UNTETHERING THE WIDOW(ER): THE CASE AGAINST ARTICLE 874 OF THE CIVIL CODE*

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ABSTRACT

The Philippines is no stranger to archaic laws. One such example is Article 874 of the Civil Code of the Philippines, which allows dying spouses, or their ascendants or descendants, to validly impose upon the surviving spouse the condition of non-remarriage in order for them to be entitled to a testamentary disposition. Unlike other outdated laws, however, Article 874 has failed to garner sufficient interest in the past decades to be the subject of debates and, ultimately, reform. This Note hopes to spark such interest by dissecting Article 874 with the goal of uncovering not only bad policy, but constitutionally suspect foundations. By the end, a framework can be set for the legislature or the judiciary to use when revisiting this provision.

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> *"I have to remind myself that some birds aren't meant to be caged. Their feathers are just too bright. And when they fly away, the part of you that knows it was a sin to lock them up does rejoice."*
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> —Ellison Boyd Redding *in* *The Shawshank Redemption*[1]

INTRODUCTION

The Civil Code of the Philippines[2] is rife with provisions evincing the collective conservatism of the country's legal system.[3] From outrightly limiting the concept of marriage to a man and a woman[4] to disallowing donations between common-law paramours.[5] The State, through the legislative branch, has made no efforts to conceal the patent Judeo-Christian undertones influencing its policy-making discretion. This is unsurprising information given our rich—and often times, troubled—history under colonial Spain where the friar orders succeeded in indoctrinating us "by the way of the Sword and the Cross[.]"[6] Yet, more than a century later, the statute books remain riddled with the same brand of unrealistic, normative expectations of societal conduct. A perfect case in point is the law on succession.

Much of the scholarly literature on problematic successional laws have been fixated on the Iron Curtain Rule under Article 992, and deservedly so.[7] The provision bars illegitimate children from inheriting intestate from their parents' legitimate descendants, ascendants, and collateral relatives, and vice-versa. This distinction, however, between marital and non-marital children has been criticized for lacking substantial basis. While the treatment of illegitimate children as a separate class initially appears to be grounded on

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[1] THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

[2] The term "Civil Code" herein is to be construed as including the Family Code of the Philippines.

[3] *See* Imbong v. Ochoa, Jr., G.R. No. 204819, 721 SCRA 146, 725, Apr. 8, 2014 (Perlas-Bernabe, *J., concurring and dissenting*)

[4] FAM. CODE, art. 1.

[5] CIVIL CODE, art. 739 (1).

[6] Raul C. Pangalangan, *Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law*, 82 PHIL. L.J. 1, 2 (2008).

[7] *See* Sandra M.T. Magalang, *Legitimizing Illegitimacy: Revisiting Illegitimacy in the Philippines and Arguing for Declassification of Illegitimate Children as a Statutory Class*, 88 PHIL. L.J. 467 (2014); Hilton A. Lazo, *Piercing the Iron Curtain Rule on Intestate Succession: A Due Process Approach*, 91 PHIL. L.J. 349 (2018).

the protection of public morals and the promotion of the family as a sacred institution, it has been pointed out these supposed problems are "more apparent than real."[8] According to Sandra Magalang:

> As legitimacy and illegitimacy in the Philippines are defined on the basis of the validity or invalidity of marriage, there will be situations in which a legitimate child may be born and raised in a one-parent household, e.g.[,] where the marriage was subsequently annulled or dissolved under Articles 36 and 53, and situations in which an illegitimate child will be raised in a two-parent household that for all intents and purposes passes for a legitimate family [...] *The latter child has no more in common with say, the child of a paramour, except for the fact that their parents are not validly married.*[9]

Meanwhile, Article 874 has flown under the radar despite being equally deserving of critical inquiry. The provision states in relevant part that "[a]n absolute condition not to contract a first or subsequent marriage shall be considered as not written *unless such condition has been imposed on the widow or widower by the deceased spouse, or by the latter's ascendants or descendants.*"[10] In short, dying spouses, or their ascendants or descendants, may validly impose upon surviving spouses the condition of non-remarriage in order for them to be entitled to the testamentary disposition.

Over the years, the provision has attracted its fair share of criticism. Back in 2014, the late Senator Miriam Defensor-Santiago sponsored a bill which sought to delete the aforementioned contentious portion. The proposal was grounded on the "detrimental effect such a provision may cause on the life, liberty, and happiness of the surviving spouse."[11] Sadly, the bill never crystallized into law and no further mention of it has been made on both the legislative and judicial fronts in the years that followed.

Since then, Article 874 has lied low, consigned to the mansions of seemingly obscure laws. Like Article 992, it continues to act as a safeguard against problems that are more apparent than real. It has been hastily justified on the grounds of conjugal and family affection, and has been described as a means of securing fidelity from even beyond the tomb.[12] Moreover, it has also been defended as a legal remedy "to avoid the consequence that property

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[8] Magalang, *supra* note 7, 509-10.

[9] *Id.* at 510. (Emphasis supplied.)

[10] CIVIL CODE, art. 874. (Emphasis supplied.)

[11] S. No. 2529, 16th Cong., 2nd Sess., (2014). An Act Amending Article 874 of Republic Act No. 386, Also Known as the Civil Code of the Philippines.

[12] ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES VOLUME III 230-31 (1990).

coming from the deceased should be enjoyed, through a subsequent marriage, by a person who, with more or less offense to the memory of the deceased, has taken his place in the family."[13] These reasons have been unsurprisingly accepted by a generally apathetic public. After all, if the Supreme Court itself has readily acknowledged the flimsy *presumed antagonism* rationale behind Article 992, then who would dare challenge the familial considerations underlying Article 874.[14]

However, with the advent of the 21st century's heightened focus on individual autonomy and personal liberties, it is high time that Article 874 be re-examined not merely as bad policy, but as a statutory deviance inimical to the human rights guarantees of the Constitution.

Before substantive discussions begin, it is important to define what this paper is not. It is not a direct attack on Article 874 as a whole. This paper does not seek to assail the general freedom of the testator to dispose of his or her property the way he or she sees fit.[15] Neither does this paper attempt to be a treatise on valid and invalid conditional dispositions. To undertake these endeavors would otherwise undermine the very foundations of testamentary succession. This paper is a study concentrated solely on the express exception provided for under the second phrase of Article 874 (1). It is concerned simply with the placement of such provision within the general expanse of our civil laws and how the same creates an unlawful and unnecessary infringement of established individual rights.

