A COMPREHENSIVE CASE FOR THE RECOGNITION IN THE PHILIPPINES OF SAME-SEX MARRIAGES BETWEEN FILIPINOS ABROAD*

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ABSTRACT

This Article argues that pursuant to the *lex loci celebrationis* rule under Article 26(1) of the Family Code, same-sex marriages between Filipinos validly celebrated outside the Philippines can and should be recognized in the Philippines without further legislation. It reflects on *Republic v. Manalo*, and characterizes the decision as an exhibition of the Court's ambivalence towards judicial positivism and pragmatism as distinguished by Richard Posner. From this, this Article makes the case for local recognition of same-sex marriages celebrated abroad for both a judicial positivist and a judicial pragmatist. For the positivist, the Article considers precedent, the text, the intent, its relationship with Articles 15 and 17(3) of the Civil Code and the Constitution. For the pragmatist, the Article argues that the socially optimal decision is to recognize same-sex marriages. Finally, the Article reflects on the role to be played by advocates.

KEYWORDS: LGBTQIA+, same-sex marriage, foreign marriage, conflict of laws, judicial positivism, judicial pragmatism

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I. INTRODUCTION

The Philippines has still not legally recognized the celebration of same-sex marriage in the country.[1] In 2019, the Supreme Court dismissed a petition seeking the recognition of same-sex marriages in the Philippines.[2] This is despite the fact that a survey conducted from April 2023 to March 2024 showed that 11% of Filipinos identify as lesbian, gay, bisexual, or

[1] FAM. CODE, art. 2(1), *in relation to* FAM. CODE, art. 4.
[2] Falcis v. Civ. Registrar Gen. [hereinafter "*Falcis*"], 861 Phil. 388 (2019).

transexual.[3] In fact, the Philippines, alongside the United States and Israel have the highest share among the 43 countries surveyed.[4] Further, 38 countries have legalized same-sex marriage, with Thailand, Liechtenstein, and the Czech Republic legalizing same-sex marriage or same-sex civil unions just in 2025.[5]

Thus, while a Filipino same-sex couple may not legally get married in the Philippines,[6] they may be able to do so in other countries. Several of such marriages have been reported. In 2022, artist Nica Del Rosario and her partner Justine Peña got married in Australia,[7] where it has been legal even for tourists since 2017.[8] In 2024, members of the Filipino band Ben&Ben, Agnes Reoma and Patricia Lasaten also tied the knot in California.[9]

This legal situation opens the door to an inevitable private international law question: if a same-sex Filipino couple gets married abroad,[10] can such same-sex marriage be recognized in the Philippines? Much of the existing literature, for differing reasons, have claimed that such marriage *cannot* be recognized in the Philippines.[11] In an interview, Peña said

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[3] Anna Fleck, *Where It's Most & Least Common To Be LGBT+,* STATISTA, May 16, 2024, *at* https://www.statista.com/chart/30142/respondents-who-identify-as-lgbt--in-selected countries/.

[4] *Id.*

[5] *Same-sex marriage*, EQUALDEX, *at* https://www.equaldex.com/issue/marriage.

[6] FAM. CODE, art. 2(1)*, in relation to* Art. 4.

[7] ABS-CBN News, *Nica del Rosario marries partner Justine Pena in Australia,* ABS-CBN NEWS, Aug. 23, 2022, *at* https://www.abs-cbn.com/entertainment/08/23/22/nica-del-rosario-marries-partner-justine-pena-in-australia.

[8] Beatrice Pinlac, *Nica del Rosario to wed partner in Australia*, INQUIRER.NET, Aug. 18, 2022, *at* https://newsinfo.inquirer.net/1649278/nica-del-rosario-to-wed-partner-in-australia.

[9] Kristofer Purnell, *Ben&Ben's Pat Lasaten, Agnes Reoma tie knot in Los Angeles*, PHILSTAR.COM, Nov. 20, 2024, *at* https://www.philstar.com/entertainment/music/2024/11/20/2401375/benbens-pat-lasaten-agnes-reoma-tie-knot-los-angeles.

[10] As a preliminary matter, I limit the scope of the inquiry of this Article to marriages celebrated outside the Philippines between Filipinos, which comply with all the requisites of the country where the marriage is celebrated. I further assume that the marriage is between two consenting adults, with no other reason to be invalid under Philippine law except for not complying with the different sex requirement under FAM. CODE, art. 2(2). References to marriages celebrated abroad in this Article make these assumptions.

[11] J. Eduardo Malaya & Anna Christina Iglesias, *Recognizing the Effects of Same-Sex Marriages: An Examination of Department of Justice Opinion No. 11, Series of 2019 on the Issuance of 9(E-1) Visas to Same-sex Spouses of Foreign Diplomats*, 18 PHIL. Y.B. INT'L L. 77, 94 (2019);

that a week after getting married in Australia, she felt the slap in the face when she had to fill out a Philippine Immigration form declaring herself as single.[12] For others, this is an open discussion. Recently, a similar question was discussed in a Philippine Law Student forum on the online platform, *Reddit*.[13]

In this Article, I argue that same-sex marriages between Filipinos celebrated abroad *can and should be recognized* in the Philippines pursuant to Article 26, Paragraph 1 of the Family Code ("Article 26(1)"). While it is my position that the prohibition of the celebration of same-sex marriages in the Philippines is unconstitutional, I do not seek to examine the constitutionality of the Family Code's textual definition of marriage as "between a man and a woman"[14] in general. Instead, this Article approaches such issue from the lens of private international law. While there are some broader constitutional claims, my specific focus would be same-sex marriages celebrated abroad. I argue that within the existing Philippine legal system, same-sex marriages validly celebrated abroad can *already* be recognized.

First, for the judicial positivist, I argue that both the text and intent behind Article 26(1) permits the recognition of marriages that do not fall under the provision's enumerated exceptions. Same-sex marriages, which do not fall under this enumeration, should therefore be recognized. *Second*, in relation to the nationality principle, I argue against the view that Article 26(1) is strictly limited to questions of extrinsic validity and propose a different way to harmonize the nationality principle and Article 26(1). *Third*, I reject the view that same-sex marriage is contrary to Philippine public policy and attempt to extract a standard of public policy by examining the jurisprudence

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MARIA CAROLINA LEGARDA & AVELINO SEBASTIAN, JR., CIVIL LAW IS A JOURNEY: THE GUIDE, 46–47 (2022), *citing* Ambrose v. Suque-Ambrose [hereinafter "*Ambrose*"], 905 Phil. 149 (2021); ELMER RABUYA, PRE-BAR REVIEWER IN CIVIL LAW 54 (2024); GALAHAD PE BENITO, CONFLICT OF LAWS 270–71 (2016), *citing* FAM. CODE, art. 2; HONORATO AQUINO, REVIEW NOTES IN CONFLICT OF LAWS 50, 66 (2000) [hereinafter "H. AQUINO"]; Edzyl Josef G. Magante, *International Comity and Family Law*, 52 ATENEO L.J. 372, 390 (2007); MELENCIO STA. MARIA, JR., PERSONS AND FAMILY RELATIONS LAW 204–05 (8th ed. 2022).

[12] RAPPLER, *At Home sa Abroad: Overseas marriage, an option for Pinoy LGBTQ+ couples*, (YouTube, June 17, 2024), https://www.youtube.com/watch?v=faFZVhLZ1F0.

[13] Rainbowrainwell, *Manalo, Obergefell and Falcis: Gay Marriage Solemnized Abroad*, REDDIT.COM, 2024, *at* https://www.reddit.com/r/LawStudentsPH/comments/1h04kvj/manalo_obergefell_and_falcis_gay_marriage/?rdt=32774. The Original Poster, Rainbowrainwell, argued that such same-sex marriages could also be recognized. Unless otherwise provided, I have independently arrived at the arguments of this Article.

[14] FAM. CODE, art. 1.

of the Philippines and of some US state courts prior to *Obergefell v. Hodges*[15] in relation to recognizing same-sex marriages celebrated out-of-state. *Fourth*, in making the constitutional case, it is argued that the Constitution protects a fundamental right to marry that does not exclude same-sex marriages from two sources: one sourced from importing US precedent and another sourced indigenously.

Finally, for the judicial pragmatist, while I do not intend to make a definitive empirical case for same-sex marriage, I propose that the Philippine interest, especially in preventing limping marriages, is better served by an approach that recognizes same-sex marriages. I further respond to the possible claim that this interpretation may permit the evasion of Philippine law. The Article draws comparisons between Philippine law and the US practice as discussed in the First and Second Restatements of Conflict of Laws.

This Article has six parts. *Part I* introduces this Article. *Part II* gives a brief history of Article 26(1), which will aid in contextualizing my arguments in the larger development of the Philippines' marriage comity provision. *Part III* attempts to revisit the Court's decision in *Republic v. Manalo*[16] using the lens of both judicial positivism and judicial pragmatism as differentiated by Richard Posner. From this, I propose a dualist framework for analyzing Court action. *Part IV* makes the case for a judicial positivist for the recognition of same-sex marriages abroad. Meanwhile, *Part V* argues that a judicial pragmatist should make the same conclusion. Finally, *Part VI* reflects on the role of advocates given such discussion.

I aim to make three main contributions to the extant literature. *First*, by reexamining Manalo, this Article proposes a framework for examining Court decisions as ambivalent between judicial pragmatism and judicial positivism. *Second*, I diverge from most scholars on the question of whether Filipino same-sex marriages abroad can be recognized. I attempt to offer a comprehensive case for reconsidering this conventional position. *Third*, while I take the position that the celebration of same-sex marriages should be permitted in the Philippines, I intend open the discussion of an alternative route for same-sex couples, without relying on subsequent legislation. Thus, Filipinos who ask for the equal legal recognition of their love may be given some remedy, albeit suboptimal.

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[15] [Hereinafter "*Obergefell*"], 135 S.Ct. 2584 (2015).

[16] Republic v. Manalo [hereinafter "*Manalo*"], 831 Phil. 33 (2018).

II. A BRIEF HISTORY OF ARTICLE 26(1) OF THE FAMILY CODE

The recognition of marriages celebrated outside the Philippines revolves around Article 26(1), which provides:

> Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 36[,] 37 and 38.[17]

Melencio Sta. Maria has traced the evolution of Article 26(1),[18] claiming that the first Philippine comity provision was Section IV of General Orders No. 68,[19] which was promulgated on December 18, 1899.[20] That provision reads:

> All marriages contracted without these Islands which would be valid by the law of the country in which the same were contracted, are valid in these Islands.[21]

Section IV of General Orders No. 68 was then amended by Section 19 of Act No. 3613.[22] Afterward, the Civil Code incorporated the rule but added substantial exceptions.[23] Garcia and Alba describe this change as a "[r]estatement with an innovation of Sec. 19 of Act. No. 3613 as

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[17] FAM. CODE, art. 26, ¶ 1.

[18] STA. MARIA, *supra* note 11, at 203–04. Sta. Maria, however, focused on how the comity provision articulated how the marriage must be executed. Sec'y of Justice Op. No. 23 (July 29, 2021) has also cited Sta. Maria, albeit an older version of the book, MELENCIO STA. MARIA, JR., PERSONS AND FAMILY RELATIONS LAW 167–70 (2010 ed.).

[19] STA. MARIA notes that this provision is Section V of General Order No. 68. STA. MARIA, *supra* note 11, at 203. However, this appears to be an incorrect citation as the provision appears to be Section IV of General Orders No. 68. *See* Wong Woo Yiu [Hereinafter "*Wong Woo Yiu*"], G.R. No. 20176, 13 SCRA 552, 555, Mar. 31, 1965. This provision is thus labelled as "Section IV of General Orders No. 68" for the purposes of this Article.

[20] Benedicto v. De La Rama, 3 Phil. 34, 38 (1903).

[21] STA. MARIA, *supra* note 11, at 203.

[22] *Id.*

[23] *Id; See also* I AMBROSIO PADILLA, CIVIL LAW CIVIL CODE ANNOTATED 319 (1961 ed.). Padilla notes that Article 71 of the Civil Code was "[t]aken from section 19 of Act No. 3613."

amended."[24] Then, the rule was adopted, with some changes, under Article 26(1).[25]

To better see the historical evolution of Article 26(1), a table from the Department of Justice (DOJ) is reproduced below:[26]

Sec. [IV], GO No. 68	Sec. 5, Act No. 3613	Art. 71, Civil Code	Art. 26, Family Code
All marriages contracted without these Islands which would be valid by the law of the country in which the same were contracted, are valid in these Islands.	All marriages performed outside of the Philippine Islands in accordance with the laws in force in the country where they were performed and valid there as such, shall also be valid in the Islands.	All marriages performed outside of the Philippines in accordance with the laws in force in the country where they were performed and valid there as such, shall also be valid in this country, except bigamous, polygamous, or incestuous marriages as determined by Philippine law.	All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they are solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 36, 37 and 38.

From this table, it can be observed that until Act No. 3613, the validation provision did not have exceptions. It was only in the Civil Code and the Family Code that additional exceptions were added to the provision. This belated addition of express exceptions suggests that there could not be implied exceptions from the provision, and thus there was a need to enumerate them.

