmark was the “first in the world to enact registered partnerships law,”⁵⁰⁷ it was the Netherlands that was actually the first country to allow same-sex marriages by legislation on April 1, 2001.⁵⁰⁸ Prior to the European trend in granting gay marriage, there have already been numerous changes, although limited in effect, which were taken by various countries in recognizing same-sex unions and partnerships.⁵⁰⁹

In 1980s Netherlands, two cases were “brought to court where the homosexual couples claimed that the state ban on same-sex marriage violated their human rights. These legal challenges arose because the marriage statute in the Netherlands contained gender-neutral language, which made it possible to argue that marriage could be between people of the same gender.”⁵¹⁰

⁵⁰³ *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

⁵⁰⁴ Nicholas Confessor, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, *The New York Times*, June 24, 2011, available at <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>.

⁵⁰⁵ *Where the State Laws Stand*, FREEDOMTOMARRY.ORG, Oct. 17, 2014, available at <http://www.freedomtomarry.org/pages/where-state-laws-stand>.

⁵⁰⁶ Associated Press, *European Court Rules Gay Marriage Not a Universal Human Right*, FOXNEWS.COM, June 25, 2010, available at <http://www.foxnews.com/world/2010/06/25/european-court-rules-gay-marriage-universal-human-right/>.

⁵⁰⁷ M.Y. LEE, EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES 16 (2010).

⁵⁰⁸ Glass, Kubasek & Kiester, *supra* note 497, at 143.

⁵⁰⁹ LEE, *supra* note 507, at 18.

⁵¹⁰ *Id.*

Proponents of gay marriage had a tenacity that did not falter.⁵¹¹ There was “subtle progress [...] achieved on the sidelines.”⁵¹² It was, however, not only because of the perseverance of proponents, but also due to the “willingness of the municipalities to register same-sex relationships [which then] carried significant political and symbolic values, paving the way for a sequence of legislative initiatives,” such as decriminalizing homosexuality, and enacting a registered partnership law and a General Equal Treatment Act.⁵¹³ “[T]he return of the liberal/social coalition government[,] which had made introducing same-sex marriage their election manifesto[,] saw the passage of a bill that re-defined marriage to include same sex couples. On 1 April 2001, the Netherlands became the first country to legalize same-sex marriages.”⁵¹⁴ Notably, Otto Vos, a representative of the liberal party argued in the last Parliamentary debate that “the real basis for marriage is love between two partners.”⁵¹⁵

Two years after the Netherlands, Belgium became the second country to grant gay marriage.⁵¹⁶ “Similar to the Dutch, same-sex couples in Belgium first went to the municipalities to register their relationships.”⁵¹⁷ This laid the basis for eventual same-sex marriage, although initially stalled by conservatives.⁵¹⁸ Similar to the Netherlands, there was also a coalition that included same-sex partnerships in its platform for election.⁵¹⁹ After securing “property and financial rights for cohabiting couples, the parliament honored its election promise and proceeded to equalize other rights between homosexual and heterosexual couples.”⁵²⁰ Belgium actually amended their Civil Code to “change the definition of marriage so that ‘two persons of different or same sex may contract into a marriage.’”⁵²¹ On June 1, 2003, Belgium was officially the second country to legalize same-sex marriage.⁵²²

Again, two years later, the law granting same-sex couples the right to marry was effectuated in Spain.⁵²³ The authors noted:

⁵¹¹ *Id.* at 19.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ Glass, Kubasek & Kiester, *supra* note 497, at 149.

⁵¹⁶ *Id.* at 150.

⁵¹⁷ LEE, *supra* note 507, at 20.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ Glass, Kubasek & Kiester, *supra* note 497, at 153.

Spain presents an important case study for two reasons. First, unlike other countries that have legalized same-sex marriage—such as Netherlands, Norway, and Sweden—Spain is not known for its political liberalism. Rather, the strong role of the Catholic Church in Spanish society made Spain an unlikely candidate for same-sex marriage rights [...]. Catholic leaders lobbied hard against the law, calling it a threat to society. Furthermore, Spain’s citizens are more religious than those of other countries that have introduced full marriage rights.⁵²⁴

Spain had, in fact, no trace of recognizing LGBTQ rights, even in terms of domestic partnerships or adoption.⁵²⁵ However, when the LGBTQ marriage law was passed, it went even further than the Dutch and the Belgians in terms family law by also allowing adoption. Traditionally, Spanish law always made reference to “man and woman” when it came to marital and family relations.⁵²⁶ Thousands of people protested the new law alongside conservative parties and the Catholic leaders.⁵²⁷ Political leaders, such as mayors, also expressed their refusal to marry people of the same sex.⁵²⁸