This paper is divided into four main chapters. The *first* chapter narrates the concept of marriage as an important foundational piece in society. Later, it tackles the classification of marriage as a fixed-term union, terminable upon one spouse's death. The *second* chapter discusses the history of Article 874, highlighting its aberrant placement within the general framework of marriage. The *third* chapter explores the right to marry under both US and Philippine jurisprudence. This part argues that, despite its absence from the black letter of the Constitution, the right to marry nevertheless is implicit from the guarantees therefrom. Finally, the *fourth* chapter analyzes Article 874 to determine whether it passes constitutional muster given its direct

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[13] *Id.*

[14] Diaz v. IAC, G.R. No. 66574, 182 SCRA 427, 432, Feb. 21, 1990. *But see* Aquino v. Aquino, G.R. No. 208912, which provides the Supreme Court an opportunity to reverse the said doctrine and declare Article 992 of the Civil Code unconstitutional.

[15] *See* RUBEN BALANE, JOTTING AND JURISPRUDENCE IN CIVIL LAW (SUCCESSION) 320 (2016). "The right of the testator to impose conditions, terms[,] or modes springs from testamentary freedom. If he has the right to dispose of his estate mortis causa, then he has the right to make the dispositions subject to a condition, term, or mode."

entanglement with a fundamental right. The objective of this paper is to aid legislators and members of the judiciary to revisit the law with a fresh pair of eyes, one with a renewed emphasis on individual autonomy and personal freedom.

I. THE CONCEPT OF MARRIAGE

A. An Inviolable Social Institution

Consistent with the country's Roman Catholic foundation, it became a widespread social belief that the cornerstone of society is the family established by civil marriage, which requires ecclesiastical blessing.[16] To this end, the framers of the Constitution have bestowed upon marriage a *sui generis* status. It is not merely a contract between a consenting pair of adults; rather, it is an inviolable social institution and the very foundation of the family.[17] Accordingly, spouses are legally obliged to cohabitate, observe mutual love, respect, and fidelity, and render mutual help and support to one another.[18] This obligation is legal in the strictest sense of the term, to the point that failure to perform it gives rise to valid causes of action.

In the famed case of *Chi Ming Tsoi v. Court of Appeals*, for instance, the Court categorically declared that, since procreation is an essential marital obligation under the Family Code, constant non-fulfillment of such obligation will lead to the destruction of the integrity or wholeness of the marriage. As such, "the senseless and protracted refusal of one of the parties to fulfill the above marital obligation is equivalent to psychological incapacity."[19]

The protective mantle surrounding marriage is evident not just in what the law says but also in what it does *not* say. The most obvious example being the lack of a divorce law in the country. To date, the Philippines remains the only country in the world, other than Vatican City, which does not recognize divorce.[20] Not only does the Philippines not recognize divorce; it has made conscious efforts to ensure that no person takes advantage of

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[16] Magalang, *supra* note 7, at 472, *citing* Victor Von Borosini, *The Problem of Illegitimacy in Europe*, 4 J. AM. INST. OF. CRIM. L. & CRIMINOLOGY 212, 213 (1913).

[17] CONST., art. XV, § 2.

[18] FAM. CODE, art. 68.

[19] G.R. No. 119190, 266 SCRA 324, 333, Jan. 6, 1997.

[20] Ana P. Santos, *Ending a Marriage in the Only Country That Bans Divorce*, THE ATLANTIC, June 25, 2015, *available at* https://www.theatlantic.com/international/archive/2015/06/divorce-philippines-annulment/396449/. *But see* MUSLIM CODE, arts. 45-57.

currently available statutes to circumvent its absence. For example, Article 48 of the Family Code requires the prosecuting attorney or fiscal appearing on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed in all cases of annulment or declaration of absolute nullity of marriage.[21]

The Legislature is not alone in such an effort. The Supreme Court has also done its part to ensure the sanctity of marriage.[22] In *Tenchavez v. Escaño*, the Court refused to recognize the validity of a divorce decree secured by a Filipino citizen abroad from her likewise Filipino spouse.[23] In resolving the Motions for Reconsideration of the earlier Decision, Justice J.B.L. Reyes, speaking for the majority, admonished Vicenta Escaño for her continued pleas to have her foreign divorce recognized, *viz.*:

> [Escaño's proposition] legalizes a continuing polygamy by permitting a spouse to just drop at pleasure her consort for another in as many jurisdictions as would grant divorce on the excuse that the new marriage is better than the previous one; and, instead of fitting the concept of marriage as a social institution, the proposition altogether does away with the social institution, [...] with the social aspects of marriage in favor of its being a matter of private contract and personal adventure.[24]

In the same vein, the Court has made sure that the provisions on the declaration of absolute nullity of marriages—specifically Article 36 of the Family Code on psychological incapacity—are not easily abused as quasi-divorce remedies. In *Tan-Andal v. Andal*,[25] the Court, despite ruling that psychological incapacity is a legal concept rather than a medical one,[26] maintained that it must still be "caused by a durable aspect of one's personality structure [...] before the parties married."[27] Furthermore, it must relate to a "genuinely serious psychic cause"[28] and must be proven by clear and convincing evidence.[29]

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[21] FAM. CODE, art. 48.

[22] *See also* RULES OF COURT, Rule 9, § 3(e); Rule 34, § 1.

[23] G.R No. 19671, 15 SCRA 355, 367, Nov. 29, 1965.

[24] G.R. No. 19671, 17 SCRA 674, 678, July 26, 1966.

[25] G.R. No. 196359, May 11, 2021.

[26] *Id.* at 33. This pinpoint citation refers to a copy of the decision released by the Court on its website.

[27] *Id.* at 40.

[28] *Id.*

[29] *Id.*

B. A Fixed-term Union

Marriage, despite its inviolable status, was not meant to be a perpetual affair. Death is the natural and, for the longest time in human history, the most common endpoint of marriage.[30]

As stipulated in Article 99 of the Family Code, the death of either spouse terminates the absolute community regime[31]—the legal embodiment of the union's single and unified personality. Since marriage effectively entails reciprocal obligations, it logically follows that the death of one spouse means that there is no longer another person to whom the surviving spouse can perform the aforementioned obligations. Spouses are mandated to carry out their marital duties to a living, breathing beloved—not a cold, hard corpse.

The natural consequence of the termination of one's marriage via death is that the once-married spouse assumes the statutory designation of widow or widower, as the case may be. This opens up the surviving spouse's successional rights to the deceased spouse's estate, both as compulsory[32] and intestate[33] heir. In the case of the latter especially, they become entitled to the entire estate of the deceased spouse, provided that their marriage bore no children and that the deceased had no other surviving legitimate ascendants or descendants or illegitimate children.[34]

The more important consequence though goes beyond mere inheritance. Upon dissolution of the marital bond, the surviving spouse reverts back to single status in the eyes of the law. Concomitant to this reversion is the freedom to remarry.

While neither the Civil Code nor the Family Code explicitly speaks of the widow's or widower's freedom to remarry, several provisions have mentioned it in passing but enough to create a general acknowledgement of the same. For one, Article 103 of the Family Code reads:

> Upon the termination of the marriage by death, the community property shall be liquidated in the same proceeding for the settlement of the estate of the deceased.