In 2004,[27] Senator Miriam Defensor-Santiago filed Senate Bill No. 1276 which sought to amend Article 26 of the Family Code to exclude same-sex marriages:

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[24] I COSME GARCIA & LEODEGARIO ALBA, CIVIL CODE OF THE PHILIPPINES 207 (1950).

[25] STA. MARIA, *supra* note 11, at 203–04.

[26] Sec'y of Justice Op. No. 23 (July 29, 2021). (Emphasis omitted.)

[27] *Prohibiting Same-Sex Marriages*, SENATE OF THE PHIL. WEBSITE, *at* http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=13&q=SBN-1276. (Emphasis supplied.)

> All Marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were solemnized and valid there as such, shall also be valid in this country, *except SAME-SEX MARRIAGES AND* those prohibited under Articles 35 (1), (4), (5) and (6), 36, 37 and 38.
>
> When a marriage between a Filipino citizen and a foreigner is validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law.[28]

The bill was not adopted as it was left on the committee level.[29]

In 2007, Senator Defensor-Santiago refiled such bill through Senate Bill No. 1282, which was a refiling of Senate Bill No. 1276,[30] that aimed to exclude same-sex marriages from the coverage of Article 26(1).[31] This bill also did not go beyond the committee level.[32]

In 2011, Congressman Rene Relampagos filed House Bill No. 4269, which aimed to add same-sex marriages and common-law marriages between Filipinos abroad, as well as proxy marriages, as additional exceptions to Article 26(1).[33] The "proposed legislative amendments as enumerated hereunder, which are codifications based on jurisprudence, will *add to, expand or* clarify the various exceptions enumerated in the first paragraph of Article 26[.]"[34] House Bill No. 4269 provided that:

> IN ADDITION, THE FOLLOWING MARRIAGES SHALL BE CONSIDERED EXCEPTIONS TO THIS ARTICLE:
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> * * *
>
> (2) SAME SEX MARRIAGES OF FILIPINOS ABROAD;[35]

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[28] S. No. 1276, 13th Cong., 1st Sess., § 1 (2004).

[29] *Prohibiting Same-Sex Marriages*, *supra* note 27.

[30] *See* S. No. 1282, 14th Cong., 1st Sess., n.* (2007).

[31] S. No. 1282, 14th Cong., 1st Sess., § 1 (2007).

[32] *Exempting Same Sex Marriage Solemnized Abroad from the Coverage of Art. 26, Family Code*, SENATE OF THE PHIL. WEBSITE, *at* http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-1282.

[33] H. No. 4269, 15th Cong., 1st Sess., § 1 (2011).

[34] Explanatory Note.

[35] § 1.

This bill was similarly not enacted by Congress and was left pending with the Committee on the Revision of Laws.[36]

Thus, despite several efforts to amend such, Article 26(1) stands as it was originally worded. The interpretation of this provision is now the primary subject of this study.

III: THE DUALIST *MANALO* FRAMEWORK

To structure the case for recognition, this Article will apply the interpretative approach used by the Court in *Manalo* for the recognition of foreign divorces.[37] Therefore, it is imperative to briefly outline the approach taken by the Court.[38] Preliminarily, the distinction between judicial pragmatism and judicial positivism must be laid out.

In *Manalo,* the Court confronted a simple question: does a Filipino have a right to remarry if they initiated the divorce proceeding abroad against their alien spouse, who was capacitated to marry?[39] In answering such question, the Court had to interpret Article 26, Paragraph 2 of the Family Code.[40] which provides that, "[w]here 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 to remarry under Philippine law."[41]

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[36] *An Act Amending Article 26 of Executive Order 209 or the Family Code of the Philippines and for Other Purposes*, HOUSE OF REPRESENTATIVES OF THE PHIL. WEBSITE, *at* https://www.congress.gov.ph/legislative-documents/.

[37] *Manalo*, 831 Phil. 33.

[38] This is not the first time that *Manalo's* ratio is dissected in academic literature. *See, e.g.*, Amparita Sta. Maria, *From Van Dorn to Manalo: An Analysis of the Court's Evolving Doctrine in the Recognition of Foreign Divorce Decrees in Mixed Marriages*, 63 ATENEO L.J. 101, 114–19 (2018). However, this Article sorts out the arguments in *Manalo* differently from Sta. Maria's thematic segmentation. Further, during the petitioners in *Falcis* also attempted to rely on certain substantive pronouncements in *Manalo* such as applying a liberal interpretation to avoid an unconstitutional reading, or the pronouncement on the fundamental right to marry. RAPPLER, *LIVE: Supreme Court oral arguments on same-sex marriage*, (YouTube, June 19, 2018), https://www.youtube.com/watch?v=tFth0tuFTzg [Hereinafter "RAPPLER (Day 1)"]. In contrast, while it will later also use substantive pronouncements of Manalo, this Article first seeks to dissect Manalo as a reflection of the judicial philosophies of the Court.

[39] *Manalo*, 831 Phil. at 52.

[40] *See id.* at 57–75.

[41] FAM. CODE, art. 26, ¶ 2.

A close reading of Manalo reveals that the Court hedges by applying *both* judicial positivism and judicial pragmaticism to justify the same result. The following section will preliminarily examine the distinction between positivism and pragmatism distinction before explaining how the Court applied both.

A. Contrasting Judicial Pragmatism and Judicial Positivism

For Richard Posner, briefly put, "the positivist starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts."[42]

For a judicial positivist, "the positivist account should guide judicial decision-making in the strong sense that no right should be recognized or duty imposed that does not have its source in positive law."[43] A judicial positivist judge also believes that positive law is the only source of the law's meaning.[44] Thus, they give determinative weight to the authorities which are composed of laws, administrative regulations, and previous cases.[45] In other words, the role of the judge is to apply the law (and all the associated legal authorities).

In contrast, modifying Ronald Dworkin's definition, Posner's working definition of judicial pragmatism is as follows: "a pragmatist judge always tries to do the best [they] can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past[.]"[46] Thus, the goal of pragmatism is to consider present and future needs in arriving at the best decision.[47] The role of authorities is limited to providing informational value and decisional constraints on the judge's freedom.[48] Stephen Breyer expounds on the considerations of pragmatism:

> A good pragmatic decision must take account, to the extent practical, of the way in which a proposed decision will affect a host of related legal rules, practices, habits, institutions, as well as

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[42] Richard Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 240 (Morris Dickstein ed. 1998).

[43] *Id.* at 237.

[44] *Id.*

[45] *Id.* at 237–38.

[46] *Id.* at 237. (Gender neutral language supplied.)

[47] *Id.* at 238.

[48] *Id.*

> certain moral principles and practices, including the practical consequences of the decision, such as how those affected by the decision will react.[49]

In other words, while pragmatism does not exclude legal authorities in its decision making, pragmatism considers law (and all the associated legal authorities), *alongside*, other consideration such as the consequences of the decision.

B. *Manalo's* Application

In applying the positivist approach, the Court examined the following authorities: previous jurisprudence, the text of the Family Code, the intent of the drafters, and the text's relationship with other statutes and the Constitution.

First, the Court surveyed precedent.[50] It found that in previous cases, such as *Dacasin v. Dacasin* and *Van Dorn v. Romillo*, divorces involving a Filipino spouse who initiated such were upheld.[51] It also inferred the same rule from other decisions, namely *Fujiki v. Marinay* and *Medina v. Koike*.[52] Thus, the Court concluded that "[t]here is no compelling reason to deviate from the above-mentioned rulings."[53] For brevity, I will call this the *doctrinal analysis*.

Second, the Court in *Manalo* examined the text.[54] It read the provision plainly, and reasoned that the fact that it is a foreign spouse who initiated the divorce is not demanded by the letter of the law as the law only requires that such divorce abroad was validly obtained.[55] The law, the Court said, did not "distinguish whether the Filipino spouse is the petitioner or the respondent in the foreign divorce proceeding."[56] For brevity, I will call this the *textual analysis*.

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[49] STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 10–11 (2024). (Emphasis supplied.)

[50] *Manalo*, 831 Phil. 33, 52–56.

[51] *Id.* at 52–54 (2018), *citing* Dacasin v. Dacasin, 625 Phil. 494 (2010) *and* Van Dorn v. Romillo, 223 Phil. 357 (1985).

[52] *Id.* at 55–56, *citing* Fujiki v. Marinay [hereinafter "*Fujiki*"], 712 Phil. 524 (2013) *and* Medina v. Koike, G.R. No. 215723, 798 SCRA 733, July 27, 2016.

[53] *Id.* at 56.

[54] *Id.* at 57.

[55] *Id.*

[56] *Id.*

Third, the Court assumed that *"'obtained'"* means to initiate. It looked at the *intent* or purpose of the provision and held that the intent prevails if the letter goes against such.[57] Thus, it claimed that the purpose of Article 26, Paragraph 2 is "to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after foreign divorce decree that is effective in the country where it was rendered, is no longer married to the Filipino spouse."[58] It found the provision to be a corrective measure.[59] Thus, applying the purpose of the provision, there ought to be no difference if it was a Filipino or the alien who initiated the proceeding.[60] For brevity, I will call this the *intent analysis*.

Fourth, the Court stepped out of the Family Code and examined the relationship of this provision to other laws. First, the Court examined the intertextual relationship of Article 26, Paragraph 2 of the Family Code with the nationality principle in Article 15 of the Civil Code ("NCC 15").[61] The Court found that the former is an exception to the nationality principle, as such "is not an absolute and unbending rule."[62] For brevity, I will call this the *intertextual analysis*.

Fifth, and perhaps the most interesting part of *Manalo*, the Court examined the relationship between this provision and the Constitution. The Court reasoned that the nationality principle should not be applied "if it would cause unjust discrimination and oppression to certain classes of individuals whose rights are equally protected by law. The courts have the duty to enforce laws of divorce as written by the Legislature only if they are constitutional."[63] It reiterated that *strict judicial scrutiny* is necessary if there is a fundamental right or a suspect class being interfered with or disadvantaged by the legal classification.[64] The Court also held that such fundamental rights are "those basic liberties explicitly or implicitly guaranteed in the Constitution[,]"[65] which includes the right to marry, which the Court emphasized.[66]

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[57] *Id.* at 57–58.

[58] *Id.* at 58.

[59] *Id.* at 57–58, *citing Fujiki*, 712 Phil. 524, 555.

[60] *Id.* at 58.

[61] *See id.* at 59.

[62] *Id.*

[63] *Id.* (Citation omitted).

[64] *Id.* at 59–60.

[65] *Id.* at 60, *citing* Biraogo v. Phil. Truth Comm'n of 2010 [hereinafter *"Biraogo"*], 651 Phil. 374, 553 (2010) (Brion, *J.*, *concurring*).

[66] *Id.*, *citing* Central Bank Employees Ass'n., Inc. v. Bangko Sentral ng Pilipinas [hereinafter "*Central Bank*"], 487 Phil. 531, 697–98 (2004) (Carpio-Morales, *J., dissenting*).

The Court found the absence of a "real and substantial difference" between Filipinos who initiate the divorce and those who do not.[67] It reasoned that such Filipinos have equivalent rights, obligations, and circumstances, and that the effect of still being "married to their foreigner spouses who are no longer their wives/husbands" was the same.[68] It further argued that such different treatment is arbitrary as it would mean that a person who initiates a divorce in another country on the grounds similarly provided in the Family Code would still not be recognized in the Philippines.[69] For brevity, I will call this the *constitutional analysis*.

In summary, in applying judicial positivism, the authorities considered by the Court were: precedent, the text, the intent, the intertext, and the Constitution.

The Court, however, did not stop with its legal positivist *ratio*. Instead, it shifted to judicial pragmatism.

It addressed the dissent's claim—that there are other mechanisms available to sever such marital ties—by recognizing that such would not be automatically granted.[70] Moreover, it considered the effect on cost, and said that "such proceeding is duplicitous, costly, and protracted."[71] It addressed the argument that such interpretation would open the floodgates for Filipinos marrying foreign nationals by arguing that such was "speculative and unfounded."[72] After claiming that the State policy of the Constitution is not violated by upholding such divorce,[73] the Court claimed that "[a] prohibitive view of Paragraph 2 of Article 26 would do more harm than good."[74] It considered the consequences of prohibitive interpretation which would render subsequent relationships illegal and the children illegitimate.[75] It then reiterated that Article XV, Section 2 of the Constitution not only protects unions formalized by marriage, but also protects "live-in arrangements or to families formed according to indigenous customs."[76] It

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[67] *Id.* at 62.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 64.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 66–72.
[74] *Id.* at 72.
[75] *Id.*
[76] *Id.* at 73.

declared that it "should not turn a blind eye to the realities of the present time" and considered changes in technology and mixed marriages.[77]

The judicial pragmaticism of the Court is best highlighted when *Manalo* reiterated *San Luis v. San Luis*,[78] which emphasized the importance of doing justice in interpreting and applying the law:

> In reiterating that the Filipino spouse should not be discriminated against in his or her own country if the ends of justice are to be served, *San Luis v. San Luis* quoted:
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> x x x In *Alonzo v. Intermediate Appellate Court*, the Court stated: But as has also been aptly observed, we test a law by its results; and likewise, we may add, by its purposes. It is a cardinal rule that, in seeking the meaning of the law, the first concern of the judge should be to discover in its provisions the intent of the lawmaker. Unquestionably, the law should never be interpreted in such a way as to cause injustice as this is never within the legislative intent. An indispensable part of that intent, in fact, for we presume the good motives of the legislature, is to *render justice*.
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> Thus, we interpret and apply the law not independently of but in consonance with justice. Law and justice are inseparable, and we must keep them so.[79]

While the decision of the Court in *Manalo* is criticized, it appears that the critique is primarily rooted in the pragmatist approach by the Court.