“During the dictatorship rule of Franco, homosexuals were treated as degraded people along with drug addicts and vagabonds [...] It was not until Franco’s death in 1975 that the plight of gays and lesbians improved.”⁵²⁹ Very much like the Netherlands and Belgium, “Spain allowed regional governments to set up their own partnership registration regimes. Symbolic as the procedure was, it signified the recognition by a state institution and boosted the lobbying of the national government for recognizing same-sex relationships.”⁵³⁰ In 2004, Prime Minister Zapatero wanted to “create a secular state in the traditionally Catholic nation,”⁵³¹ hence, he “proposed the same-sex marriage bill shortly after the election.”⁵³² On June 30, 2005, Spain became the third country to grant “same-sex couples the rights to marry and adopt children. Before the vote, Zapatero addressed Congress saying, ‘We are not the first, but I am sure we will not be the last. After us will come many other countries, driven, ladies and gentlemen, by two unstoppable forces: freedom and equality.’”⁵³³

⁵²⁴ *Id.* at 154.

⁵²⁵ *Id.* at 153-54.

⁵²⁶ *Id.* at 154.

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ LEE, *supra* note 507, at 21.

⁵³⁰ *Id.*

⁵³¹ *Id.* at 22.

⁵³² *Id.*

⁵³³ *Id.*

Interestingly, majority of Filipino Catholic values are strongly rooted in Spanish Catholic values.⁵³⁴

On January 1, 2009, Norway became the fourth country in Europe, but the sixth country in the world to grant same-sex marriage.⁵³⁵ It was second to Denmark in granting domestic partnership registration.⁵³⁶ Historically, “Norwegian citizens did not demonstrate high levels of support of same-sex marriage or adoption.”⁵³⁷ The major turning point was actually the resurgence of the Labor Party to the majority.⁵³⁸ Anniken Huitfeldt of Norway’s Ministry of Children and Equality developed a series of “‘white’ proposals for the Norwegian Parliament. Out of these proposals came new legislation, titled ‘A Marriage Act for All’, which was intended to make marriage gender neutral by amending the definition of civil marriage in federal law. Huitfeldt said of the legislation: ‘this new marriage law is a step forward along the lines of voting rights for all and equality laws.’”⁵³⁹ Even if there was opposition from certain parties, the “King of Norway granted his royal assent and the law took effect on January 1, 2009.”⁵⁴⁰ LGBTQ couples may not only adopt, but can also undergo artificial insemination.⁵⁴¹

The Lutheran Church is the largest religious institution in Norway, but its followers were split between the liberals and the conservatives.⁵⁴² This disagreement continues to ensue to this day.⁵⁴³ The law does not require churches to perform wedding ceremonies, even if there are still liberal followers of the church.⁵⁴⁴

In April 2009, Sweden legalized same-sex marriage, becoming the fifth country in Europe to grant the same, by passing a marriage bill that is gender-neutral.⁵⁴⁵ The fight for marriage equality started in 1973.⁵⁴⁶ Even if it was not legal at that time, Sweden has always accepted same-sex partnerships’ as a “perfectly acceptable form of family life.”⁵⁴⁷

⁵³⁴ FLERAS, *supra* note 21, at 826.

⁵³⁵ Glass, Kubasek & Kiester, *supra* note 497, at 158.

⁵³⁶ *Id.*

⁵³⁷ *Id.* at 158-59.

⁵³⁸ *Id.* at 159.

⁵³⁹ *Id.* at 159-60. (Citations omitted.)

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ *Id.* at 161.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 160.

In 2004, the Swedish Parliament formed an independent committee to investigate the effects of registered partnerships laws and to determine the consequences of amending marriage law to make it gender neutral [...] [T]he committee issued a report that recommending Swedish marriage law to grant full marriage rights to couples irrespective of gender.⁵⁴⁸

The Social Democrats, Greens, and Left parties pushed for the legalization of same-sex marriage.⁵⁴⁹ Nevertheless, the bill won by a 261-22 vote.⁵⁵⁰ Calling the movement “immoral,” “only members of the Christian Democrats opposed the bill, saying that the party wanted to protect ‘a seven hundred year old concept’ that was marriage between one man and one woman.”⁵⁵¹ In the end, Sweden became “one of the first countries in the world to grant same-sex couples access to church weddings.”⁵⁵²