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[30] James P. Cunningham, *Marriage in the 21st Century - The Death of Till Death Do Us Part*, 83 MICH. B. J. 18, 19 (2004).

[31] FAM. CODE, art. 99.

[32] CIVIL CODE, art. 887.

[33] Art. 995-1002.

[34] Art. 995.

> If no judicial settlement proceeding is instituted, the surviving spouse shall liquidate the community property either judicially or extra-judicially within one year from the death of the deceased spouse. If upon the lapse of said period, no liquidation is made, any disposition or encumbrance involving the community property of the terminated marriage shall be void.
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> *Should the surviving spouse contract a subsequent marriage* without compliance with the foregoing requirements, a mandatory regime of complete separation of property shall govern the property relations of the subsequent marriage.[35]

Article 103 of the Family Code directly deals with the mandatory liquidation of the absolute community of property of the surviving spouse and the deceased spouse upon the latter's death. However, note how the third paragraph speaks of the surviving spouse's ability to contract a subsequent marriage, subject to the condition that liquidation proceedings be instituted as to the previous community property lest the later marriage be governed by the regime of complete separation of property. Reading between the lines, the provision practically recognizes the widower's or widow's reversion to single status, thereby granting upon him or her the freedom to remarry should he or she so desire. As explained by the Court in the case of *Republic v. Manalo*: "When the marriage tie is severed and ceased to exist, the civil status and the domestic relation of the former spouses change as both of them are freed from the marital bond."[36]

In like fashion, Article 41 of the Family Code expressly allows the spouse to contract a subsequent marriage following the presumptive death of the other spouse. As a general rule, such presumptive death takes effect if the prior spouse had been absent for four consecutive years and the spouse present has a well-founded belief that the former was already dead. However, in case of disappearance where there is danger of death, an absence of only two years shall be sufficient for one to be considered as presumptively dead. The ability to remarry though does not become available simply by reason of the lapse of said periods. As held in *Tadeo-Matias v. Republic*, a judicial declaration of presumptive death of the absent spouse is needed before the other spouse may contract a subsequent marriage.[37] This is in line with the statutory mandate of the second paragraph of Article 41. Such a requirement is in stark contrast to the previous doctrine pronounced in the 1931 case of *Jones v. Hortiguela*, wherein the Court held that "[f]or the purposes of civil

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[35] FAM. CODE, art. 103. (Emphasis supplied.)

[36] [Hereinafter "*Manalo*"], G.R. No. 221029, 862 SCRA 580, 606, Apr. 24, 2018.

[37] G.R. No. 230751, 862 SCRA 788, 796, Apr. 25, 2018.

marriage law, it is not necessary to have the former spouse judicially declared an absentee."[38]

It is now established that despite the high regard accorded by the State to the concept of marriage, it was never intended to be a perpetual ordeal. Marriage terminates upon the death of one spouse, thereby allowing the surviving spouse the liberty to pursue his or her own happiness in the form of a subsequent marriage should he or she choose to do so.

This leaves Article 874 in an awkward spot. Whether by accident or by deliberate policy-making, the provision deviates from the otherwise universal conceptualization of marriage in the country.

II. A STATUTORY ABERRATION

A. Historical Background

Laws regulating the freedom of the surviving spouse to remarry are not new. Article 351 of the Revised Penal Code[39] previously read, in relevant part, that "[a]ny widow who shall marry within three hundred and one days from the date of the death of her husband, or before having delivered if she shall have been pregnant at the time of his death, shall be punished by *arresto mayor* and a fine not exceeding 500 pesos."[40]

In *U.S. v. Dulay*, the Court justified the provision as it was supposedly "intended to prevent confusion in connection filiation and paternity, inasmuch as the widow might have been conceived and become pregnant by her late husband."[41] This reasoning was subsequently affirmed in the case of *People v. Rosal*, with the Court describing the provision as "a sound principle of public policy."[42]

Despite the provision's patent perpetuation of discrimination against women, effectively enforcing upon them a mandatory mourning period whereas no such law applies to their male counterparts,[43] it was not until 2014,

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[38] 64 Phil. 179, 183 (1937).

[39] The provision existed even prior to the Revised Penal Code under Article 476 of the Spanish Código Penal.

[40] REV. PEN. CODE, art. 351.

[41] 10 Phil. 302, 305 (1908).

[42] 49 Phil. 509, 511 (1926).

[43] LUIS REYES, THE REVISED PENAL CODE BOOK TWO 1019 (2017).

with the passage of Republic Act No. 10655, that the provision was finally decriminalized.[44]

Likewise, the New Civil Code was previously littered with provisions that punished widows who wished to remarry or who have in fact remarried after the death of their spouses.

For one, Article 84 stated that "[n]o marriage license shall be issued to a widow till after three hundred days following the death of her husband, unless in the meantime she has given birth to a child."[45] The purpose of the law, similar to that of Article 351 of the Revised Penal Code, was to prevent confusion as to the paternity of the child.[46] But, as Professor Myrna Feliciano pointed out, such problem was easily remediable by the issuance of a medical certificate to the effect that the applicant was not pregnant.[47]

Similarly, Article 328 decreed that a mother who contracts a subsequent marriage loses parental authority over her children, unless the deceased husband—who was also the father of the children—has expressly provided in his will that he allows his widow to marry again and has ordered in such case that she should retain parental authority over their children.[48] This provision was extremely burdensome because it required the *express* authority of the deceased spouse for the widow not only to remarry, but also to retain parental authority over the same children she birthed. Such logic went against traditional Filipino values as it is the mother who is often seen as glue of the family.[49]

These Civil Code provisions were eventually repealed with the enactment of subsequent laws such as the Child and Youth Welfare Code[50] and the Family Code,[51] respectively. Yet, either by ignorance or oversight—or a perhaps a mixture of both—Article 874 has subsisted, despite the changing tides that have swept its cousin provisions away.

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[44] Rep. Act No. 10655, § 1. An Act Repealing the Crime of Premature Marriage under Article 351 of Act No. 3815 Otherwise Known as the Revised Penal Code.

[45] CIVIL CODE, art. 84.

[46] Myrna Feliciano, *Law, Gender, and the Family in the Philippines*, L. & SOC'Y REV. 547, 553 (1994).

[47] *Id.*

[48] CIVIL CODE, art. 328.

[49] Feliciano, *supra* note 46.

[50] CHILD & YOUTH WELFARE CODE, art. 17. "In case of the absence or death of either parent, the present or surviving parent shall continue to exercise parental authority over such children, unless in case of the surviving parent's remarriage, the court, for justifiable reasons, appoints another person as guardian."

[51] FAM. CODE, art. 254.