In his dissent, Justice Alfredo Benjamin Caguioa emphasized that it is Congress and not the Court's job to adapt the law to changing times, and that "as members of the Court, ours is the duty to interpret the law; this duty does not carry with it the power to determine what the law should be in the face of changing times, which power, in turn, lies solely within the province of Congress."[80] Similarly, Amparita Sta. Maria criticizes *Manalo* by claiming that it was a form of judicial overreach, and that, "in interpreting the law, the judiciary should not go beyond its well-established parameters, not even if the court believes that by doing so, a just and equitable resolution of the case

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[77] *Id.*

[78] 543 Phil. 275 (2007).

[79] *Id.* at 73–74, *quoting* San Luis v. San Luis, 543 Phil. 275, 292–93 (2007). (Emphasis in the original.)

[80] *Id.* at 87 (Caguioa, *J., dissenting*).

would be achieved."[81] However, in my opinion, there was an insufficient discussion in the dissent and by Sta. Maria with respect to the judicial positivist arguments taken by the Court.[82]

These critiques highlight the strength of the dualist *Manalo* framework. Even if one is not persuaded by its judicial pragmatism, one can rely on the independently valuable positivism to end with the same conclusion. The Court did not take an exclusively positivist or pragmatist approach. However, it is also unclear which approach was the decisive factor for the Court. Does a conclusion have to be supported by both approaches? What if an application of both approaches yields contradictory results? *Manalo* appears to be ambivalent about which judicial approach is superior or preferable.

This uncertainty suggests that the Supreme Court has not adopted a dominant judicial approach. In truth, it is difficult to characterize the Supreme Court's judicial approach collectively. Justice Caguioa has renounced this pragmatism.[83] Meanwhile, Justice Jhosep Lopez has proudly identified as judicial pragmatist, who considers the "practical consequences of judicial action, especially within particular contexts."[84] Normatively, much could be said about such ambivalence. However, for the purposes of this Article, this will be treated as a descriptive fact.

Manalo, therefore, can also be read as a signal for advocates. The decision expresses the openness of the Court to consider not only positivist, but also pragmatist arguments. In the face of such uncertainty, the case instructs advocates to take a dualist approach that caters to the possible spectrum of judicial approaches. In doing so, the advocate can ensure that the case is persuasive to any ear that may hear it. This strategy may also

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[81] Sta. Maria, *supra* note 38, at 119; *see also*, Clarice Angeline V. Questin, *PITFALLS OF AN OVERPROTECTIVE COURT: Probing the Supreme Court's Role in Marriage Legislation in the Philippines*, 63 U.S.T. L. REV, 14 (2019). (The document is unnumbered, and thus the page number is derived from the actual page count.)

[82] *See Manalo*, 831 Phil. 33, 86–105 (Caguioa, *J., dissenting*); *see also*, Sta. Maria, *supra* note 38, at 114–19. For example, the ordinary meaning interpretation in *Manalo* was not extensively dealt with by the Dissent.

[83] *Manalo*, 831 Phil. at 87 (Caguioa, *J., dissenting*). "As members of the Court, ours is the duty to interpret the law; this duty does not carry with it the power to determine what the law should be in the face of changing times, which power, in turn, lies solely within the province of Congress."

[84] Jay B. Rempillo, *JUSTICE JHOSEP YLARDE LOPEZ: The Judicial Pragmatist,* BENCHMARK, Volume 9(2), 5 (2024), *available at* https://sc.judiciary.gov.ph/3d-flip-book/volume-9-2-2024/.

insulate the argument from possible shifts in the Supreme Court's judicial approach.

Returning to the recognition of same-sex marriages abroad in the Philippines, like Article 26, Paragraph 2 of the Family Code, Article 26(1) is a conflict of laws provision that aims to grant recognition to a foreign act. Thus, the approach of the Court, may help illuminate how a conflict of laws provision relating to marriage *ought to be*, or at least, *is currently* appreciated. Therefore, I attempt to apply the same dualist framework in justifying their recognition. First, I apply judicial positivism and justify this conclusion on the weight of the available authorities. Second, I argue that the pragmatist approach yields the same conclusion.

IV: THE CASE FOR THE JUDICIAL POSITIVIST

To reiterate, judicial positivism exclusively bases decisions on the positive law, giving determinative authority to legal sources (e.g., law, administrative regulation, precedent).[85] In *Manalo*, the Court considered precedent, text, intent, intertext, and the Constitution as the legal sources. I shall structure the judicial positivist case for recognition along the same authorities.

A. Doctrinal Analysis

There have been many cases decided by the Court on the second paragraph of Article 26 of the Family Code on foreign divorces.[86] Unfortunately, however, the first paragraph of Article 26 does not have the same level of jurisprudential discussion. In 2007, it was claimed that there is a "dearth of jurisprudence" on foreign marriage recognition.[87] Even beyond 2007, I could not find a case that rules squarely on an issue regarding the applicability of Article 26(1), and even less-so regarding same-sex marriages celebrated abroad.[88] This is a novel and unprecedented question. Broadly,

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[85] Posner, *supra* note 42, at 237–38.

[86] *See e.g. Fujiki*, 712 Phil. 524; *Manalo*, 831 Phil. 33; Republic v. Ng, 951 Phil. 785, (2024).

[87] Magante, *supra* note 11, at 374.

[88] There is a case that made some pronouncements regarding Article 26(1). *Ambrose*, 905 Phil. 149. However, as discussed later on, such pronouncements are *obiter dictum* as the case did not involve a foreign marriage. *See infra* Part IV(D)(i).

one must resort to the other authorities, such as the text, to better resolve this question.[89]

B. Textual Analysis

Again, the text of Article 26(1) provides:

> Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 36[,]37 and 38.[90]

Article 26(1) does not mention same-sex marriages.[91] However, applying the rules of statutory construction, the text of Article 26(1) should be interpreted to include same-sex marriages between Filipinos abroad.

A similar reasoning was employed by Senator Defensor-Santiago in explaining her desire to amend Article 26(1):

> The Family Code, Article 26*,* expressly provides that, except for marriages prohibited under Articles 35 (l), (4), (5) and (6), 36, 37 and 38, marriages solemnized abroad and are valid there as such, are recognized as valid here. As a general rule therefore, the Philippine follows the *lex loci celebrationis* rule.
>
> For this reason, same-sex marriages legally celebrated abroad would be considered valid since Article 26 does not include the requirement that the parties have to be a man and a woman. This requirement is not one of the exceptions to the general rule.
>
> Article 26 is a special provision. Thus, *inclusio unius est exclusio alterius.* But Article 26*,* as it is currently worded, conflict[s] with the general provisions of the Family Code.[92]

Moreover, while not making a specific claim regarding the validity of same-sex marriages celebrated abroad, authors like Jose Vitug and

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[89] For this Article, when it is relevant, precedent will be discussed in conjunction with other sources.

[90] FAM. CODE, art. 26, ¶ 1.

[91] *See* Art. 26, ¶ 1.

[92] S. No. 1276, 13th Cong., 1st Sess., Explanatory Note (2004); S. No. 1282, 14th Cong., 1st Sess., Explanatory Note (2007).

Edgardo Paras, have not included same-sex marriages in their list for the exceptions to Article 26(1).[93] For Vitug, when there is a Filipino party to the marriage, the general rule is to apply the law where marriage was celebrated, except when the marriage is:

> (a) Contracted by a national who is below 18 years of age;
> (b) bigamous or polygamous (except as provided for in Article 41);
> (c) contracted through mistake of one party as to the identity of the other;
> (d) contracted following the annulment or declaration of nullity of a previous marriage but before the partition of the property of the spouses, the delivery of the presumptive legitimes of the children and the proper recording thereof;
> (e) contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of the marriage;
> (f) incestuous; and
> (g) void for reasons of public policy (due to the relationship of the parties; see Art. 26, in relation to Arts. 35-38, Family Code).[94]

Further, in *Samson v. Court of Appeals*,[95] the Court has held that exceptions should be "strictly, but reasonably construed" and that "*all doubts should be resolved in favor of the general provisions rather than the exception*."[96] In the absence of any express exception regarding same-sex marriages, any doubt in interpretation must be resolved in favor of the general rule that all marriages validly solemnized abroad, are valid in Philippines.

1. Responding to the Definitional Argument

In contrast, some scholars make a textual argument by invoking the definition of marriage under Philippine law as the basis for non-recognition of same-sex marriages between Filipinos abroad. For example, Elmer Rabuya takes the position that same-sex marriages valid abroad should not

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[93] I JOSE VITUG, CIVIL LAW 256–57 (2003); I EDGARDO PARAS, CIVIL CODE OF THE PHILIPPINES ANNOTATED: PERSONS AND FAMILY RELATIONS, 360–62 (2021 ed.). For Paras, the exceptions are: Arts. 35(1), (4),(5), and (6), 36, 37, 38 of the Family Code.

[94] I VITUG, *supra* note 93.

[95] [Hereinafter "*Samson*"], G.R. No. 43182, 145 SCRA 654, Nov. 25, 1986.

[96] *Samson*, 145 SCRA 654, 659; RUBEN AGPALO, STATUTORY CONSTRUCTION 346–47 (6th ed.) (2009), *citing Samson*, 145 SCRA at 659. *See also,* DANTE GATMAYTAN, LEGAL METHOD ESSENTIALS 4.0 353 (2020), *citing* Benedicto v. CA, G.R. No. 125359, 364 SCRA 334, Sept. 4, 2001.

be recognized in the Philippines by invoking the definition of marriage and arguing that:

> Same-sex marriage is not recognized as valid here in the Philippines, even if the marriage is solemnized abroad and valid there as such. In fact, the same is not even considered a marriage under Philippine laws because marriage is defined in the Family Code as a special contract of permanent union between a man and a woman only. Hence, a same-sex marriage solemnized abroad may not be registered in the Philippine Civil Registry *because the same is not considered by our law as a marriage*.[97]

Galahad Pe Benito also claims that same-sex marriages abroad are not subject to recognition.[98] Although primarily citing Article 2 of the Family Code as basis, [99] Pe Benito also invokes the definition of marriage under Philippine law, such that "while same-sex marriages have been legalized in some jurisdictions, the Philippines is still sticking to the time-honored definition of marriage as 'being between a man and a woman.'"[100]

Taking these arguments further, since Article 26(1) only applies to "[a]ll marriages solemnized outside the Philippines,"[101] it can be argued that same-sex marriages, which are not marriages under Philippine law, are excluded from the provision's application. For brevity, I refer to this as the *definitional argument*.

The underlying premise of this definitional argument is that in interpreting the word "marriage" in Article 26(1),[102] one should apply the Family Code definition of marriage and not the definition of marriage in the country where the marriage was celebrated. Thus, if the marriage celebrated in a foreign country does not comport with the Philippine definition of marriage, then it cannot be recognized.

I argue that this is an incorrect interpretation. First, adding the qualification "in accordance with the laws in force in the country where they were solemnized" to the phrase "[a]ll marriages solemnized outside the

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[97] RABUYA, *supra* note 11, at 54. (Emphasis supplied, citation omitted.)
[98] PE BENITO, *supra* note 11, at 270–71, *citing* FAM. CODE, art. 2.
[99] *Id.* at 271, *citing* FAM. CODE, art. 2.
[100] *Id.*
[101] FAM. CODE, art. 26, ¶ 1.
[102] Art. 26, ¶ 1.

Philippines"[103] textually anchors the definition of marriage not on Article 1, but rather on the laws of the country where they are solemnized.[104] Thus, the meaning of "marriage" in Article 26(1) is different from the general use of "marriage" in the Family Code.

Second, as Jovito Salonga clarifies, the meaning of marriage in Conflicts of Law is broader than the meaning of marriage under Philippine internal law.[105] Salonga warns, "[t]here are marriages contracted in other legal systems that do not exactly conform to our notion of marriage; to deny validity to them in all cases would create chaos in many domestic relationships."[106] To further illustrate, if the Philippines' definition of marriage is different from the definition of marriage in another country, then applying the definitional argument, the marriage celebrated abroad cannot be considered a "marriage" under Philippine law, and therefore Article 26(1) would not apply. For example, the Philippines defines marriage as a "special contract of *permanent* union[.]"[107] However, all countries in the world except the Philippines and the Vatican legalize divorce.[108] Thus, the union or bond formed in other countries is not necessarily permanent. Does this mean that one cannot recognize marriages celebrated in countries where there is divorce because they are not compliant with the definition of marriage under Article 1 of the Family Code?