Canada only recently (compared to Europe) decriminalized homosexuality.⁵⁵³ “The removal of the legal stigma unleashed the yearning for equal treatment on the part of homosexual rights activists nationwide.”⁵⁵⁴ In 1996, “sexual orientation” was inserted into the Human Rights Act of 1985, “marking another leap of equality for the country’s gay and lesbian citizens.”⁵⁵⁵ However, what differentiates Canada and its experience from other LGBTQ movements is that “the momentum for legalizing same-sex marriage originated from the court instead of the parliament. In 1995, the Supreme Court unanimously read ‘sexual orientation’ into the Canadian Charter of Rights and Freedoms as analogous ground of discrimination.”⁵⁵⁶ After such landmark decision, there was a “plethora of homosexual litigants fighting for equal rights across the country which culminated in the 1999 decision of *M v. H.*”⁵⁵⁷ But the full grant of marital rights did not automatically happen.⁵⁵⁸ It was a long battle before the case *Halpern v. Canada*⁵⁵⁹ “upheld same-sex marriage for the first time in Canada [...] The Ontario Superior Court ruled that the common law definition of marriage violated the Canadian Charter and should be changed to

⁵⁴⁸ *Id.* at 164.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ LEE, *supra* note 507, at 22.

⁵⁵⁴ *Id.* at 23.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Halpern v. Canada* (2003) 60 O.R. (3d) 321 (Div. Ct.).

‘the voluntary union for life of two persons to the exclusion of all others.’⁵⁶⁰ The Court held a similar decision in *Hendricks v. Quebec*.⁵⁶¹ In the end, the parliament, although divided, passed the bill, granted marriage by the usage of a similar definition laid down in *Halpern v. Canada*.⁵⁶²

“Even without a marriage title, same-sex relationships are increasingly recognized in many places in varying degrees and by different names [...] Civil unions made its Latin American debut in the Argentine capital Buenos Aires in 2002.”⁵⁶³ Within a few years, civil partnership laws have turned into marriage equality laws, specifically in Brazil and in some regions in Mexico. In 2010, Argentina legalized same-sex marriage after a battle of words with the Catholic Church.⁵⁶⁴ President Cristina Fernandez de Kirchner argued that it would be a “terrible distortion of democracy to deny gay couples the right to wed and that it was time for religious leaders to recognize how much more liberal and less discriminatory the nation’s social mores had become.”⁵⁶⁵

The Czech Republic also has recognized civil partnerships in 2006. Although Israel does not recognize same-sex unions, those married overseas clamored for recognition.⁵⁶⁶ Eventually, the “Supreme Court of Israel ruled in favor of claimants by ordering the government to register their same-sex marriages.”⁵⁶⁷

3. Jurisprudence

i. *Baker v. Nelson* and Other Similar Cases as the Foundation to the Ban on Same-sex Marriage

Before being overturned, *Baker v. Nelson*⁵⁶⁸ was almost always used as the seemingly inviolable rule by US Courts. In this case, the main question was whether or not state statutes authorize the marriage of people of the same-sex,

⁵⁶⁰ LEE, *supra* note 507, at 24.

⁵⁶¹ *Hendricks v. Quebec* (2002) J.Q. 3816.

⁵⁶² Civil Marriage Act, S.C. 2005, c. 33, 2 (Can.). “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”

⁵⁶³ LEE, *supra* note 507, at 38.

⁵⁶⁴ Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, THE NEW YORK TIMES, July 15, 2010, available at <http://www.nytimes.com/2010/07/16/world/americas/16argentina.html> (last accessed Jan. 24, 2012).

⁵⁶⁵ *Id.*

⁵⁶⁶ LEE, *supra* note 507, at 35.

⁵⁶⁷ *Id.* at 38-39.

⁵⁶⁸ *Baker v. Nelson*, 291 Minn. 310, 191 N.W. 2d 185 (1971).

and, if not, whether state authorization is constitutionally compelled.⁵⁶⁹ The Minnesota Court found that the marriage statute does not authorize same-sex marriage, and that not allowing such does not violate due process and equal protection.⁵⁷⁰ The Court also added:

The institution of marriage as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner vs. Oklahoma* [...], which invalidated Oklahoma's Habitual Criminal Sterilization Act, on equal protection grounds stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race," This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.⁵⁷¹

In *Jones v. Hallaban*,⁵⁷² where a lesbian couple fought for their right to be issued a marriage license, the Kentucky Court said that "[t]here is no constitutional sanction or protection of right of marriage between persons of the same sex."⁵⁷³

In *Singer v. Hara*,⁵⁷⁴ the Washington Court further explained the reason behind the ban. The basis of the ban, according to the Court, was not because of the fact that the parties were both males, but because marriage is desirable for procreation,⁵⁷⁵ and that "it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus, the refusal of the state to authorize same-sex marriage results from the impossibility of reproduction rather than from an insidious discrimination 'on account of sex'."⁵⁷⁶

ii. Non-LGBTQ related cases of Discrimination

Despite the existence of laws that were oppressive to minorities, the US is still considered historically progressive, as proven by certain landmark cases.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Jones v. Hallahan*, 502 S. W. 3d 588 (Ky. Ct. App. 1973).

⁵⁷³ *Id.* at 590.