B. The Essence of the Law

Article 874 has roots tracing back to before the enactment of the New Civil Code. It was carried over almost word per word from its original iteration under Article 793 of the Spanish Código Civil.[52] A quick glance at the provision reveals that Congress was not totally oblivious to the existence of an individual's right to marry. The first phrase of the first paragraph of Article 874 states that "[a]n absolute condition not to contract a first or subsequent marriage shall be considered as not written[.]"

It is the government's primary duty to serve and protect the people.[53] This protection applies not only to majoritarian considerations, but also to the protection of human rights.[54] After all, the very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury.[55] The government, in turn has the positive duty to afford that protection.[56]

In enacting the first phrase of Article 874 into law, Congress exercised that positive duty to respect an individual's freedom to choose his status, an intangible an inalienable right.[57] It is shocking then that within the span of only a few words, Congress immediately reneged on that positive duty by carving out an exception as to those conditions imposed on the widow or widower by the deceased spouse, or by the latter's ascendants or descendants. As pointed out by the eminent jurist and statesman Arturo Tolentino, the exception hardly makes logical sense because "what is immoral for one to impose must be immoral also for others."[58] This is especially true as to

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[52] The English-translated version of the text reads:

> "The absolute condition of not making a first or subsequent marriage shall be deemed not written, unless it is imposed on the widow or widower by the deceased spouse, or by the ascendants or descendants of the latter.
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> However, the usufruct, use or habitation, or a personal allowance or benefit may be bequeathed by legacy to any person for the time during which he remains single or widowed."

[53] CONST. art II, § 4.

[54] Vicente V. Mendoza, *The Protection of Civil Liberties and the Remedies for Their Violations*, 81 PHIL. L.J. 345, 361 (2006).

[55] Bryan Dennis G. Tiojanco & Leandro Angelo Y. Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73, 80 (2009), *citing* Marbury v. Madison, 5 U.S. 137, 163 (1803).

[56] *Id.*

[57] TOLENTINO, *supra* note 12, at 230.

[58] *Id.*

conditions imposed by the deceased spouse's ascendants or descendants upon the widow or widower.

To illustrate: John and Cynthia were married. Cynthia later died. Cynthia's aging father, George, bequeathed to John via will his prized Rolex watch on the condition that John would never get married again. George later died. Shortly afterwards, John married Yoko. In that situation, assuming that John had already taken possession of the watch, he must give it up because the condition that George imposed for the receipt of the legacy is a valid one.[59] The same thing happens if the condition was imposed by the children of the deceased spouse, without distinction as to whether they were the products of the marriage or were exclusively that of the deceased.[60]

While one can make out a semblance of an interest sought to be protected in allowing the deceased spouse to ask of the surviving spouse not to remarry, the same does not hold true with respect to the former's ascendants or descendants. Marriage is a bilateral affair composed of only two actors—husband and wife. Granting third persons the ability to have a say as to how a widower or widow should live his or her life afterwards, regardless of their close relations to either or both, effectively constitutes an intrusion into the privacy of the couple's marital bond.[61]

In any event, such exception inevitably leads to troubling policy ramifications. While it initially appears to be grounded on the preservation of the family even after death, closer examination reveals that it actually promotes the opposite. As aptly observed by Tolentino, the inclusion of the second phrase "merely tends to more immorality, because it will be easy enough to comply with the letter of the condition but much easier to violate its spirit and intent by living a loose licentious life in a state of concubinage."[62] In this sense, the exception becomes a self-fulfilling prophecy. In its supposed pursuit of preserving familial ties, the State essentially creates a situation that forces the surviving spouse to live a clandestine life akin to a common-law relationship instead of having the same legitimized via marriage.

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[59] *See* EDGARDO PARAS, CIVIL CODE OF THE PHILIPPINES ANNOTATED VOLUME THREE 270 (2008).

[60] TOLENTINO, *supra* note 12, at 231; DESIDERIO JURADO, COMMENTS AND JURISPRUDENCE ON SUCCESSION 219 (2009); AVELINO SEBASTIAN, WILLS AND SUCCESSION 420 (2015).

[61] *See, generally,* Griswold v. Connecticut [hereinafter "*Griswold*"], 381 U.S. 479 (1965).

[62] TOLENTINO, *supra* note 12, at 231.

C. Bound from the Tomb

Article 874 is a deviance in our jurisdiction because it in effect extends the bonds of matrimony way past its natural endpoint. It forces the widow or widower to remain bound not to a physical partner, but to a mere memory. In light of the repeals of Articles 84 and 328 of the Civil Code, as well as Article 351 of the Revised Penal Code, it stands alone as the only remaining relic of the regressive legal philosophy we have inherited by virtue of our Spanish colonial past.

Admittedly, there is a paucity of jurisprudence and literature discussing Article 874 (as well as its predecessor, Article 790). In the long history of the Supreme Court, the provision has only been the subject of litigation thrice. The first one, *Morente v. De La Santa*,[63] decided in 1907, dealt with a straight application of the provision. The Court therein held that while the deceased spouse indeed wrote in her will that her husband shall not marry anyone else after her passing, such wording was not restrictive enough as to evince an intent to make the legacy contingent upon his non-remarriage.[64]

The second case, *Villanueva v. Juico*,[65] was decided in 1962 and was concerned merely with the interpretation of the non-remarriage clause. In granting the appeal, the Court held that, although the surviving spouse faithfully complied with the non-remarriage clause in her late husband's will, what was granted to her was merely the use and possession of the property and not the title thereto.[66] Thus, upon her death, ownership over the property rightfully passed to the late husband's grandniece who was instituted as the substitute heir.[67]

Lastly, the 1997 case of *Philippine Telegraph and Telephone Co. v. NLRC*[68] only referred to Article 874 in passing, as a footnote, in reference to the woman employee's "intangible and inalienable right" to choose her status.[69]

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[63] 9 Phil. 387 (1907).

[64] *Id.* The wording of the will was as follows: "That my said husband shall not leave my brothers after my death, and that he shall not marry anyone; should my said husband have children by anyone, he shall not convey any portion of the property left by me, except the one-third part thereof and the two remaining thirds shall be and remain for my brother Vicente or his children should he have any."

[65] G.R. No. 15737, 4 SCRA 550, Feb. 28, 1962.

[66] *Id.* at 555.

[67] *Id.*

[68] G.R. No. 118978, 272 SCRA 596, May 23, 1997.

[69] *Id.* at 613-614.

None of the three cases discussed Article 874 in depth, especially in relation to its rationale and propriety. The same goes with notable civil law commentators who—with the exception of Tolentino—have remained mostly silent about their misgivings about the provision. It is thus tempting to simply let the provision be out of convenience. However, accepting this proposition would be in gross disregard of the State's positive duty to ensure protection to civil liberties.[70]

Notwithstanding the fact of such scarcity, the constant threat of the application of Article 874 hangs like the Sword of Damocles over the heads of widows and widowers whose pursuit of individual happiness is quelled from beyond the grave.