> For example, the state of California defines marriage as:
>
> [A] personal relation arising out of a *civil contract* between two persons, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).[109]

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[103] Art. 26, ¶ 1.

[104] There has been an argument that Article 26(1) is a special provision and thus the definition in Article 1 and 2 of the Family Code does not apply. Rainbowrainwell, *supra* note 13. I argue, however, that beyond being a special provision, the textual reference of Article 26 to foreign law is what justifies the non-application of the Filipino definition.

[105] II JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 260 (1995 ed.).

[106] *Id.*

[107] FAM. CODE, art. 1. (Emphasis supplied.)

[108] The Week Staff, *Countries where divorce is illegal*, THE WEEK, Apr. 9, 2019, *at* https://theweek.com/100683/countries-where-divorce-is-illegal.

[109] CAL. FAM. CODE § 300(a) (West 2015). (Emphasis supplied.)

Similarly, Pennsylvania defines marriage as a "civil contract" without any mention of the purpose.[110] Both these definitions which consider marriage as a civil contract differ from the Philippine definition which considers marriage to be a *special* contract.[111] Moreover, the Philippine definition includes the specific purpose of such marriage,[112] which is absent in the Californian definition and Pennsylvanian definition. Should the Philippines not recognize any marriage solemnized in California or Pennsylvania because their "marriages" are not defined the same way as marriages under Article 1 of the Family Code? These absurdities suggest that the definition of marriage, for the purposes of Article 26(1), should only be determined by the foreign law where the marriage was celebrated and not Article 1 of the Family Code.

Third, the term "marriage" in the Family Code does not always refer to the marriage defined under Article 1. For example, Article 33 of the Family Code recognizes the validity of certain "[m]arriages among Muslims" without a marriage license.[113] The Code of Muslim Personal Laws of the Philippines has a slightly different definition of marriage as it provides that marriage is "not only a civil contract but a social institution. Its nature, consequences and incidents are governed by this Code and the Shari'a and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations of the spouses."[114] Notably, marriage is not defined as a "permanent union" nor is the social institution described as "inviolable[.]"[115] If we apply the reasoning that for a marriage to be a marriage it must comply with the definition of Article 1 of the Family Code, then marriages under the Code of Muslim Personal Laws of the Philippines would not be considered marriages that could trigger the application of Article 33 of the Family Code. Thus, in some provisions of the Family Code, "marriage" may mean something else notwithstanding its definition under

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[110] 23 PA. CONS. STAT. § 1102 (2024).

[111] FAM. CODE, art. 1.

[112] *See* FAM. CODE, art. 1, i.e., "entered into in accordance with law for the establishment of conjugal and family life."

[113] FAM. CODE, art. 33.

[114] MUSLIM CODE, art. 14.

[115] Unlike FAM. CODE, art. 1, which defines marriage as "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." (Emphasis supplied.)

Article 1 of the Family Code. Similar treatment should be given for the term "marriage" in Article 26(1).

Beyond the text, using the foreign definition of marriage, in contrast to the definitional argument, is better supported by precedent. When dealing with a question of recognition of marriage, the Court has required the proof of the foreign law, necessarily implying that the relevant law is the foreign law, and not Article 1 of the Family Code. In interpreting the marriage comity provision, the Court in *Adong v. Cheong Seng Gee*[116] said, "[t]o establish a valid foreign marriage pursuant to this comity provision, it is first necessary to prove before the courts of the Islands the *existence of the foreign law* as a question of fact, and it is then necessary to prove the alleged foreign marriage by convincing evidence."[117] Similarly, in *Wong Woo Yiu v. Vivo*,[118] the Court made no mention of the Philippine definition of marriage,[119] and when it applied the comity provision, it instead required proof of the Chinese law:

> [I]t may be contended that under […] Article 71 of [the] Civil Code, a marriage contracted outside of the Philippines which is valid under the law of the country in which it was celebrated is also valid in the Philippines. But no validity can be given to this contention because no proof was presented relative to the *law of marriage in China*. Such being the case, we should apply the general rule that in the absence of proof of the law of a foreign country it should be presumed that it is the same as our own.[120]

If a foreign law defines a particular relation to be a marriage, then it should be considered a marriage as well in the Philippines.

Therefore, considering the text of the provision, same-sex marriages are not excluded by the general rule of recognition in Article 26(1).

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[116] [Hereinafter "*Adong*"], 43 Phil. 43 (1922).
[117] *Id.* at 49. (Emphasis supplied.)
[118] 13 SCRA 552.
[119] *Id.*
[120] *Id.* at 555. (Emphasis supplied.)

C. Intent Analysis

Beyond the text, the intent behind Article 26(1) supports the position that same-sex marriages can be recognized. The provision's exceptions did not intend to include same-sex marriages.

First, "[t]he rule of *casus omissus pro omisso habendus est* states that a person, object or thing omitted from an enumeration must be held to have been omitted intentionally."[121] Thus, in the absence of contrary information, this omission of same-sex marriage must be treated intentionally.

This theory of intentional omission is supported by the provision's legislative history. Preliminarily, while the Family Code was a presidential action,[122] the Court has previously considered the deliberations of the Civil Code Revision Committee in ascertaining the intent of Article 26 of the Family Code.[123] With respect to Article 26(1),[124] "[t]he Committee agreed that the intention of the above provision is to except *only* bigamous or polygamous marriages, incestuous marriages and void marriages for reason of public policy."[125] For example, according to Judge Alicia Sempio-Diy, other reasons for invalidity such as Article 35(2) on solemnizing officers,[126] and Article 35(3) on licenses,[127] of the Family Code were intended to be excluded.[128] This is further supported by the actuations of the committee members. When Judge Sempio-Diy wanted to include Articles 35(1), (4), (5), and 36 as additional exceptions to Article 26, the provision was amended to include such.[129] If the list was not intended to be an exclusive list, then such amendment would not have been necessary, thereby evidencing an intention to make the list of exceptions exclusive.

Furthermore, as earlier discussed, the earlier versions of Article 26(1) did not have to enumerate exceptions to the *lex loci celebrationis* rule.[130] Thus, the decision to subsequently add exceptions under Article 71 of the Civil

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[121] AGPALO, *supra* note 96, at 336, *citing* People v. Manantan, 115 Phil. 657 (1962).

[122] *Manalo*, 831 Phil. 33, 49. (Citation omitted.)

[123] *See, e.g.,* Republic v. Orbecido, 509 Phil. 108, 114 (2018).

[124] Although, it was still denominated as Article 26.

[125] Minutes of the 184th Meeting of the Civil Code and Family Law Committees, at 1, June 6, 1987.

[126] FAM. CODE, art. 35(2).

[127] Art. 35(3).

[128] *See* Minutes of the 188th Meeting of the Civil Code and Family Law Committees, at 2, July 16, 1987.

[129] *Id.*

[130] *See supra* Part II.

Code, and later in Article 26(1), [131] suggests that exceptions could not be implied. Otherwise, then there would be no need to amend the provision to add exceptions.

Second, Article 26(1) appears intended to be a curative provision, and thus, should be read liberally in favor of preserving the validity of marriages. A curative statute is "enacted to cure defects in a prior law or validate legal proceedings which would otherwise be void for want of conformity with certain legal requirements."[132] In *Adong*, the Court had to examine the validity of marriages in the Philippines performed in accordance with Muslim rites.[133] The Court had to interpret Section IX of the Marriage Law, which provided:

> No marriage heretofore solemnized before any person professing to have authority therefor shall be invalid for want of such authority or on account of any informality, irregularity, or omission, if it was celebrated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married.[134]

The lower court found that such provision was inapplicable to marriages celebrated between Muslims.[135] In rejecting such argument, the Court textually examined the provision and found that there was no indication of limiting the provision to Christian marriages.[136] Importantly, the Court found that the provision was curative and "intended to safeguard society by legalizing prior marriages."[137] Thus, the Court held that public policy aims to support acts that validate, and not invalidate, marriages.[138]

Like Section IX of General Orders No. 68, Article 26(1) also validates marriages even if they are not fully compliant with the internal rules of the Philippines. Thus, if the intent was to cure marriages that may not be legal in the Philippines, then an interpretation that recognizes same-sex marriages, as opposed to invalidates them, is more consistent with such intent.

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[131] *See* Sec'y of Justice Op. No. 23 (July 29, 2021).
[132] AGPALO, *supra* note 96, at 451.
[133] *Adong*, 43 Phil. 43, 46.
[134] *Id.* at 53, *quoting* Gen. Orders No. 68, § IX (1899).
[135] *Id.*
[136] *Id.* at 53–54.
[137] *Id.* at 56.
[138] *Id.* at 56–57.

1. Responding to the "Never Contemplated" Argument

It could be argued that that same-sex marriages were just *never contemplated* at the enactment of the Family Code and, therefore, could not have been covered by Article 26(1) because it was only in 2001 when a country—the Netherlands—first legalized same-sex civil marriage.[139] In contrast, the Family Code was adopted in 1987.[140]

For brevity, I will call this the "*Never Contemplated" Argument*. There are two parts of this argument: first, the premise that same-sex marriages were not considered during the adoption of the Family Code, and second, the conclusion that, because of such, Article 26(1) should therefore exclude same-sex marriages. I aim to respond to both parts.

The drafting history of the text addresses this argument. On the premise, it is not clear that same-sex marriages were not contemplated by the Family Code. First, it was only the Family Code that expressly added the different sex definition[141] and requirement.[142] Under the Civil Code, Article 52 does not define marriage to be between a man and a woman[143] and Article 53 does not have the different sex requirement.[144] The decision to amend the prohibition is likely to have been motivated by the contemplated possibility of same-sex marriages. If same-sex marriages were never contemplated, it is unclear what the motivation was in including such amendment. This is further confirmed by Justice Flerida Ruth Romero, who was part of the Civil Code Revision Committee,[145] when she narrated later on that the suggestion to include "man and woman" was met with laughter and the claim that such was already understood.[146] However, there was a

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[139] *During Pride Month, A Look At LGBT Rights: New Map Shows Same-Sex Marriage, Civil Unions and Registered Partnerships Worldwide*, HUMAN RIGHTS WATCH, *at* https://features.hrw.org/features/features/marriage_equality/.

[140] FAM. CODE.

[141] Art. 1.

[142] Art. 2(1).

[143] CIVIL CODE, art. 52.

[144] Art. 53.

[145] Minutes of the Meeting of the Civil Code Revision Committee, at 1, May 10, 1983.

[146] Flerida Ruth P. Romero, *Concerns and Emerging Trends on Laws Relating to Family and Children*, 86 PHIL. L.J. 5, 12 (2011); *see also*, UNIVERSITY OF THE PHILIPPINES COLLEGE OF LAW, *Concerns and Emerging Trends in Family Law | Justice Flerida Ruth Romero* (YouTube,

subsequent interjection saying, "[a]h, but you never can tell…"[147] further evidencing that same-sex marriages, or at least the possibility of such, were contemplated.

Second, while same-sex marriages might have been prohibited, it does not mean same-sex relationships were inexistent. The words "homosexuality" or "lesbianism" are not mentioned in the Civil Code.[148] In contrast, the text of the Family Code recognizes the existence of homosexuality,[149] which supports the claim that same-sex relationships were already considered during its adoption. As further discussed later, there were even times when same-sex marriages were celebrated in the Philippines.[150] While homophobia spread during the Spanish colonial period,[151] the LGBTQ were able to be more expressive with their identities during the American colonial period. [152] Thus, it not beyond the scale of imagination that the fact that some country may recognize same-sex marriage in the future was contemplated.

Regarding the second part of the argument or the conclusion, even assuming that same-sex marriages were not contemplated at the time of the adoption of the Family Code, it does not follow that Article 26(1) cannot recognize them.

Aug. 17, 2012), https://www.youtube.com/watch?v=h5mvSwGQTwQ. The Minutes, however, record that it was Professor Esteban B. Bautista and Dean Fortunato Gupit who suggested to enumerate male and female in the requisites of then Article 104, and this was done to modify the originally wording rule of "different sexes." Minutes of the Meeting of the Civil Code Revision Committee, at 2–4, May 10, 1983. Thus, I have not been able to find the record in the Minutes that directly confirm the account of Romero.

147 Romero, *supra* note 146, at 12.

148 *See* CIVIL CODE.

149 *See* FAM. CODE, art. 46(4); *see* FAM. CODE, art. 55(6).

150 *Infra,* Part IV.E.1; Jay Jomar Quintos, *A Glimpse Into the Asog Experience: A Historical Study on the Homosexual Experience in the Philippines*, 9 PLARIDEL 155, 159 (2012); *Falcis*, 861 Phil. 388, 469, *citing* Quintos, *supra* note 150, 161. Although, the proper citation should have been Quintos, *supra* note 150, 159.