⁵⁷⁴ *Singer v. Hara*, 522 P. 2d 1187 (1974).

⁵⁷⁵ *Id.* at 1195.

⁵⁷⁶ *Id.*

In *Loving v. Virginia*,⁵⁷⁷ a “negro” woman and a white man, both residents of Virginia, married each other in District Columbia in 1958.⁵⁷⁸ The couple returned to Virginia to establish their abode, thereby violating the ban on interracial marriages.⁵⁷⁹ They were found guilty, as pleaded, with a sentence of one year in jail, but the trial judge, instead, suspended the sentence for 25 years with the condition that the couple had to leave Virginia, and to not return for the said period of time.⁵⁸⁰

It was stated in the decision, the “Almighty God created the races white, black, yellow, [M]alay and red, and he placed them on separate continents. But for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”⁵⁸¹ The intent of the law was to preserve the integrity of race and to prevent the corruption of blood.⁵⁸² Interestingly, it also mentioned God.

The US Supreme Court, however, declared that the prohibition of interracial marriages to maintain white supremacy was a violation of the Equal Protection Clause.⁵⁸³ The Court also declared that the due process clause was violated because the statutes deprived people of their liberty to marry.⁵⁸⁴ The Court further stated:

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.⁵⁸⁵

Then, in *Turner v. Safley*,⁵⁸⁶ the Court upheld prisoner’s right to marry without permission of the prison superintendent, which was the current

⁵⁷⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁷⁸ *Id.* at 2.

⁵⁷⁹ *Id.* at 3.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *Id.* at 7.

⁵⁸³ *Id.* at 12.

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

⁵⁸⁶ *Turner v. Safley*, 482 U.S. 78 (1987).

regulation.⁵⁸⁷ The complete ban on marriage was held to fail the rational relationship test.⁵⁸⁸ While prison may regulate marriages, they cannot completely ban prisoners to enjoy their constitutional right to marry.⁵⁸⁹

iii. International Cases

*Toonen v. Australia*⁵⁹⁰ is a significant case in international law. Nicolas Toonen was an Australian citizen residing in Tasmania.⁵⁹¹ Being a gay rights activist, he challenged the Tasmanian Criminal Code for penalizing “unnatural sexual intercourse” or “intercourse against nature” and “indecent practice between male persons.” His arguments were that the Tasmanian Criminal Code violates Articles 2(1), 17, and 26 of the ICCPR because:

(a) They do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;

(b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity;

(c) The Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. That the laws in question are not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.⁵⁹²

Toonen also adds that there are no effective remedies available to him. Australia commented that, although Toonen has been victimized by arbitrary interference, the laws were reasonable so as to protect public health and

⁵⁸⁷ *Id.* at 99.

⁵⁸⁸ *Id.* at 91.

⁵⁸⁹ *Id.* at 99.

⁵⁹⁰ *Toonen v. Australia*, *supra* note 275.

⁵⁹¹ *Id.* at par. 1.

⁵⁹² *Id.* at par. 3.1. (Emphases supplied.)

morals.⁵⁹³ Toonen contended that he is protected under Article 17 of the ICCPR or the provision on the right to privacy.⁵⁹⁴

The Committee found that Toonen's right to privacy was nonetheless violated, since consensual sexual activity between adults is embraced by the notion of "privacy" protected by international law.⁵⁹⁵ They found that the Tasmanian Criminal provisions do not meet the test of reasonableness.⁵⁹⁶

It is notable that the Committee found that "sexual orientation" is included in the word "sex" found in Article 26 of the ICCPR,⁵⁹⁷ hence, all persons are entitled to equal protection of the law and protection against discrimination, regardless of sexual orientation. This case laid down the basis for the inclusion of the LGBTQ in Article 26.

However, in *Joslin v. New Zealand*,⁵⁹⁸ where lesbians were seeking the right to marry since the denial of such causes a real adverse impact on their lives, the UN Human Rights Committee found that the denial of the right to marry of same-sex couples was not a violation of Article 26 of the ICCPR.⁵⁹⁹ This was because if they allowed such marriage, it would mean the redefinition of the whole legal institution.⁶⁰⁰

Yet a minute number of cases have invoked the non-discrimination doctrine. In *X v. Colombia*,⁶⁰¹ and in an older case, *Young v. Australia*,⁶⁰² the Human Rights Committee disputed the laws, which distinguished between same-sex couples and common-law or unmarried heterosexual partners, since

⁵⁹³ *Id.* at par. 8.4.

⁵⁹⁴ *Id.* at par. 3.1.

⁵⁹⁵ *Id.* at par. 8.2.

⁵⁹⁶ *Id.* at par. 8.6.

⁵⁹⁷ ICCPR, art. 26. "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁵⁹⁸ *Joslin v. New Zealand*, Communication No. 902/1999, U.N. Human Rights Committee, U.N. Doc. A/57/40, at 214 (2002).