III. THE RIGHT TO MARRY AND WHAT IT ENTAILS

A. Why People Enter into Marriage

People get married for a variety of reasons. Some do it out of necessity, as in the case of unplanned pregnancies in order to legitimize a common child born out of wedlock.[71] Others do it for more practical reasons such as financial security.[72] There are also those who do it for legal purposes such as the receipt of government benefits and the enjoyment of property rights.[73] The aforementioned reasons deal with the perceptible incidents of marriage. But the allure of matrimony goes beyond what it can do for the persons involved and into the philosophical significance of such an act.

Romantic as it may sound, marriages are also "expressions of emotional support and public commitment."[74] The late constitutional law scholar Kenneth Karst linked the urge of people to get married to the concept of intimate association. Intimate association, he says, contemplates "the opportunity to enjoy the society of certain other people"[75] as "to be human is

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[70] Tiojanco & Aguirre, *supra* note 55, at 80.

[71] *See* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2088 (2005).

[72] *See* Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer? Marriage as an Anti-Poverty Strategy in the United States*, 57 POP. 509 (2002); Mark Saludes, *Poverty drives more Filipino women into early marriage*, UCA NEWS, January 1, 2020, *at* https://www.ucanews.com/news/poverty-drives-more-filipino-women-into-early-marriage/85653#.

[73] Turner v. Safley [hereinafter "*Turner*"], 482 U.S. 78, 96 (1987). *See* Sunstein, *supra* note 71, at 2090-92.

[74] *Id.* at 95.

[75] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630 (1980).

to need to love and be loved."[76] The chief value then in intimate association is the satisfaction of such human needs.[77] As Justice Anthony Kennedy writes in *Obergefell v. Hodges*: "Marriage responds to the universal fear that a lonely person might call out only to find no one there."[78] But intimate association also works inwards: as a means of forming and shaping a person's own sense of identity.[79] In this sense, one's relationships—whether romantic or not—provide him or her with the best chance to be seen "as a whole person rather than as an aggregate of social roles."[80] A good case in point is Edward VIII's[81] marriage to Wallis Simpson.

As then King of the United Kingdom, Edward's romance with Simpson, a two-time divorcée, severely conflicted with the prevailing norms of society at the time. Thus, his decision to abdicate the throne and eventually marry Simpson served not only as a testament to his commitment to her, but also as an affirmation of his unconventionally progressive views on marriage and the monarchy.

It is one thing to talk about the universality of marriage from a humanist and sociological perspective, but it is another matter altogether to talk about how it has seeped into legal systems to become a judicially enforceable right. To this end, the succeeding discussions will revolve around the development and formulation of said right from the United States to its eventual transplantation to Philippine shores.

B. US Constitutional Framework

Neither the US Constitution nor any of its amendments speak of an explicit right to marry. Nevertheless, the absence of any such provision in the black letter of the US Constitution does not mean that no such right exists. *Griswold v. Connecticut* has already established the concept of penumbral rights which are "formed by emanations from those [express constitutional] guarantees that help give them life and substance."[82] These penumbral rights, although not explicitly found in the Constitution, are nevertheless still treated as fundamental rights on equal footing with that of their textual brethren.[83]

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[76] *Id.* at 632.
[77] *Id.*
[78] 576 U.S. 644, 14 (2015)
[79] Karst, *supra* note 75, at 635.
[80] *Id.* at 635-36.
[81] Later known as the Duke of Windsor after his abdication.
[82] *Griswold*, 381 U.S. 479, 484.
[83] *Id.* at 491-92. (Emphasis in the original.)

Interestingly, one of the earliest pronouncements by the US Supreme Court of a supposed right to marry came 42 years before *Griswold* even spoke of penumbral rights. In the 1923 case of *Meyer v. Nebraska*, the Court ruled that liberty, as contemplated within the due process clause of the 14th Amendment, "denotes not merely freedom from bodily restraint, but also the right of the individual [...] to marry [...] and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[84] Then, in *Skinner v. Oklahoma*, the Court again underscored the importance of marriage by describing it, jointly with procreation, as being "fundamental to the very existence and survival of the race."[85]

Notwithstanding the brief, if not passing, nature of the Court's pronouncements in *Meyer* and *Skinner*, the excerpts provided by those two cases later became instrumental in *Loving v. Virginia*,[86] arguably the most significant early decision regarding the constitutional right to marry.[87]

In *Loving*, the Court dealt with an issue involving the marriage of two Virginian residents, Mildred Jeter, who was a black woman, and Richard Loving, who was a white man. At the time in Virginia, the Racial Integrity Act of 1924 was in place, criminalizing marriages between "white" and "colored" people. Because of this ban, the couple decided to get married instead in Washington, D.C. pursuant to its laws. Upon returning to Virginia, however, they were charged and convicted under Sections 258 and 259 of the Virginia Code for their elopement.

Speaking for a unanimous Court, Chief Justice Warren proceeded to admonish Virginia's anti-miscegenation laws as an "endorsement of the doctrine of White Supremacy."[88] In the eyes of the Court, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[89] It pointed out that "[t]he

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[84] 262 U.S. 390, 399 (1923).

[85] [Hereinafter "*Skinner*"], 316 U.S. 535, 541 (1942).

[86] Loving v. Virginia [hereinafter "*Loving*"], 388 U.S. 1 (1967).

[87] Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158(5) U. PA. L. REV. 1375, 1387 (2010).

[88] *Loving*, 388 U.S. 1, 7. The Supreme Court of Virginia relied on its 1955 decision in *Naim v. Naim* in concluding that the State, in enacting anti-miscegenation laws, had legitimate purposes such as "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and the 'obliteration of racial pride[.]'"

[89] *Id.* at 11.

fact that Virginia prohibits only interracial marriages involving white persons"[90] all the more underscored the racist animus behind such legislation.

While *Loving* initially appeared to strictly invoke only the Equal Protection Clause as its basis for overturning the petitioners' convictions, the *ponencia* towards the end jarringly shifted to a Substantive Due Process discussion. Much like *Meyer*, the Court invoked the concept of substantive due process under the Fourteenth Amendment, referring to marriage as one of the "basic civil rights of man"[91] and a "fundamental freedom[.]"[92] It noted that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[93] However, later in the same paragraph, the Court again appeared to revert back to its Equal Protection argument by saying:

> 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*.[94]

Whereas *Loving* was ambiguous as to its jurisprudential framework, *Zablocki v. Redhail*[95] was more clear-cut. The Court in that case was faced with a Wisconsin statute which prohibited non-custodial parents who are obliged to pay child support from entering into marriages without prior court approval. Those who nevertheless decided to get married in contravention of said statute risked having void marriages and being liable for a criminal offense.