151 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, 871 (2014), *citing* Jomar Fleras, *Reclaiming our Historic Rights: Gay and Lesbians in the Philippines, in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 826 (1997).

152 *Id.* at 872, *citing* Jomar Fleras, *Reclaiming our Historic Rights: Gay and Lesbians in the Philippines, in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 827–28 (1997).

First, this argument could also apply to developments in technology that were not contemplated before the Family Code. For example, a marriage conducted through internet teleconference would probably not have been contemplated when the Family Code was adopted, but it would be absurd to say they are excluded by Article 26(1). In answering the question of whether marriages online marriages valid abroad can be recognized, the DOJ still applied the *lex loci celebrationis* rule of Article 26(1) and recently opined in the affirmative:

> First, we note that online marriages between a Filipino and foreign national do not fall under any of the exceptions to the *lex loci celebrationis* rule. Hence, such rule applies to these marriages. Accordingly, so long as these marriages have been solemnized in accordance with the law of the State where the marriage took place and considered valid there as such, the same may be considered valid here in the Philippines. For example, if the law of a foreign State allows the parties, their witnesses and the solemnizing officer to meet online to celebrate the marriage, the marriage may be considered valid here in the Philippines.[153]

Applying the same reasoning, even if at the time of the Family Code, it was unforeseeable for same-sex relationships to be considered marriage, it does not mean that they should not be recognized.

Second, to claim that the provision was only meant to apply to situations that were contemplated during the adoption of the Family Code would rely on an unreasonable assumption that its drafters were aware of intricacies of *all* marriage laws of *all* countries around the world, such that they could have made a judgment of which particular marriages to permit and not to permit. Even courts are prohibited from taking judicial notice of foreign laws.[154] On the contrary, it appears more reasonable to assume that the drafters intended to construct a negative list. Thus, they acknowledged the variety of marriages that could be validated by this provision, and only intended to exclude those they considered sufficiently problematic and thus warranting an express prohibition.

In conclusion, assessing the intent behind the Family Code, it can be said that recognition is better supported, and the fact that same-sex marriages were not included in the list of exceptions was intentional.

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[153] Sec'y of Justice Op. No. 23 (July 29, 2021).
[154] *Manalo*, 831 Phil. 33, 77.

D. Intertextual Analysis

Importantly, Article 26(1) is not the only conflict of laws provision that may be relevant to the issue of same-sex marriages. Instead, two other statutory provisions must also be considered. First, NCC 15, which provides that, "[l]aws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."[155] Second, Article 17, Paragraph 3 of the Civil Code ("NCC 17(3)"), which provides that, "[p]rohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."[156] Thus, an intertextual analysis of both of these provisions is necessary.

1. Regarding Article 15 of the Civil Code

Some scholars and practitioners have used NCC 15 as an intertextual basis to justify the non-recognition of same-sex marriages.[157] While there may be an apparent conflict between Article 26(1) and NCC 15, both provisions can be harmonized. It is a rule that "every statute should be construed in such a way that will harmonize it with existing laws. To interpret and do it in such a way as to harmonize laws with laws is the best method of interpretation."[158] To this end, there could be three ways to harmonize: the *Cumulative Approach,* the *Alternative Approach*, and the *Hybrid Approach*.

First, one can treat NCC 15 and Article 26(1) as cumulative requirements, and thus there are two hoops that Filipinos marrying abroad must jump through before their marriage can be recognized. For brevity, I shall call this the *Cumulative Approach*. This appears to be the approach taken by some scholars in justifying non-recognition of same-sex marriages. Carolina Legarda and Avelino Sebastian also invoke the nationality principle under NCC 15 to argue that void marriages, including same-sex marriages celebrated abroad, should be void.[159]

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[155] CIVIL CODE, art. 15.

[156] Art. 17, ¶ 3.

[157] *See, e.g.,* Malaya & Iglesias, *supra* note 11, at 94; LEGARDA & SEBASTIAN, *supra* note 11, at 46–47, *citing Ambrose*, 905 Phil. 149.

[158] AGPALO, *supra* note 96, at 377, *citing* Manila Jockey Club, Inc. v. CA, G.R. No. 103533, 300 SCRA 181, Dec. 15, 1988.

[159] LEGARDA & SEBASTIAN, *supra* note 11, at 46–47, *citing Ambrose*, 905 Phil. 149.

Second, one can treat certain aspects of the validity of marriage to be governed by the national law, and other aspects of marriage to be governed by the law of the place of celebration. This is a position taken by many scholars.[160] For brevity, I will call this the *Hybrid Approach*.

Third, one can treat the two provisions as alternative ways by which a marriage celebrated abroad could be validated. Thus, if a marriage celebrated abroad between Filipinos complies with either (1) Philippine law, under the nationality principle of NCC 15, *or* (2) the law of the place of celebration, subject to the exceptions under Article 26(1), despite not complying with the other, then it should be recognized in the Philippines. For brevity, this will be called the *Alternative Approach*.[161]

I argue here that the Alternative Approach is the only correct method of interpreting NCC 15 in relation to Article 26(1). This becomes clearer after examining the Cumulative and Hybrid Approaches.

i. Addressing the Cumulative Approach

The Alternative Approach appears to be taken by the Court in *Wong Woo Yiu*.[162] In this 1965 case, the Court examined whether a marriage celebrated with a Filipino citizen[163] before a village leader in China could be recognized.[164] In determining the applicable law, it first applied NCC 15 as basis to apply Philippine law on the possible solemnizing officers.[165] However, after concluding that the nationality principle was not complied

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[160] *See, e.g.,* I ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 261–62 (1990 ed.); RANHILIO AQUINO, ELEMENTS OF PHILIPPINE PRIVATE INTERNATIONAL LAW 200–01 (3rd ed. 2016) [hereinafter "R. AQUINO"]; JORGE COQUIA & ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS: CASES, MATERIALS AND COMMENTS 262 (2000); Elizabeth Aguiling-Pangalangan, *Fundamental Conflict of Laws Concepts as Applied to the Philippine Law on Personal and Property Relations of Couples Within and Without Marriage*, 1 ASIAN COMP. L. 1, 3 (2021).

[161] This is similar to "[t]he *optional rule*" described by Salonga that is followed by many countries and for the *formal* validity of marriage in which the parties must either comply with the law of the place of celebration or the parties' personal law. II SALONGA, *supra* note 105, at 264. This is slightly different from the Alternative Approach, however, as the latter applies to both *formal* and *substantive* requisites of marriage. It must be noted, however, that Salonga classified the Philippines as following "[t]he *imperative or compulsory rule*[,]" which requires the application of the law of the place of celebration exclusively for *formal* validity. *Id.* at 263–64.

[162] *Wong Woo Yiu*, 13 SCRA 552.

[163] *Id.* at 553.

[164] *Id.* at 555.

[165] *Id.*

with, the Court also recognized the possibility of arguing the validity of the marriage based on the *lex loci celebrationis* rule, under Section IV of General Orders No. 68, which evolved into Article 71 of the Civil Code, which is now Article 26(1),[166] to assess the validity of the marriage:

> But it may be contended that under Section 4 of General orders No. 68, as reproduced in Section 19 of Act No. 3613, which is now Article 71 of our new Civil Code, a marriage contracted outside of the Philippines which is valid under the law of the country in which it was celebrated is also valid in the Philippines.[167]

While the Court still applied Philippine law due to the failure of the petitioner to prove the foreign law, that application was simply based on the processual presumption that foreign law is the same as Philippine law.[168] Thus, it can be said that the foreign law, which was presumed to be the same as Philippine law, was applied.[169] This case demonstrates that the treatment of the nationality principle and Article 26(1) should be read as alternative means to determine that a marriage is valid as the Court tested the marriage against both the Philippine law and the foreign law.

Interestingly, the Court did not make any distinction between the formal and essential requisites of marriage.[170] The case involved a question of who can be the solemnizing officer,[171] which under the present Family Code is considered a formal requirement,[172] as opposed to the different sex requirement which is an essential requisite.[173] Thus, contrary to the position of some that it is the *lex loci celebrationis* that governs extrinsic requirements,[174] the Court in *Wong Woo Yiu* held that NCC 15 could also apply to extrinsic or formal requirements of marriage. In other words, the "[l]aws relating to family rights and duties, or to the status, condition, and legal capacity"[175] include formal or extrinsic requirements.

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[166] *See supra*, Part II.

[167] *Wong Woo Yiu,* 13 SCRA at 555.

[168] *Id.*

[169] *Id.*

[170] *See id.* at 552.

[171] *Id.* at 555.

[172] FAM. CODE, art. 3(1).

[173] Art. 2(1); *See also* EDGARDO PARAS, PHILIPPINE CONFLICT OF LAWS 235 (8th ed. 1996). Paras considers the different sex requirement an implied essential requisite.

[174] *See e.g.*, Aguiling-Pangalangan, *supra* note 160, at 3. However, as I will discuss later in this section, I disagree with this distinction.

[175] CIVIL CODE, art. 15.

Taking this further, a Filipino who gets married abroad must still comply with the formal requirements in the Philippines under the Cumulative Approach. This leads to the absurd situation where, despite Article 26(1) excluding reference to Article 35(2) and (3)[176] regarding the authority of a solemnizing officer[177] and the absence of a marriage license,[178] Articles 35(2) and (3) can still be used to reject the recognition of marriage. In contrast, an Alternative Approach will preserve these omissions in Article 26(1), because a marriage can still be valid despite violating Articles 35 (2) and (3) if it complies with the *lex loci celebrationis*.

In contrast, to support the argument that the nationality principle is a cumulative requirement, one could invoke the case of *Ambrose v. Suque-Ambrose*.[179] This case has been previously invoked to support the claim that same-sex marriages celebrated abroad are void and cannot be recognized.[180] There, Paul Ambrose, a US Citizen, and Louella got married in the Philippines.[181] A few years later, alleging psychological incapacity under Article 36 of the Family Code, Paul sought the declaration of nullity of their marriage.[182] This petition was dismissed by the Regional Trial Court which invoked NCC 15 to exclude the applicability of Philippine "laws on family rights and duties, status and legal capacity" to foreigners.[183] Paul Ambrose, meanwhile, argued that NCC 15 was inapplicable.[184] The Court agreed that NCC 15 was inapplicable[185] and applied the *lex loci celebrationis* rule or Philippine law.[186]

Important to this Article's inquiry, in discussing the *lex loci celebrationis* rule, the Court made a statement regarding the exceptions to Article 26(1) for marriages celebrated outside the Philippines:

> Along this line, it is useful to state that when the marriage is celebrated elsewhere, its validity does not depend fully on foreign law. While accepted in the jurisdiction in which it is celebrated, it

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[176] FAM. CODE, art. 26, ¶ 1.
[177] Art. 35(2).
[178] Art. 35(3).
[179] *Ambrose*, 905 Phil. 149.
[180] LEGARDA & SEBASTIAN, *supra* note 11, 46–47, *citing Ambrose*, 905 Phil.
[181] *Ambrose*, 905 Phil. at 149.
[182] *Id.*
[183] *Id.* at 150. (Citation omitted.)
[184] *Id.* at 152.
[185] *Id.*
[186] *Id.* at 152–53.

> may be held invalid in the Philippines when it falls under the instances mentioned in par. 1, Article 26 of the Family Code such as incestuous or bigamous marriages. *As well, irrespective of the place of solemnization of marriage, Philippine laws bind the contracting Filipino citizen with respect to "family rights and duties, status, condition, and legal capacity"; any controversy arising therefrom would then have to be determined in accordance with the same law.*[187]

Ambrose's dictum[188] suggests that NCC 15 should be read as an additional exception to Article 26(1). And, since the Family Code requires marriage to be between a man and a woman,[189] a same-sex marriage between Filipinos abroad would not be valid.

I argue that such pronouncement is *obiter dictum*. *Obiter dictum* is "[a] remark made or opinion expressed by a judge in a decision upon a cause, incidentally or collaterally, and not directly upon the question before the court, or upon a point not necessarily involved in the determination of the cause[.]"[190] First, the marriage in this case was celebrated in the Philippines, and not abroad.[191] It was unnecessary to rule on the applicable law for marriages abroad to determine the applicable law for marriages in celebrated in the Philippines. In fact, Article 26(1) which only applies to "marriages solemnized outside the Philippines"[192] was not applicable, and thus did not have to be clarified or qualified by this case. Second, the issue here was whether a foreigner would have standing to bring forward an action to declare the nullity of the marriage based on psychological incapacity,[193] and not the recognition of a foreign marriage. Thus, the Alternative Approach applied in *Wong Woo Yiu* should be applied, and not the *obiter* applying the Cumulative Approach.

Assuming it was not *obiter,* this view in *Ambrose,* with due respect, should be reconsidered. In supporting its claim, the Court cited *Del Socorro v. Van Wilsem*[194] and made reference to *Manalo*.[195] Unfortunately, these cases

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[187] *Id.* at 153, *citing* Del Socorro v. Van Wilsem [hereinafter "*Del Socorro"*], 749 Phil. 823, 834 (2014) *and Manalo*, 831 Phil. 33. (Emphasis supplied.)