⁵⁹⁹ *Id.* at par. 8.3.

⁶⁰⁰ *Id.* at par. 4.2.

⁶⁰¹ Communication No. 1361/2005, U.N. Human Rights Committee, U.N. Doc. CCPR/C/89/D/1361/2005 (2007).

⁶⁰² Communication No. 941/2000, U.N. Human Rights Committee, U.N. Doc. CCPR/C/78/D941/2000 (2003).

the heterosexual partners were granted pension benefits, and the same-sex couples were not.⁶⁰³

iv. The *Windsor* and *Hollingsworth* Cases

Although certain states have already legalized marriage equality before 2013, it was on the said year, when *Hollingsworth v. Perry*⁶⁰⁴ and *United States v. Windsor*⁶⁰⁵ were decided, that the rapid propagation of marriage equality throughout the US truly commenced.

In *Hollingsworth*, Proposition 8, a ballot initiative limiting the definition of marriage as that between a man and a woman, was struck down with finality as unconstitutional.⁶⁰⁶

Windsor was about Edith Windsor, a widow, being barred from receiving spousal benefits after the death of her wife, Thea Spyer. Windsor and Spyer, both residents of New York, were legally married in Canada in 2007. Spyer, who died in 2009, left her entire estate to her wife, Windsor. Windsor then sought estate tax exemptions from the Internal Revenue Service, but she was denied of this claim because of the provisions set forth in the Defense of Marriage Act (“DOMA”), where the term “spouse” only applied to marriages between man and woman.⁶⁰⁷ Windsor, in turn, had to pay the amount of USD 363,053 for the said estate tax.⁶⁰⁸ Ultimately, the Supreme Court, in a 5-4 decision, declared the DOMA provisions unconstitutional for being in violation of the due process clause and the equal protection clause, thus:

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government[...]. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous

⁶⁰³ X v. Colombia, Communication No. 1361/2005, U.N. Human Rights Committee, U.N. Doc. CCPR/C/89/D/1361/2005 (2007); Young v. Australia, Communication No. 941/2000, U.N. Human Rights Committee, U.N. Doc. CCPR/C/78/D941/2000 (2003).

⁶⁰⁴ *Hollingsworth v. Perry*, 133 S. Ct. 2652, (2013).

⁶⁰⁵ *U.S. v. Windsor*, 133 S. Ct. 2675, (2013).

⁶⁰⁶ *Hollingsworth v. Perry*, 133 S. Ct. 2652, (2013).

⁶⁰⁷ *U.S. v. Windsor*, 133 S. Ct. 2675, (2013).

⁶⁰⁸ *Id.*

federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits[.]

* * *

By this dynamic[.] *DOMA undermines both the public and private significance of state-sanctioned same-sex marriages*; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects[...] and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives[.]

* * *

By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive[...]. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations[...]. It forces them to follow a complicated procedure to file their state and federal taxes jointly[...]. It prohibits them from being buried together in veterans' cemeteries[.]

* * *

DOMA also brings financial harm to children of same[-]sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure

those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.⁶⁰⁹

With the foregoing precedents and recent developments, the recognition of the LGBTQ and their inherent right to found a family can be said to be well on its way in attaining the same status as those of heterosexual individuals and heterosexual families. It is only a matter of time when most, if not all, jurisdictions tear down the walls of oppressive statutes and finally acknowledge that the LGBTQ's right to marriage is inevitably a basic human right.

VII. CONCLUSION

Although the term “human rights” positions itself in an ambiguous domain,⁶¹⁰ the inherent dignity of each person cannot be controverted by unjust laws and temporal social norms. Rights such as the right to identity, right to conscience, and right to found a family will remain fundamental to human existence, regardless of state implementation. State implementation only serves as a form of recognition of these rights;⁶¹¹ it does not necessarily bestow them on their citizens.

Human suffering as found in metanarratives of the victims of oppression (systematic or not) will find its way in permeating the government and other institutions that delimit their humanity, as in the case of the LGBTQ community. Upendra Baxi appreciates the fact that human rights are a form of insurrectionary praxis.⁶¹²

Through myriad struggles and movements throughout the world, ‘human rights’ become an arena of transformative political practice that disorients, destabilizes, and at times, even helps destroy deeply unjust concentrations of political, social, economic and technological power. Movements for decolonization and self-determination, elimination of apartheid, ‘women’s rights as human rights’, ecological integrity and the right sexual orientation provide archetypal illustrations of the potential for transformative practice.⁶¹³

⁶⁰⁹ *Id.* (Emphases supplied.)

⁶¹⁰ BAXI, *supra* note 51, at 5.

⁶¹¹ *Id.* at 3.