In ruling against the statute and in favor of appellee Redhail, the Court therein used the equal protection framework while reiterating the fundamental importance of the right to marry for all individuals.[96] It noted that the statutory classification in the case directly and substantially interfered with the exercise of the fundamental right to marry because those in the affected class, like Redhail, will never be able to obtain the necessary court order due to

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[90] *Id.*
[91] *Id.* at 12.
[92] *Id.*
[93] *Id.*
[94] *Id.* (Emphasis supplied.)
[95] 434 U.S. 374 (1978).
[96] *Id.* at 384.

circumstances such as lack of financial means to show compliance with their child support duties.[97] As a result, such persons are essentially prevented from getting married. At the same time, those who in theory are able to satisfy the statute's requirements are "sufficiently burdened by having to do so that they will in effect be coerced into foregoing their right to marry."[98]

The Court ultimately used the strict scrutiny test to declare the statutory classification invalid.[99] It did this by juxtaposing the incongruence between the supposed legislative purpose of the statute with its practical ineffectiveness, to wit:

> First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that there are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties.[100]

After *Zablocki*, the next significant decision involving the right to marry came from the case of *Turner*. Whereas *Loving* and *Zablocki* were concerned with anti-miscegenation laws and financial pre-conditions to marriage, respectively, *Turner* was about a Missouri Division of Corrections regulation permitting an inmate to marry only upon prior permission from the prison superintendent who, in turn, can give such permission only when there are "compelling reasons" to do so.[101]

Ruling that such measures were unconstitutional, the Court cited the fundamental right to marry as discussed in *Loving* and *Zablocki*.[102] The Court

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[97] *Id.* at 387.

[98] *Id.*

[99] *Id.* at 388. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *See also* Karst, *supra* note 75, at 670.

[100] *Id.* at 388-89.

[101] *Turner*, 482 U.S. 78, 78.

[102] *Id.* at 95.

held that inmates do not shed such constitutional rights which are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system simply by reason of their conviction and imprisonment.[103] Moreover, the Court described the commitment of marriage as more than just a legal union, but also "an exercise of religious faith as well as an expression of personal dedication."[104]

A noticeably glaring omission in *Turner* though was the specific constitutional interest at stake. True enough, unlike in the previous cases, there was no mention of neither the Due Process Clause nor the Equal Protection Clause. It sufficed for the *Turner* Court, it seems, to characterize the right to marry as fundamental without specifying on what grounds it was basing its decision.[105]

While *Turner* was silent as to the specific constitutional foundations it relied upon, it was extremely clear as to the standard of scrutiny it used in arriving at its conclusion. The Court dismissed the Court of Appeals for the Eight Circuit's application of the strict scrutiny analysis in deciding in favor of the inmates' constitutional rights. Instead, it held that "a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules."[106] According to the Court, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related to legitimate penological interests*."[107] This "reasonable standard" test is a stark deviation from the strict scrutiny test earlier applied in *Zablocki*. Thankfully though, the "reasonable standard" test appears to be the exception rather than the (new) general rule, the former being applicable only to prison settings and other like circumstances.[108]

Finally, in *Obergefell*, the Court once again reiterated the fundamental nature of the right to marry, stating that it "[r]is[es] from the most basic human

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[103] *Id.*, *citing* Pell v. Procunier, 417 U.S. 817, 822 (1974).

[104] *Id.* at 96.

[105] Tebbe & Widiss, *supra* note 87, at 1389-90.

[106] *Turner*, 482 U.S. 78, 81.

[107] *Id.* at 89. (Emphasis supplied.)

[108] *Id.* According to the Court: "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking [sic] process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem[.]"

needs"[109] and "is essential to our most profound hopes and aspirations."[110] In declaring that legislative prohibitions on same-sex marriage are unconstitutional, the Court grounded the right to marry on both the Due Process and Equal Protection Clauses, much like *Loving* originally did. However, unlike in *Loving*, the *Obergefell* Court did not stop at the mere invocation of said constitutional concepts. The Court explained that it is the "synergy between the two protections"[111] that makes the right to marry so potent. According to the Court:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from the Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other.[112]

By explicitly recognizing the interplay between the Due Process Clause and the Equal Protection Clause, *Obergefell* dispelled the confusions arising from the Court's theoretical flip-flopping in right-to-marry cases dating back to *Meyer*.[113] With a new, clearer doctrine in place, we can only hope that the consistency in application will follow, for the benefit of both scholars and litigators.

C. Philippine Constitutional Framework

Some have posited that there is uncertainty as to whether there is indeed a right to marry in the Philippines.[114] I beg to disagree. That there is a constitutional right to marry in the Philippines is clear as day. With our collective penchant for all wedding-related theatrics,[115] surely that vibrant mixture of culture and tradition has carried over to our legal system. The only

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[109] *Obergefell*, 576 U.S. 644, 3.

[110] *Id.*

[111] *Id.* at 20.

[112] *Id.* at 19.

[113] Tebbe & Widiss, *supra* note 87, at 1390.

[114] Coleen Claudette R. Luminarias, *Engendered Equality: Probing the Right to Marry in Light of Obergefell v. Hodges and Constitutional Freedoms and Limitations*, 61 ATENEO L.J. 68, 115 (2016).

[115] *See* Scott Garceau, *My big, noisy, endless Filipino wedding*, PHIL. STAR, Nov. 4, 2002, *available at* https://www.philstar.com/lifestyle/sunday-life/2002/11/24/185247/my-big-noisy-endless-filipino-wedding.

problem though is that, unlike its American counterparts, Philippine Supreme Court decisions regarding the right to marry often come in fragments and excerpts, as if there was no unified jurisprudential thought tying everything together.

For starters, there has yet to be a case decided by the Supreme Court which directly talks about the right to marry in the same fashion as the aforementioned US cases. The closest thing to that is the case of *Falcis v. Civil Registrar General*.[116] However, the potential breakthrough of *Falcis* was greatly undermined by procedural lapses, which took up majority of the *ponencia* and eventually led to dismissal of the petition, as well as contempt citations for the petitioners' counsels.[117] Thankfully, the other decisions concerning the right to marry were categorical enough in their designation of the right as fundamental so as to clearly carve out the place of such right within our constitutional framework.

In *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*,[118] the Court invalidated a stipulation by respondent Brent requiring the petitioner Cadiz to get married to her boyfriend—with whom she bore a child—as a precondition to her reinstatement to her job. The Court brushed aside Brent's justification that such requirement was in consonance with the public policy against encouraging illicit or common-law relations.[119] It held that Cadiz had the freedom to choose a spouse and to enter into marriage only with her free and full consent.[120] As such, Brent's precondition requiring her to get married at the risk of losing her job was described as "coercive, oppressive[,] and discriminatory"[121] as it deprived Cadiz of the "intangible and inalienable right"[122] to choose her own status.