[188] *Id.*

[189] FAM. CODE, art. 2(1).

[190] DANTE GATMAYTAN, *supra* note 96, at 232 (2020 ed.), *citing* City of Manila v. Entote, G.R. No. 24776, 57 SCRA 497, June 28, 1974.

[191] *Ambrose*, 905 Phil. at 149. (Citation omitted.)

[192] FAM. CODE, art. 26, ¶ 1.

[193] *Ambrose*, 905 Phil. at 150.

[194] *Ambrose*, 905 Phil. at 153, *citing Del Socorro*, 749 Phil. At 834.

[195] *Id.*, *citing Manalo*, 831 Phil. 33.

do not seem to support this proposition. In *Del Soccoro*, there was no pronouncement that NCC 15 is an exception to Article 26(1),[196] unlike what was pronounced in *Ambrose*,[197] or any question about the validity of a marriage abroad.[198] Instead, it involved an issue of "[w]hether or not a foreign national has an obligation to support his minor child under Philippine law[.]"[199] The ruling regarding the nationality principle under NCC 15 was used to exclude foreigners from the applicability of the Family Code's rules on support.[200] Thus, such case cannot be used to support any pronouncement regarding the relationship between Article 26(1) and NCC 15 for marriages celebrated abroad.

Similarly, in *Manalo*, the Court did not make any pronouncement regarding the validity of a marriage celebrated abroad. On the contrary, *Manalo* highlights the limited nature of NCC 15, as it pronounced:

> Conveniently invoking the nationality principle is erroneous. Such principle, found under Article 15 of the Civil Code, is not an absolute and unbending rule. In fact, the mere existence of Paragraph 2 of Article 26 is a testament that the State may provide for an exception thereto. *Moreover, blind adherence to the nationality principle must be disallowed if it would cause unjust discrimination and oppression to certain classes of individuals whose rights are equally protected by law.* The courts have the duty to enforce the laws of divorce as written by the Legislature only if they are constitutional.[201]

Beyond jurisprudence, the Alternative Approach is also more consistent with the approach recently taken by the DOJ. In 2019, the Secretary of Justice issued an opinion addressing the question of:

> whether the Philippines can consider these spouses or partners as the legal spouses of said foreign government officials, for the purpose of issuance to them of diplomatic 9(e-1) visas under Section 81 (n) of the Codified Visa Rules and Regulations of 2002

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[196] *See Del Socorro*, 749 Phil.

[197] *Ambrose*, 905 Phil. at 153, *citing Del Socorro*, 749 Phil. At 834.

[198] *See Del Socorro*, 749 Phil.

[199] *Id.* at 831.

[200] *Del Socorro*, 749 Phil. at 834.

[201] *Manalo*, 831 Phil. At 59, *citing* Tenchavez v. Escaño, 122 Phil. 752, 762 (1965), *citing* Barreto Gonzalez v. Gonzalez [hereinafter "*Barreto Gonzalez*"], 58 Phil. 67, 72 (1933). (Emphasis supplied.)

> (CVRR), in relation to the Philippine Immigration Act of 1940, as amended.[202]

The 2019 Opinion applied *both* Article 26(1) and NCC 15 as separate ways to justify the recognition of same-sex marriages between foreigners married abroad:

> Hence, same-sex marriages solemnized abroad between foreigners that are considered valid in the country where the marriages are solemnized may be recognized as valid here in the Philippines on the basis of Article 26 of the Family Code (*lex loci celebrationis*). The personal status of said foreigners as married *may also* be recognized here in the Philippines pursuant to Article 15 of the Civil Code (*lex nationalii or domicilii*).[203]

While this 2019 Opinion was limited to the question of foreign same-sex marriages between foreign diplomats,[204] I argue that a similar rule should also apply to Filipinos, as both Article 26(1) and NCC 15 are applicable to Filipinos.

Moreover, the Alternative Approach is more likely to preserve the validity of marriage as it effectively allows two options for the marriage to comply with to be valid. In contrast, the Cumulative Approach adds more requirements for a marriage to be valid, and thus increasing the chances that the marriage will be invalidated. Applying the Cumulative Approach suggests that the policy of the state is to make marriage more difficult and prefer the invalidation of marriage over its validation. However, given the policy of validating marriages,[205] the Alternative Approach should be applied.

ii. Addressing the Hybrid Approach

Now that I have explained why the Alternative Approach is preferable over the Cumulative Approach, I will explain why the former is also preferable over the Hybrid Approach, which appears to be the position taken by many scholars.

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[202] Sec'y of Justice Op. No. 11 (Mar. 6, 2019).
[203] Sec'y of Justice Op. No. 11 (Mar. 6, 2019). (Emphasis supplied.)
[204] Sec'y of Justice Op. No. 11 (Mar. 6, 2019).
[205] *See Adong*, 43 Phil. 43, 56–57.

Some scholars apply a form of *depeçage*[206] and note that different aspects of marriage should be governed by various laws. For some scholars, legal capacity of Filipinos for marriage is governed by Philippine law. In arguing for an additional exception to Article 26(1), Arturo Tolentino invokes the nationality principle and claims that:

> Our laws relating to the legal capacity of persons are, therefore, binding upon Filipinos wherever they may go. The legal capacity for marriage is clearly defined in our law; the impediments are likewise enumerated. We believe that *when Filipinos are married abroad, their legal capacity to marry must still be tested by the criteria of our law*. All other requisites, not affecting capacity, may be governed by the foreign law.[207]

Ranhilio Aquino similarly argues that Article 26(1) must be read together with NCC 15 and NCC 17(3) and explains, "that compliance with the requirements of foreign law notwithstanding the Filipino spouse must possess the *capacity to marry* according to Philippine law[.]"[208]

For Article 71 of the Civil Code, Article 26(1)'s predecessor,[209] Eduardo Caguioa makes a similar claim that "in relation to Article 15, the capacity of parties, if they are Filipinos, is governed by Philippine law no matter where the parties are and, consequently, their *capacity* to marry will be determined by Philippine law."[210]

Meanwhile, some scholars take a slightly broader position and claim that the personal law governs questions, not just of legal capacity, but of *intrinsic validity*. For Jorge Coquia and Elizabeth Aguiling-Pangalangan, it is one's personal law that controls the intrinsic requisites of marriage.[211] Aguiling-Pangalangan further elaborates by saying, "[t]hough stated as the controlling law in all questions of validity of marriage, *lex loci celebrationis*

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[206] "*Dépe*[*ç*]*age* (from the French 'depecer' meaning 'to dissect') is a term for the phenomenon where 'different aspects of a case involving a foreign element may be governed by different systems of laws.'" COQUIA & AGUILING-PANGALANGAN, *supra* note 160, at 97, *citing* K. Lipstein, The general principles of private international law, 135 Recueil des cours 97, 214 (1972).

[207] I TOLENTINO, *supra* note 160, at 261–62. (Emphasis supplied.)

[208] R. AQUINO, *supra* note 160, at 200–01. (Emphasis supplied.)

[209] *See supra* Part II.

[210] I EDUARDO CAGUIOA, COMMENTS AND CASES ON CIVIL LAW: CIVIL CODE OF THE PHILIPPINES 144 (3rd ed. 1967). (Emphasis supplied.)

[211] COQUIA & AGUILING-PANGALANGAN, *supra* note 160, at 262.

applies only to the extrinsic requirements of marriage."[212] Since the different sex requirement is an essential requirement of marriage,[213] applying this reasoning, Philippine law would apply and a same-sex couple would not be able to invoke Article 26(1) to recognize their marriage abroad.

In contrast, other authors have applied Article 26(1) to questions of intrinsic validity or legal capacity. For Salonga, citing Article 26(1) as basis, the substantive validity of marriages abroad, is primarily governed by the *lex loci celebrationis*.[214] Paras also applied Article 26(1) to one's "[c]apacity to get married[,]"[215] and has said that *lex celebrationis* generally governs the intrinsic or substantial validity of marriage contracts.[216]

I argue that Article 26(1) is not limited to questions of extrinsic validity. Instead, Article 26(1) should govern *all* questions of validity, except for the enumerated circumstances, because the Hybrid Approach does not have sufficient legal basis.

There are two parts to this argument. First, I will explain why the Alternative Approach and not the Hybrid Approach should be applied. Second, I shall deal with the specific iterations of the Hybrid Approach on legal capacity and intrinsic validity individually.

Primarily, "[i]t is a well-recognized rule that where the law does not distinguish, courts should not distinguish."[217] In this case, the text of the phrase "in accordance with the laws in force in the country where they were solemnized"[218] does not distinguish between laws relating to intrinsic validity or extrinsic validity. Similarly, the phrase "valid there as such"[219] does not distinguish between a marriage being formally valid and essentially valid. Finally, the phrase "shall also be valid in this country"[220] does not distinguish between valid for complying with the essential requisites, or valid for complying with the formal requisites. Thus, the text indicates no distinction between the formal and essential validity of marriage.

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[212] Aguiling-Pangalangan, *supra* note 160, at 3.

[213] FAM. CODE, art. 2(1); PARAS, *supra* note 173, at 235. Paras claims that different sexes is an implied essential requisite of marriage. *Id.*

[214] II SALONGA, *supra* note 105, at 271.

[215] I PARAS, *supra* note 93, at 86.

[216] PARAS, *supra* note 173, at 242.

[217] AGPALO, *supra* note 96, at 289; *see Manalo*, 831 Phil. 33, 57.

[218] FAM. CODE, art. 26, ¶ 1.

[219] Art. 26, ¶ 1.

[220] Art. 26, ¶ 1.

In contrast, other choice of law provisions, when limited to only an aspect of validity, do make express distinctions. For example, Article 80 of the Family Code, which discusses the governing law for property relations provides:

> Art. 80. In the absence of a contrary stipulation in a marriage settlement, the property relations of the spouses shall be governed by Philippine laws, regardless of the place of the celebration of the marriage and their residence.
> This rule shall not apply:
>
> (1) Where both spouses are aliens;
> (2) With respect to the *extrinsic validity* of contracts affecting property not situated in the Philippines and executed in the country where the property is located; and
> (3) With respect to the *extrinsic validity* of contracts entered into in the Philippines but affecting property situated in a foreign country whose laws require different formalities for its extrinsic validity. (124a)[221]

Thus, under Article 80 of the Family Code, the discussion of validity is expressly limited to extrinsic validity. If validity under Article 26(1) is interpreted to only refer to extrinsic validity, then there would have been no need to expressly qualify the validity referred to in Article 80.

Similarly, Article 33 of the Family Code also makes reference to the "customs, rites or practices" of Muslims and ethnic cultural communities with respect to the validity of a marriage, for the expressed limited issue of validity despite the absence of a marriage license: "Marriages among Muslims or among members of the ethnic cultural communities may be performed *validly without the necessity of marriage license*, provided they are solemnized in accordance with their customs, rites or practices."[222]

Beyond the Family Code, Article 17, Paragraph 1 of the Civil Code also makes an express qualification limiting the choice of law rule to formal validity when it says, "[t]he *forms and solemnities* of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed."[223] This is also seen in the choice of law rules for wills

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[221] Art. 80. (Emphasis supplied.)
[222] Art. 33. (Emphasis supplied.)
[223] CIVIL CODE, art. 17, ¶ 1. (Emphasis supplied.)

executed by Filipinos abroad. Article 815 of the Civil Code, which governs the extrinsic validity of the will,[224] expressly limits the applicability of foreign law to the form of a will, as it provides, "[w]hen a Filipino is in a foreign country, he is authorized to make a will in any of the forms established by the law of the country in which he may be. Such will may be probated in the Philippines."[225] Meanwhile, Article 16, Paragraph 2 of the Civil Code expressly limits the applicability of the nationality law to intrinsic validity and the order and amount of succession:

> However, intestate and testamentary successions, both with respect to the order of succession and to the amount of successional rights and to the intrinsic validity of testamentary provisions, shall be regulated by the national law of the person whose succession is under consideration, whatever may be the nature of the property and regardless of the country wherein said property may be found.[226]

Thus, in other choice of law provisions, when the law intends to limit which questions of validity the provision applies to, there is clear textual basis to suggest such intent. In contrast, there is no similar indication in Article 26(1).[227]

Further, many meetings during the deliberations were spent amending the list of exceptions,[228] suggesting that such list was deemed to be important. Notably, "a provision of a statute should be so construed as not to nullify or render nugatory another provision of the same statute."[229] In this case, if one were to interpret the nationality principle to govern the intrinsic validity of marriages abroad, and Article 26(1) to govern its extrinsic validity, the enumeration of exceptions, which all pertain to questions of intrinsic validity,[230] would be rendered nugatory as it would be unnecessary. In other words, an interpretation of the general rule in Article 26(1) to be

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[224] III ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 119 (1992 ed.).

[225] CIVIL CODE, art. 815.

[226] Art. 16, ¶ 2. (Emphasis supplied.)

[227] *See* FAM. CODE, art. 26, ¶ 1.