⁶¹² *Id.* at 10.

⁶¹³ *Id.*

It should be remembered that this fight is undeniably an inevitable fight. History has revealed that inconspicuous outcries from those whose lives are in continuous suffering will not remain silent, especially when their human dignity is constantly being trampled on by governmental institutions who do not look out for their welfare.

The contemporary human rights paradigm helps one take suffering seriously,⁶¹⁴ thereby affording one to realize that there is such a thing as transcendental human rights.⁶¹⁵

The right to found a family is a transcendental human right. This human right should cut across and outstrip any arbitrary reasoning based on discriminatory and arbitrary pretexts. The right to found a family implies or would necessarily involve the right to marry.

Some argue that the LGBTQ should perhaps be afforded civil unions, and not marriage. However, granting a right with such a distinction will be another form of discrimination where there should not be one in the first place. “[T]he dissimilarity between the titles ‘civil marriage’ and ‘civil union’ is not trivial as it represents ‘a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second class status.’”⁶¹⁶ Further, the significance of the “name” symbolizes what is called “the politics of recognition. Because ‘non-recognition’ or ‘misrecognition’ can inflict harm in the form of oppression or imprisoning a person in a ‘reduced mode of being,’ the existence of ‘first class’ and ‘second class’ citizens is antithetical to the equalization of rights and entitlements.”⁶¹⁷

In defense of same-sex marriage, Spanish Prime Minister Zapatero puts forward the argument that a supreme force, freedom and equality, should be the basis for the recognition and enforcement of LGBTQ rights.⁶¹⁸

Public displays of disgust and condemnation against the LGBTQ by the Catholic Church,⁶¹⁹ and other fundamentalist religions and followers, are very

⁶¹⁴ *Id.* at 34-35.

⁶¹⁵ *Id.*

⁶¹⁶ LEE, *supra* note 507, at 45.

⁶¹⁷ *Id.*

⁶¹⁸ *Id.* at 22.

⁶¹⁹ Sheryll Mundo, *Bishop calls same-sex weddings ‘kadiri’*, ABS-CBNNEWS.COM, June 28, 2011, available at <http://www.abs-cbnnews.com/lifestyle/06/28/11/bishop-calls-same-sex-weddings-kadiri>. See also *CBP: Pastors in same-sex weddings may face charges*, GMA NEWS ONLINE, June 29, 2011, available at <http://www.gmanews.tv/story/224732/nation/cbcp-pastors-in-same-sex-weddings-may-face-charges> (last accessed June 30, 2011) and Graham Smith, *Pope Benedict*

much undeserved. Unfortunately, the Filipinos base its family laws on these religious standards,⁶²⁰ instead of ideals such as freedom and equality.

The Constitution, itself, does not contemplate the right of an LGBTQ individual to found his or her own family, as enshrined in international law. The Constitution is shamelessly lacking in protection and preservation of inherent human rights when it comes to sexual minorities.

Families exist in different forms,⁶²¹ but the state has the power to recognize which families they want to protect.⁶²²

It must also be remembered that just like any other personal circumstance, sexual orientation or gender identity “is basic. It counts the most determinative human forces of human personality and social organization. Those facing the entire range of human rights violations due to their actual or imputed sexual orientation rank on a par with those facing racism, sexism, and all other internationally recognized forms of persecution.”⁶²³

The prevention of marriage equality for all human beings amounts to unjustified discrimination because the statute that defines marriage to be for males and females only is the same statute that places the LGBTQ in an unprotected posture. Being an individual of the LGBTQ community is a ground for annulment due to fraud,⁶²⁴ legal separation,⁶²⁵ and possibly, annulment under Article 36 or Psychological Incapacity.⁶²⁶ It is gravely absurd to coerce LGBTQ

XIV: *Gay Marriage is a threat to humanity*, MAIL ONLINE, Jan. 10, 2012, available at <http://www.dailymail.co.uk/news/article-2084696/Pope-Benedict-XVI-Gay-marriage-threat-humanity.html> (last accessed Jan. 24, 2012).

⁶²⁰ V RECORD CONST. COMMISSION, *supra* note 404, at 36.

⁶²¹ U.N. Human Rights Committee, General Comment No. 19: Protection of family, the right to marriage and equality of spouses (Art. 23), U.N. Doc. HRI/GEN/1/Rev.9 (July 27, 1990) ¶ 2.

Protection of the family, the right to marriage and equality of the spouses (Art. 23), CCPR General Comment No. 19, 27 July 1990, para. 2: “The Committee notes that the *concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.* However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23 (Emphasis supplied.)

See also THE YOGYAKARTA PRINCIPLES, princ. 24.

⁶²² *Joslin v. New Zealand*, *supra* note 598.

⁶²³ HEINZE, *supra* note 5, at 21.