In his concurring opinion, Justice Francis Jardeleza added that the freedom to make personal choices such as the decision to marry and to whom are embodied in the Due Process Clause through the rights to personal liberty and privacy.[123] The State, therefore, had no business interfering with such

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[116] G.R. No. 217910, Sept. 3, 2019.

[117] *But see* Dante B. Gatmaytan, Finding Fault: Marriage Equality, Judicial Deference, and Falcis (June 18, 2020) (unpublished manuscript of online lecture conducted on behalf of the University of the Philippines College of Law), *available at* https://law.upd.edu.ph/up-college-of-law-holds-professorial-chair-in-law-online-lecture/.

[118] G.R. No. 187417, 785 SCRA 18, Feb. 24, 2016.

[119] *Id.* at 36-37.

[120] *Id.* at 37.

[121] *Id.*

[122] *Id.* at 38.

[123] *Id.* at 51 (Jardeleza, *J.*, *concurring*).

choice. Neither can it sanction any undue burden of the right to make such choices.[124] Thus, although the condition herein was not made under threat of penalty unlike in other Bill of Rights cases, the mere fact that there was pressure on Cadiz to abandon such a right already constituted a burden on her freedom.

A more recent case is that of *Republic v. Manalo*. There, the Court, citing Justice Conchita Carpio-Morales' dissent in *Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas*,[125] declared that the right to marry is among the fundamental rights implicitly guaranteed in the Constitution "whose infringement leads to strict scrutiny under the equal protection clause."[126] In so doing, the Court effectively placed the right to marry on the same plane as historically actionable rights such as free speech, political expression, free press, and assembly, to name a few.[127] The Court ruled that Article 26 (2) of the Family Code[128] applies regardless of whether it was the foreigner spouse or the Filipino spouse who initiated the divorce proceedings.[129]

Capin-Cadiz and *Manalo* were also subsequently cited in Justice Jardeleza's concurring and separate opinions in *Union School International v. Dagdag*[130] and *Versoza v. People*,[131] respectively. The former pointed out the express recognition by the Court in *Manalo* of the fundamental right to marry,[132] while the latter noted how the decision applied the Equal Protection analysis to uphold the liberty interest of Manalo to remarry.[133]

The key takeaway from these cases is not only that the right to marry indeed exists within our jurisdiction. It is that the right to marry is not so much a guarantee of a person's capacity to enter into a marriage, as it is a guarantee of his liberty to *possibly* enter into one. The right ensures not just the overt act

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[124] *Id.*

[125] G.R. No. 148208, 446 SCRA 299, 496, Dec. 15, 2004 (Carpio-Morales, *J., dissenting*).

[126] *Manalo*, 862 SCRA 580, at 609.

[127] *Id.*

[128] Article 26 (2) of the Family Code reads in full: "Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity the remarry under Philippine law."

[129] *Manalo*, 862 SCRA 580, at 606.

[130] [Hereinafter "*Union School International*"], G.R. No. 234186, 886 SCRA 563, Nov. 21, 2018.

[131] [Hereinafter "*Versoza*"], G.R. No. 184535, Sept. 3, 2019

[132] *Union School International*, 886 SCRA at 584 (Jardeleza, *J., concurring*).

[133] *Versoza*, at 15 (Jardeleza, *J., separate*).

of being wed, but the choice in general of who, when, where, and even if, to marry.

D. The Standard of Analysis

The right to marry being a fundamental right under the Constitution, any state interference with the exercise of the same warrants the application of the strict scrutiny test.[134] Under this test, the burden of proof is shifted to the State to demonstrate "that the classification (1) is necessary to achieve a compelling State interest, and (2) is the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest."[135]

In *Samahan ng mga Progresibong Kabataan v. Quezon City*, compelling state interest was defined as a "paramount interest of the state for which some individual liberties must give way."[136] This includes, but is not limited to, constitutionally declared policies.[137] The least restrictive means requirement, on the other hand, means that "[w]hen it is possible for governmental regulations to be more narrowly drawn to avoid conflicts with constitutional rights, then they must be so narrowly drawn."[138] In short, if the Court finds that there is a conceivably less injurious—yet equally effective—alternative to that of the original state measure, the requirement shall be deemed to not have been met; in turn, the strict scrutiny test is not fulfilled.

IV. HOW ARTICLE 874 VIOLATES THE RIGHT TO MARRY

A. Testamentary Freedom is Not Absolute

One possible counterargument that can be hurled against the thesis of this paper is that the absolute condition not to subsequently marry under Article 874 refers only to the remaining free portion of the testator's estate after the legitimes have been distributed to the compulsory heirs, the surviving spouse included. This is admittedly true. Tolentino himself observed that such a condition cannot be imposed upon the legitime of the widow or widower.[139]

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[134] Samahan ng mga Progresibong Kabataan v. Quezon City [hereinafter "*SPARK*"], G.R. No. 225442, 835 SCRA 350, 410-11, Aug. 8, 2017.

[135] *Id.* at 414.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 419-20.

[139] TOLENTINO, *supra* note 12, at 231.

That being the case, it has been argued that the testator is purely within his or her right to impose whatever conditions he or she may deem fit for the receipt of testamentary inheritance, even if that means requiring the surviving spouse to not contract a subsequent marriage. While this argument is theoretically sound, it relies heavily on the concept of the sanctity of contracts, an idea that has long been left to rot by modern jurisprudential developments.

As early as 1960, in the case of *Abe v. Foster Wheeler Corp.*,[140] the Supreme Court already ruled that the freedom of contract is not absolute. Rather, "the constitutional guaranty of non-impairment of obligations of contract is limited by the exercise of the police power of the State, in the interest of public health, safety, moral[,] and general welfare."[141] Eight years later, the Court, citing the *Abe* decision, ruled in *Philippine American Life Insurance Co. v. Auditor General*[142] that the Margin Law does not impair the non-impairment clause "for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."[143]

While those cases mainly invoked public interest and general welfare as considerations for overriding the general freedom to contract of private individuals, the same logic nevertheless applies with respect to Article 874. With the flimsy justifications for its creation and the overriding concerns against its continued existence, it is well overdue that Article 874 be revisited.

B. Failure to Meet the Strict Scrutiny Test

1. No Compelling State Interest

As Tolentino pointed out, Article 874 is sought to be justified on grounds of conjugal and family affection, as a means of securing everlasting (quite literally) spousal fidelity, and in order to avoid offense to the memory of the deceased spouse as a consequence of the surviving spouse's remarriage.[144] These do not constitute compelling-enough state interests.

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[140] 110 Phil. 198 (1960).
[141] *Id.* at 203.
[142] G.R. No. 19255, 22 SCRA 135, Jan. 18, 1968.
[143] *Id.* at 146.
[144] TOLENTINO, *supra* note 12, at 230-31.