[228] *See, e.g.,* Minutes of the Civil Code Revision Committee, at 9–10, Aug. 15, 1983; Minutes of the 151st Meeting of the Civil Code and Family Law Committees, at 2–11, Aug. 16, 1986.

[229] AGPALO, *supra* note 96, at 364, *citing* People v. Gatchalian [hereinafter "*Gatchalian*"], 104 Phil. 664 (1958); *See e.g.,* Sajonas v. CA [hereinafter *"Sajonas"*], G.R. No. 102377, 258 SCRA 79, 95–98, July 5, 1996.

[230] COQUIA & AGUILING-PANGALANGAN, *supra* note 160, at 261–62.

limited to extrinsic validity would render nugatory the exceptions enumerated in the same provision.

To be fair, some hold the position that the exceptions were intended to reflect the fact that personal law governs the intrinsic validity of marriage. For example, while discussing the exceptions to Article 26(1), Coquia and Aguiling-Pangalangan opine:

> It should be noted that these exceptions put into issue the capacity of parties to enter into the marriage and therefore relate to a substantive requirement for marriage. Since the personal law of the parties, e.g., the national law of Filipinos, governs questions of intrinsic validity of marriage between Filipinos abroad, the above enumerations are exceptions to the *lex loci celebrationis precisely because they are controlled by lex nationalii*.[231]

Paras also claims that "[t]hese exceptions are caused by our nationality theory. *(See Art. 15, Civil Code)*."[232] Similarly, Ed Vincent Albano et al. explain that the exceptions in Article 26(1) are "in view of the controlling rule that what determines the status, condition and legal capacity of Filipinos is Philippine Law (Art. 15, NCC)."[233]

Thus, it could be argued that the exceptions are not an exhaustive list, but rather indicate an intention that all matters regarding the substantive validity of marriage is still governed by one's personal law. There is some support for this position in the provision's legislative history. When Judge Sempio-Diy proposed the approved amendment to add Article 35(1), (4), (5), (6) and Article 36 to the list of exceptions, she reasoned that these pertain to substantive requisites, as opposed to Article 35(2) and (3) which refer to formal requisites.[234]

However, one must distinguish between an intention to exclude *some* matters because they involve intrinsic requisites and an intention to exclude *all* matters pertaining to intrinsic validity. Even if certain exceptions were added because they pertain to intrinsic validity, it does not follow that that

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[231] *Id.* (Emphasis modified.)

[232] PARAS, *supra* note 173, at 236. Although as discussed earlier, Justice Paras does take the position that intrinsic validity is governed generally by *lex loci celebrationis*.

[233] ED VINCENT ALBANO ET AL., FAMILY CODE OF THE PHILIPPINES 356–57 (2020 ed.).

[234] Minutes of the 188th Meeting of the Civil Code and Family Law Committees, at 2, July 16, 1987.

the general rule of Article 26(1) does not apply in all questions involving intrinsic validity. If this was the intention, then the law would not have had to burden itself by enumerating the exceptions. Instead, the law could have a general statement saying that intrinsic validity of marriages is still governed by the personal law. Instead, perhaps these specific matters are so repugnant that they must be excluded.

The provision's legislative history actually better supports this view. Various drafts which generally referenced legal capacity and/or NCC 15 as an exception to the provision were proposed. For example, in the July 11, 1983 meeting, the Civil Code Revision Committee considered a proposal to expressly subject then Article 71 of the Civil Code to the provisions of NCC 15, while Professor Araceli T. Baviera's version made express exception to questions of legal capacity:

> All marriages performed outside of the Philippines in accordance with the law of the country where they are celebrated and valid there as such, shall be valid in this country, except those which are contrary to good morals or public policy: Provided, however, *That the legal capacity to marry of the contracting parties, if both are citizens of the Philippines and are not living permanently abroad, shall be governed by this Code*.[235]

Similarly, during the August 15, 1983 meeting, Professor Bautista proposed amending Article 71's exception clause to be worded as, "'except that where the contracting parties are both citizens of the Philippines, their legal capacity to marry shall be governed by this Code.'"[236] However, in July 12, 1986, the general formulation of the exception clause was abandoned, as the accepted provision specifically enumerated the exceptions.[237] The final version of Article 26(1) also does not have this general formulation, but rather has a specific list of exceptions.[238]

Thus, it was clear that the option of making NCC 15 or the nationality principle a blanket exception to Article 26(1) was considered but not adopted. Shifting from a general formulation to an enumeration suggests

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[235] Minutes of the Meeting of the Civil Code Revision Committee, at 2, July 11, 1983. (Emphasis modified.)

[236] Minutes of the Meeting of the Civil Code Revision Committee, at 1–2, Aug. 15, 1983.

[237] Minutes of the 146th Meeting of the Civil Code and Family Law Committees, at 4–9, July 12, 1986.

[238] *See* FAM. CODE, art. 26, ¶ 1.

an intention that Article 26(1) was to provide a limited and exclusive list. Article 26(1) could apply to matters of intrinsic validity that are not expressly exempted by the provision.

Beyond this, "[i]t is well-settled that whenever possible, a legal provision must not be so construed as to be a useless surplusage, and, accordingly, meaningless in the sense of adding nothing to the law or having no effect whatsoever therein."[239] If Article 26(1) were only intended to refer to extrinsic validity, this would also be redundant as Article 17, Paragraph 1 of the Civil Code already provides that, "[t]he forms and solemnities of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed."[240] Since marriage is a kind of contract,[241] there would have been no need for Article 26(1) if such only refers to formal validity. Article 17, Paragraph 1 of the Civil Code has already been applied to justify the conclusion that the *lex loci celebrationis* should apply to the formal requisites of marriage ceremonies celebrated abroad.[242] This is worse if one considers Article 26(1) as merely expanding the exceptions originally provided for in Article 71 of the Civil Code. Thus, when Article 71 of the Civil Code was still effective, Article 71 and Article 17(1) of the same Civil Code would have provided the same rule.

Again, this is further supported by the opinion of the DOJ in 2019, which also applied Article 26(1) in justifying that same-sex partners of foreign diplomats can be recognized in the Philippines,[243] suggesting the applicability of Article 26(1) to questions of intrinsic validity.

If one were to adopt the ruling in *Ambrose*, the Court applied the *lex loci celebrationis* to determine questions of validity of a marriage celebrated in the Philippines due to psychological incapacity.[244] The Court held, "*all* matters relating to the validity of the contract of marriage, such as the presence or absence of requisites, forms, or solemnities are to be judged in relation to the law in which it has been celebrated or performed."[245] If the *lex loci celebrationis* rule enunciated in Article 26(1), applied by analogy for

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[239] AGPALO, *supra* note 96, at 369–70, *citing* Uytengsu v. Republic, 95 Phil. 890 (1954); *Gatchalian,* 104 Phil. 664; Mejia v. Balalong, 81 Phil. 497 (1948); *and* Niere v. Ct. of First Instance of Negros Occidental, G.R. No. 30324, 54 SCRA 165, Nov. 29, 1973.

[240] CIVIL CODE, art. 17, ¶ 1.

[241] FAM. CODE, art. 1.

[242] I KATRINA LEGARDA ET AL., FAMILY LAW 192 (2023).

[243] Sec'y of Justice Op. No. 11 (Mar. 6, 2019).

[244] *Ambrose*, 905 Phil. 149, 152–53.

[245] *Id.* (Emphasis supplied.)

marriages in the Philippines, could also govern questions beyond extrinsic validity in the Philippines, then there is no reason to limit Article 26(1) to questions of intrinsic validity.

In addition, there does not appear to be any sufficient practical distinction between the essential and formal requisites, which would justify a differing treatment with respect to marriages abroad. One is not more important than the other. Under the Family Code, "[t]he absence of any of the essential or formal requisites shall render the marriage void *ab initio*, except as stated in Article 35 (2)."[246]

It is true that the absence of the solemnizing officer's authority[247] is subject to the exception of good faith of one or both parties,[248] and that the license requirement is subject to exceptions.[249] It is also true that, for formal requisites, irregularities do not affect validity.[250] These distinctions, however, are insufficient to explain a completely different treatment. At most, these justify a different treatment for the requirement of a solemnizing officer's authority or a marriage license, or irregularities in the formal requisites. However, these qualifications do not justify a different treatment for the *absence*, and not mere irregularity, of the formal requirements of the ceremony.[251] Neither do they justify the absence of a marriage license or the authority of solemnizing officer which do not fall under the exceptions provided.

Further, Salonga notes that "[i]n Conflict of Laws, the distinction between formal validity and substantive validity has not been very clear."[252] For some states, a substantive requirement would be classified as a formal requirement.[253] Thus, it could be further argued that making such distinction may lead to unclear results. For example, how would the Hybrid Approach address a situation in which the choice of the partner is considered a formal requirement in another jurisdiction? Should the Philippines apply its own classification of formal and intrinsic requirements? If so, what would be the basis to apply such?

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[246] FAM. CODE, art. 4, ¶ 1.
[247] Art. 3(1).
[248] Art. 4, ¶ 1, *in relation to* Art. 35(2).
[249] Art. 3(2).
[250] Art. 4, ¶ 3.
[251] Art. 3(3).
[252] II SALONGA, *supra* note 105, at 263.
[253] *Id.*

Specific to the variant of the Hybrid Approach that limits the application of NCC 15 to questions of legal capacity, I argue that the different sex requirement under Article 2 of the Family Code[254] is not about legal capacity. Thus, assuming that a Filipino's legal capacity to get married abroad is still governed by Philippine law pursuant to NCC 15,[255] such does not bar one from entering a same-sex marriage.

Textually, the first paragraph of Article 2 of the Family Code regarding the essential requisites is worded as "[*l*]*egal capacity* of the contracting parties *who must be a male and a female*[.]"[256] Intuitively, this phrasing suggests that legal capacity and the requirement for different sexes are two separate requirements. Thus, it may be considered an intrinsic validity requirement, but not an issue with respect to legal capacity. If one's legal capacity were interpreted to include the different sex requirement, then it would be superfluous. It would likewise be contrary to the statutory construction principle of preferring constructions that avoid surplusage,[257] to include the qualification of different sexes in this provision.

In addition, Article 5 of the Family Code defines who are capacitated to marry: "[a]ny male or female of the age of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38, may contract marriage."[258] Thus, if the different sex requirement were to pertain to one's legal capacity, then such requirement should be part of its definition. In contrast, legal capacity "refers to the proper ages and the lack of impediments caused by relationship or by an existing marriage[.]"[259] Again, Articles 37 and 38 of the Family Code do not speak of same-sex relationships.[260]

Thus, there is insufficient basis to apply the Hybrid Model. Instead, Article 26(1) should be read to also govern questions of intrinsic validity or legal capacity, subject only to the exceptions provided in such article.

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[254] FAM. CODE, art. 2(1).

[255] *See, e.g.,* I TOLENTINO, *supra* note 160, at 261–62; R. AQUINO, *supra* note 160, at 200–01.

[256] FAM. CODE, art. 2(1). (Emphasis supplied.)

[257] AGPALO, *supra* note 96, at 369–70, *citing Uytengsu*, 95 Phil. 890; *Gatchalian*, 104 Phil. 664; *Mejia*, 81 Phil. 497; *and Niere*, 54 SCRA 165.

[258] FAM. CODE, art. 5.

[259] PARAS, *supra* note 173, at 235.

[260] FAM. CODE, arts. 37–38.

iii. Assuming Irreconcilability

Article 26(1) and NCC 15 are reconcilable, and the proper way to reconcile them is to apply the Alternative Approach. However, assuming they are irreconcilable, I submit that Article 26(1) and not NCC 15 should govern questions of validity of marriages celebrated abroad, even for Filipinos.

This is the position taken by Paras:

> Capacity to get married depends not on the national law of the parties, but on the law of the place where the marriage was entered into (*lex loci celebrationis* or *locus regit actum*), subject to certain exceptions. (*See Arts. 26, 35 [1], [4], [5] and [6], 36, 37, and 38, Family Code)*[261]

In contrast, explaining why same-sex marriages between Filipino diplomats abroad cannot be recognized, J. Eduardo Malaya and Anna Christina Iglesias invoke the nationality principle.[262]

First, Article 26(1) should be considered the special rule, while NCC 15 is a general rule when it comes to determining the applicable law for marriage recognition. This reasoning was applied by Paras in arguing that, "[i]n case of conflict between a particular provision (Art. 26, Family Code) and general provisions (Arts. 15 and 17, par. 3 of the Civil Code) the particular provision prevails."[263] In *Manalo*, the Court has also recognized that Article 26, Paragraph 2 of the Family Code as an exception to NCC 15.[264] Thus, by analogy, Article 26(1) should also be considered an exception.

Second, the Family Code was adopted in 1987[265] after the Civil Code. Thus, in case of any conflict, "the earlier one must yield to the later one, it being the later expression of legislative will."[266]

This is further supported by the legislative history of Article 26(1). Professor Ruben F. Balane already raised the concern of having to

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[261] I PARAS, *supra* note 93, at 86.

[262] Malaya & Iglesias, *supra* note 11, at 94.

[263] PARAS, supra note 173, at 237.