⁶²⁴ FAM. CODE, arts. 45 and 46.

⁶²⁵ FAM. CODE, art. 55.

⁶²⁶ FAM. CODE, art. 36.

individuals to forcibly fit themselves into the heteronormative framework of the law. If they do so, then they would be denying their own identity and their freedom of conscience, which should not be the case. If, the LGBTQ individual lives the lifestyle according to his or her conscience, yet the state intermittently disrespects or refuses to protect his or her right to found a family, then the state would be committing systematic oppression.⁶²⁷

Regardless of state policy discouraging homosexuality, homosexuals will continue to exist. The LGBTQ will continue to suffer from prejudice, without positive action to remedy the situation. The LGBTQ should not remain to be incapacitated people who are deemed as not fully capable human beings who contribute to a supposedly open and free society. It must be remembered that everyone has the right to remain different,⁶²⁸ and that we are all equal.

There is currently not enough room in the local laws for the LGBTQ to fully exercise their rights. It is about time to take action in addressing this problem.

VIII. RECOMMENDATION

If human rights would be judicially produced, theorizing repression would require “besides the articulation of an authentic cry of deep human anguish, enormous labours of erudite understanding of ways of power and governance, which remain the focus of the dogmatic approach with all its technologizing constructions of human rights.”⁶²⁹ Before ever understanding such human suffering, terms such as “equality” and “dignity” will have to be interpreted so as to apply these proposed principles in domestic law, thereby, giving them maximum coverage over a state’s citizenry.

In other words, formal discrimination should be eliminated, meaning laws should cater to all people regardless of personal circumstance.⁶³⁰ Of course, the formalistic change may or may not come without long and painful processes. Through such means would most likely bring about the realization of the definition of human rights, thereby educating proponents and opponents on equality and non-discrimination.

⁶²⁷ BAXI, *supra* note 51, at 18.

⁶²⁸ *Id.* at 7.

⁶²⁹ *Id.* at 12.

⁶³⁰ General Comment No. 20, *supra* note 276.

Eric Heinze recommends four principal tasks in human rights law:⁶³¹

Its first task is to *articulate* those rights which are fundamental rights. The best example of articulation of human rights is found in the International Human Rights instruments. Its second task is to *identify* and condemn violations, and if however possible, to seek redress. Its third task is to seek to *create* conditions in which human rights can be more fully realized, and violations not simply condemned, but also prevented. Its fourth task is to *enlighten* people about rights through education and open discussion. Deficiencies exist at all four levels. Yet, for all its shortcomings, International Human Rights Law is, today, the best existing framework not only for attempting to implement, but also for understanding and debating the proper relationship between governments and their citizens.⁶³²

The ideal situation, in the end, is a law recognizing the LGBTQ's right to marry and to found family. Although it is ideal for the LGBTQ to be included in the Family Code, the Family Code actually has some provisions pertaining to a specific spouse based on his or her sex. For example, the provision regarding the mother's custody of a child below seven years old in cases of dissolution or separation of property⁶³³ would perhaps burden the courts with confusion if the child's parents were both male or both female. Another example would be regarding the ownership, administrative enjoyment and disposition of property, since law prefers the husband's choice, and if the wife is unsatisfied, she may go to court to question her husband's choice.⁶³⁴ This would be another source of confusion in cases where an LGBTQ individual exercises his or her right to

⁶³¹ HEINZE, *supra* note 5, at 11.

⁶³² *Id.*

⁶³³ FAM. CODE, art. 102.

Upon dissolution of the absolute community regime, the following procedure shall apply:

* * *

(6) Unless otherwise agreed upon by the parties, in the partition of the properties, the conjugal dwelling and the lot on which it is situated shall be adjudicated to the spouse with whom the majority of the common children choose to remain. Children below the age of seven years are deemed to have chosen the mother, unless the court has decided otherwise. In case there is no such majority, the court shall decide, taking into consideration the best interests of said children.

⁶³⁴ FAM. CODE, art. 96. "The administration and enjoyment of the community property shall belong to both spouses jointly. In case of disagreement, the husband's decision shall prevail, subject to recourse to the court by the wife for proper remedy, which must be availed of within five years from the date of the contract implementing such decision."

administer the conjugal property, yet the law is silent on whose choice is to be preferred. These are just some encounters if ever only the definition of marriage in the Family Code redefined.

Certainly, there is nothing is preventing the legislature to amend all other provisions in the Family Code which are inconsistent with the principle of equality and non-discrimination, and therefore, might lead to undesirable effects for anyone. But very much like the Code of Muslim Personal Laws, it would suffice to have another law governing LGBTQ marital and familial relations.