While it is the State's positive duty to ensure the inviolability of marriage as an institution, it must also acknowledge the fact that death naturally ends the marriage for both parties.[145] Accordingly, there is no longer any conjugal affection or spousal fidelity to speak of. The ensuing dissolution of the conjugal property serves as the legal manifestation of this separation.

Forcing the surviving spouse to remain committed to the memory of the deceased spouse runs contrary to the element of voluntariness essential to every intimate association. As Karst wonderfully explained:

> It is the choice to form and maintain an intimate association that permits full realization of the associational values we cherish most. The connection between the choice principle and these values is delicate but vital.
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> * * *
>
> The full value of long-term commitment is also realizable only when there is freedom to remain uncommitted. Not only is the freedom to reject or terminate an intimate association valuable in its own right; it also promotes the realization of values in an intimate association that endures.
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> * * *
>
> The freedom of nonassociation, it is often noted, is itself an associational freedom [...] coerced intimate associations are the most repugnant of all forms of compulsory association.[146]

Mandating respect for the memory of the deceased spouse also confines the surviving spouse to a cage of perpetual sorrow. Studies show that the death of a spouse produces dramatic declines in both the economic and physical well-being of the surviving spouse.[147] These adverse effects have lasting consequences which are sometimes only mitigated through remarriage.[148] Thus, capacitating the widower or widow to remarry is not only sound legally and philosophically, but also psychologically, thereby allowing him or her to once again be an active member of society.

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[145] Cunningham, *supra* note 30, at 19.

[146] Karst, *supra* note 75, at 637-38.

[147] Ken R. Smith et al., *Remarriage Patterns Among Recent Widows and Widowers*, 28 DEMOGRAPHY 361, 361 (1991).

[148] *Id.* at 361-62. *See also* Deborah Carr, *The Desire to Date and Remarry Among Older Widows and Widowers*, 66 J. MARRIAGE & FAM. 1051 (2004).

Finally, from a public policy perspective, extending the bonds of matrimony beyond the tomb merely fosters "a licentious life in a state of concubinage."[149] It leaves the widow or widower no choice but to essentially maintain subsequent romantic relationships as common-law marriages, an arrangement that can be the subject of criminal liability[150] and one that the Court has consistently and without hesitation described as "contrary to morals and public policy."[151]

In essence, the aforementioned reasons may be compelling enough on a *personal* level for the parties involved, but definitely not on a state level to warrant such an intrusion.

2. Not the Least Restrictive Means Available

The enactment of Article 874 is likewise unconstitutional as the means employed were not the least restrictive to further those interests.

The least restrictive means test "stems from the fundamental premise that citizens should not be hampered from pursuing legitimate activities in the exercise of their constitutional rights."[152] Therefore, the primary concern in determining whether a state measure is the least restrictive is whether injury has been caused to a fundamental right. If yes, then it must be shown that such injury was necessary to attain the specific governmental objective sought. If an alternative means, which will not hamper the exercise of the fundamental right, is available, then the state measure in question is not the *least restrictive*.

Note, however, that a person need not be *absolutely* prevented from exercising a fundamental right in order to trigger the strict scrutiny test. It is sufficient that the measure is unduly burdensome to the point that, while the person is still technically capable of exercising his or her right, there is strong enough resistance to restrain him or her from doing so. As the famous jurisprudential saying goes: what cannot be done directly cannot be done indirectly.[153]

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[149] TOLENTINO, *supra* note 12, at 230.

[150] *See* REV. PEN. CODE, arts. 333-34, 349.

[151] Ching v. Goyanko, G.R. No. 165879, 506 SCRA 735, 740, Nov. 10, 2006. *But see* FAM. CODE, art. 147.

[152] *SPARK*, 835 SCRA 350, 419.

[153] Tawang Multi-Purpose Coop. v. La Trinidad Water Dist., G.R. No. 166471, 646 SCRA 21, 31, Mar. 22, 2011.

Remember that in *Zablocki* the US Supreme Court ruled that while some prospective bride and grooms may, in theory, be able to satisfy the statute's requirement of proving compliance with child support obligations, they will still "be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry."[154]

As applied herein, while the surviving spouse can still technically remarry, the mere fact that such remarriage is subject to the possible forfeiture of his or her testamentary inheritance is already tantamount to a restriction on his right to marry. The pressure on the surviving spouse not to remarry works not just legally, but also morally, gnawing at his or her conscience like an omnipresent specter. Other legal measures are already in place to save any semblance of conjugal or familial affection in light of such an unfortunate event. For instance, the Civil Code allows the widow to continue using the deceased husband's surname as if he was still alive.[155]

If Congress and the Supreme Court have read donations between spouses during the marriage as inherently riddled with undue influence,[156] what more of absolute conditions not to remarry, where the surviving spouse is naturally placed at a disadvantage by reason of grief and mourning? Certainly, a more humane and reasonable alternative to this is to simply let the spouses be.

CONCLUSION

Marriage is a status with a strong component of public dignity.[157] It is fundamental to "individual self-definition, autonomy, and the pursuit of happiness."[158] But all these values are bastardized when Article 874 effectively places state imprimatur on an act that effectively controls how a widower or widow should live his or her life—that is, still beholden to an immortal beloved. How are individual self-definition and autonomy achieved when one is forced to remain as a half of a whole that no longer exists? How is happiness pursued if the very same institution that is supposed to embody it causes its unattainability? They cannot. And that is why the only saving grace left is

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[154] *Zablocki*, 434 U.S. 374, 387. The Court went even further, in fact stating that "even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."

[155] CIVIL CODE, art. 373.

[156] *See* Calimlim-Canullas v. Fortun, G.R. No. 57499, 129 SCRA 675, 680, June 22, 1984.

[157] Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 690 (2010).

[158] *Id.*

judicial review or legislative repeal, both of which this paper can hopefully be of help with.

Justice Marvic M.V.F. Leonen once said that "[e]very law is an imagined future[;]"[159] that each one "provides for a normative statement that says, this should be how it is[.]"[160] But these normative expectations that underscore Article 874 of how a family should react and adapt in the midst of a loved one's death are remnants of a society which no longer exists. The law's continued presence now stands to do more harm than good as it carves out not so much an imagined future as it does an agonizing nightmare.

If Congress has phased out similarly archaic laws in the past, then it ought to do the same for this. The lack of open controversy as to its existence does not mean that it is any less troubling or problematic.

In the immortal words of Bob Dylan: "For the times, they are a-changin'."[161]

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[159] Marvic M.V.F. Leonen, Interpellation during the Oral Arguments on Calleja v. Exec. Sec'y, G.R. No. 252578, Feb. 2, 2021, *available at* https://www.youtube.com/watch?v=dwPdzdVkkEA&t=9517s.

[160] *Id.*

[161] BOB DYLAN, *The Times They Are a-Changin, on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).