As with many jurisdictions that have done it, before actualizing a marriage equality law, it would be advisable to first legislate against discrimination on the basis of sexual orientation and gender identity. This is usually the initial step to the path of equality and justice for the LGBTQ.

- o0o -

GLOSSARY

LGBT/GLBT – Acronyms for “lesbian, gay, bisexual, and transgender.” LGBT and/or GLBT are often used because they are most inclusive of the diversity of the community.⁶³⁵

Lesbian – Female homosexual;⁶³⁶ a woman whose enduring physical, romantic, emotional and/or spiritual attraction is to other women.⁶³⁷

Gay – Homosexual;⁶³⁸ the adjective used to describe people whose enduring physical, romantic, emotional and/or spiritual attraction to other people of the same sex. In contemporary contexts, lesbian (n.) is often the preferred term for women.⁶³⁹

Bisexual – An individual who is physically, romantically, emotionally, and/or spiritually attracted to both men and women. Bisexuals need not have had equal sexual experience with both men and women; in fact, they need not have had any sexual experience at all to identify as bisexual.⁶⁴⁰

Transgender – An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Transgender people may or may not choose to alter their bodies hormonally and/or surgically.⁶⁴¹

Transsexual – An older term which originated in the medical and psychological communities. Many transgender people prefer the term “transgender” to “transsexual.” Some transsexual people still prefer to use the term to describe themselves. However, unlike “transgender,” “transsexual” is not an umbrella term, and many transgender people do not identify as transsexual.⁶⁴²

Intersex – Describing a person whose biological sex is ambiguous. There are many genetic, hormonal or anatomical variations, which make a person's sex ambiguous (i.e. Klinefelter Syndrome, Adrenal Hyperplasia). Parents and medical professionals usually assign intersex infants a sex and perform surgical operations to conform the infant's body to that assignment.⁶⁴³

Queer – Traditionally a pejorative term, it has been appropriated by some LGBT people to describe themselves. Some value the term for its defiance and because it can be inclusive of the entire LGBT community. Nevertheless, it is not universally accepted even within

⁶³⁵ Gay and Lesbian Alliance Against Discrimination [hereinafter “GLAAD”], *Lesbian, Gay and Bisexual Glossary of Terms*, <http://www.glaad.org/page.aspx?pid=375> (last accessed June 4, 2011).

⁶³⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY [hereinafter “WEBSTER'S”] 1297 (2002).

⁶³⁷ GLAAD, *supra* note 635.

⁶³⁸ WEBSTER'S, *supra* note 636, at 941.

⁶³⁹ GLAAD, *supra* note 635.

⁶⁴⁰ *Id.*

⁶⁴¹ Gay and Lesbian Alliance Against Discrimination, *Transgender Glossary of Terms*, available at <http://www.glaad.org/page.aspx?pid=376> (last accessed June 18, 2011).

⁶⁴² *Id.*

⁶⁴³ *Id.*

the LGBT community and should be avoided unless quoting someone who self-identifies that way.⁶⁴⁴

Heterosexual – Relationship between individuals of opposite sexes (A.C. Kinsey), opposed to homosexual.⁶⁴⁵

Homosexuality – Erotic activity with member of one’s own sex.⁶⁴⁶

Homosexual – One who is inclined toward or practices homosexuality;⁶⁴⁷ “gay” and/or “lesbian” accurately describe people who are attracted to members of the same sex.⁶⁴⁸

Sexual Orientation – Refers to the direction of the emotional sexual attraction or conduct. This can be towards people of the same sex (homosexual orientation) or towards people of both sexes (bisexual orientation) or towards people of the opposite sex (heterosexual orientation);⁶⁴⁹ the scientifically accurate term for an individual’s enduring physical, romantic, emotion and/or spiritual attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual and heterosexual orientations.⁶⁵⁰

Gender Identity – Refers to the personal sense of identity as characterized, among others, by manners of clothing, inclinations, and behaviour in relation to masculine or feminine conventions. A person may have a male or female identity with physiological characteristics of the opposite sex.⁶⁵¹

Note that in the thesis, whenever “gay rights”, “same-sex” or “homosexual” is mentioned, it is meant to encompass identities included in the acronym LGBTQ. “Intersex,” in case referred to, will be deemed included under the term “queer,” for purposes of this study.

- o0o -

⁶⁴⁴ GLAAD, *supra* note 635.

⁶⁴⁵ WEBSTER’S, *supra* note 636, at 1063.

⁶⁴⁶ *Id.* at 1085.

⁶⁴⁷ *Id.*

⁶⁴⁸ GLAAD, *supra* note 635.

⁶⁴⁹ H. No. 2784, 12th Cong., 1st Sess. (2002), Anti-discrimination Bill.

⁶⁵⁰ GLAAD, *supra* note 635.

⁶⁵¹ H. No. 2784, *supra* note 649.