[264] *Manalo*, 831 Phil. 33, 59 (2018).

[265] FAM. CODE.

[266] AGPALO, *supra* note 96, at 380, *citing* City of Naga v. Agna, G.R. No. 36049, 71 SCRA 176, May 31, 1976 *and* Erana v. Vergel de Dios, 85 Phil. 17 (1947).

harmonize NCC 15 and Article 71 of the Civil Code, and after, the Committee agreed to subject marriages between Filipinos to the provisions of the Civil Code.[267] However, this limitation was not adopted in the final version of Article 26(1),[268] suggesting an intention that Article 26(1) should prevail over NCC 15.

Third, beyond the text of the provision, if one were to examine the purpose that animates the nationality principle under NCC 15, recognizing same-sex marriages does not frustrate such purpose. In fact, it forwards such.

For Salonga, the theory of personal law is justified by convenience and expediency.[269] Regarding convenience, which is based on the concerned individual's interest, the argument is that "the unity and identity of a person should be respected and guaranteed by the consistent application of one and the same law in all countries in all situations."[270] Regarding expediency, Salonga notes that "[e]ach state is said to have a profound interest in the status and the family relations of its subjects or residents." [271] And, "[i]n order to protect its interests more effectively, sole jurisdiction over questions of status is often claimed by the State of the personal law."[272]

With respect to convenience, deferring to the *lex loci celebrationis* of Article 26(1) as opposed to the nationality principle better achieves this goal. At the very least, Article 26(1) ensures that the same-sex marriage will generally be consistently recognized in both the state where the marriage was celebrated and the Philippines. Meanwhile, a strict adherence to and an overextension of the nationality principle would lead to inconsistent recognition because the marriage may be recognized in the place of celebration, but not in the Philippines. Moreover, given that marriage involves at least two people, who can have different nationalities (e.g., mixed marriages), with each person having multiple nationalities (e.g., dual citizens),

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[267] Minutes of the Meeting of the Civil Code Revision Committee, at 2, July 11, 1983.

[268] FAM. CODE, art. 26, ¶ 1.

[269] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 127 (1979 ed.), *citing* I ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 107 (1945). It is important to note that this discussion was for the theory of personal law, and not specifically the nationality principle. However, such reasoning could apply to the nationality principle.

[270] *Id.* at 127, *citing* I RABEL, *supra* note 269, at 107.

[271] *Id.* The last sentence of the paragraph where this statement is located cites I RABEL, *supra* note 269, at 107–08.

[272] *Id.* The last sentence of the paragraph where this statement is located cites I RABEL, *supra* note 269, at 107–08.

there could be a myriad of national laws that must be applied leading to inconsistency. In contrast, applying Article 26(1), generally would yield one result. It is true that Article 26(1) still allows for certain exceptions (e.g., marriages between minors),[273] but limiting the exceptions to what is enumerated would yield less inconsistency and would at least make it clear what the exceptions are.

Regarding expediency, at first glance, it could be argued that applying the nationality principle as opposed to Article 26(1) better forwards the interest of the State as it extends the application of Philippine laws. However, the Philippine interest is multifaceted. Here, it must balance its interest regulating acts of its citizens in relation to marriage[274] ("regulation interest"), and its interest in preserving marriages through recognition[275] ("recognition interest").

The nationality principle would be a blunt instrument in forwarding Philippine interests as it forces the State into a binary of forwarding its regulation interest by prohibiting a certain marriage under internal Philippine law or forwarding its recognition interest by not prohibiting such under internal Philippine law. In contrast, the regime of Article 26(1) gives the Philippines three options. Like the nationality principle, it can first opt to purely forward regulation interest by adding a certain kind marriage to one of its exceptions (e.g., bigamous marriages, marriages between minors). Thus, all marriages of such kind, whether celebrated in the Philippines or abroad, are not recognized. In the alternative, it can opt to purely forward its recognition interest by not providing any restriction, even under internal Philippine law, to a certain kind of marriage. Salonga discusses a similar solution to classify impediments as international or merely national applied by the Codigo Bustamante, Hague Convention, and the Treaty of Montevideo.[276] This classification nullifies marriages with the gravest objections (e.g., between ascendants and descendants), while applying other impediments "only to marriages celebrated within the State."[277]

However, there may be certain kinds of marriages where the Philippines has an interest in preventing its celebration, if it could do so, but if the marriage has *already* been celebrated, the Philippine recognition interest

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[273] FAM CODE, art. 26, ¶ 1, *in relation to* FAM CODE, art. 35(1).
[274] SALONGA, *supra* note 269, at 127–28, *citing* I RABEL, *supra* note 269, at 107–08.
[275] *Adong*, 43 Phil. 43, 56–57.
[276] II SALONGA, *supra* note 105, at 275.
[277] *Id.*

is greater than its regulation interest. For example, the Philippines may generally want its citizens to secure a marriage license before contracting a marriage.[278] However, its regulation interest in such may be less important than the recognition interest of preventing a situation where a Filipino is married in one state but is not married under Philippine law.

For these situations, as a third option, the Philippines can blend both its regulation and recognition interests. Under Article 26(1), the Philippines has an option to prohibit certain marriages to be celebrated in the Philippines but still recognize them if they were already celebrated abroad. This system allows the Philippines to generally reduce the number of such marriages without a license, by prohibiting their celebration in the Philippines. However, it also allows the Philippines to prioritize recognition, by recognizing them if they were celebrated elsewhere. Thus, under the Article 26(1) system, the Philippines has more leeway to more precisely express its interests in its law.

In any case, if there is a trade-off between a definite impact to consistency, as opposed to an uncertain notion of expediency due to the competing interests of the state, then on balance, the purpose of the theory of personal law is better served by applying Article 26(1).

Meanwhile, Vicente Francisco claims that the rationale behind NCC 15 was expressed in the case of *Ibañez v. Hongkong and Shanghai Bank*[279] in Justice Torres's concurring opinion.[280] The quoted portion is as follows:

> Man's activity is not limited and circumscribed within his native country. His manifold dealings with others sometimes impel him to leave it and settle in a foreign land, and as the laws of the other countries to which a person may move in search of work , of improvement, or for other reasons, are varied and diverse, *it has been determined by general assent and common agreement among civilized nations* that the laws relating to family rights and obligations, and the status, condition, and legal capacity of the persons, accompany a person even when he moves to a foreign country; that he is wholly bound to observe the laws of his native land, although he may reside in another and different country.[281]

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[278] *See* FAM. CODE, art. 3(3).

[279] 30 Phil. 228 (1915).

[280] I VICENTE FRANCISCO, CIVIL CODE OF THE PHILIPPINES: ANNOTATED AND COMMENTED, 63 (1953).

[281] *Id.*, *quoting* Ibañez v. Hongkong and Shanghai Bank, 30 Phil. 228, 251 (1915) (Torres, J., *concurring*). (Emphasis supplied.)

The premise of this claim is that there is a general agreement among states. However, as noted by Francisco, "[t]he recent tendency among modern nations is to disregard the nationality principle, and to dissect a juridical act into its component elements and to apply the proper law to each element."[282] Moreover, for marriages abroad, Salonga notes "two competing principles" for what law should be applied in questions "substantive validity of marriage[,]"[283] namely the *lex loci celebrationis* and the personal law, which "reflect the variance in policies and treatment of various legal systems."[284] Such reasoning that supposedly animates NCC 15 cannot apply to the specific question of the essential validity of marriages abroad. Thus, if one were to examine the spirit behind NCC 15, it is not frustrated by the recognition of same-sex marriages.

In sum, NCC 15 should be read in light of the policy of validating marriages.[285] Thus, instead of hindering the ability of two unmarried adult Filipinos to enter a marriage, it should aid them. However, if there is an irreconcilable difference between NCC 15 and Article 26(1), Article 26(1) being the later and special law should govern marriages celebrated abroad.

2. Regarding Article 17(3) of the Civil Code

The next possibly relevant conflict of laws provision is NCC 17(3), which provides that, "[p]rohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."[286] One of the exceptions to the application of a foreign law is if "[t]he foreign law is contrary to an important public policy of the forum."[287]

Preliminarily, Coquia and Aguiling-Pangalangan have noted criticisms by American authors regarding the public policy exception.[288] They note that "the public policy exception can disregard the applicable law

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[282] *Id.* at 63, n.123.

[283] II SALONGA, *supra* note 105, at 268, *citing* I RABEL, *supra* note 269, at 237; *referencing* Clive Perry, *A Conflicts Myth: The American "Consular" Marriage*, 67 HARV. L. REV. 1187 (1954).

[284] *Id.*

[285] *Adong*, 43 Phil. 43, 56–57; *see infra* Part IV.D.2.

[286] CIVIL CODE, art. 17, ¶ 3.

[287] COQUIA & AGUILING-PANGALANGAN, *supra* note 160, at 145–46.

[288] *Id.* at 149.

reached, based on traditional choice-of-law approaches, and replace it with forum law to arrive at its desired result without having to provide the rigorous legal analysis required to explain the shift."[289] In addition, I argue that allowing courts to invalidate marriages on the basis of public policy would effectively allow judges to legislate by expanding the provisions of Article 38 of the Family Code. This Article, however, will temporarily assume the propriety of the public policy exception but argue that recognizing same-sex marriages is not contrary to Philippine public policy.

Some authors have taken the position that same-sex marriage or unions are contrary to public policy. Honorato Aquino claims that a same-sex marriage where it is legal, would "run[ ] counter to an important public policy of the forum."[290] Sta. Maria similarly cites public policy to justify the invalidity of same-sex marriages between Filipinos abroad.[291] Edzyl Magante also considers same-sex unions to be one of the cases where the public policy exception to Article 26(1) applies.[292] In light of *Obergefell,* Ranhilio Aquino provides a more nuanced take, at least for foreigners:

> And so, the question is no longer an idle one how this jurisdiction would treat a same-sex couple that claimed the benefit of marriage under our laws. While it might seem at once that the "public policy" rubric would be sufficient warrant for rejecting any claims to the benefits of marriage, when it is remembered that it is aliens which our laws deal and not our own citizens, then the "public policy" ground does not seem firm enough to support an outright rejection.[293]

I argue that recognizing same-sex marriages between Filipinos abroad is not contrary to public policy.

i. Public Policy and the Family Code

The Family Code itself expressly defines the instances when a marriage would be void for public policy, which do not include same-sex relationships.[294] Interestingly, despite claiming that same-sex marriages are

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[289] *Id.*
[290] H. AQUINO, *supra* note 11, at 50.
[291] STA. MARIA, *supra* note 11, at 204–05.
[292] Magante, *supra* note 11, at 390.
[293] R. AQUINO, *supra* note 160, at 226.
[294] FAM. CODE., art. 38.

contrary to public policy, Sta. Maria has considered this to be an exclusive enumeration.[295]

The exclusive nature of this list is further supported by the drafting history of the Family Code. When public policy was added as an exception to Article 26,[296] aside from marriages that are bigamous, polygamous, or incestuous, such was done by making reference to Article 38,[297] suggesting that the intention of the provision is that Article 38 cover the instances that would be contrary to public policy.

To be fair, there is a part of the deliberations that may suggest the non-exclusivity of the enumeration in Article 38. In discussing the addition of the phrase "'for reasons of public policy'" to Article 38 (then Article 38), Professor Bautista said that such would mean that incestuous marriages covered under Article 37 (then Article 38), would no longer be considered void for public policy.[298] Justice Puno then said that the prohibition for such marriages was based on other reasons and not *just* public policy.[299] This could indicate that the list in Article 38 was not intended to be an exclusive list of marriages that are contrary to public policy. However, this could just be suggestive of a hierarchy in which the incestuous marriages are prohibited for reasons more than merely being contrary to public policy, unlike those that fall under Article 38 of the Family Code that are merely contrary to public policy. Actually, the fact that the such minor change was discussed may be suggestive of an intent to limit the public policy exception to Article 38 of the Family Code. In any case, unlike same-sex marriages, Article 37 of the Family Code is still enumerated as an exception to Article 26(1).[300]

Assuming the list in Article 38 of the Family Code is not an exclusive list, same-sex marriages are not analogous to the marriages considered contrary to public policy. For reference, Article 38 of the Family Code is reproduced:

> Art. 38. The following marriages shall be void from the beginning for reasons of public policy:

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[295] STA. MARIA, *supra* note 11, at 200.

[296] It was referred to as Art. 25 in the Minutes. Minutes of the 151st Meeting of the Civil Code and Family Law Committees, at 6, Aug. 16, 1986.

[297] It was referred to as Art. 39 in the Minutes. *Id.*

[298] *Id.*

[299] *Id.*

[300] *See* FAM. CODE, art. 26(1).

> (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 adopting 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 adopted children of the same adopter; and
> (9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.[301]

The first set under Article 38 relates to marriages between people with existing or previous relationships. For Article 38(1) regarding marriages between collateral blood relatives, Alicia Sempio-Diy explains that such is void "because of the known deleterious effects of such marriages on the offsprings."[302] Obviously, same-sex marriages would not have the same effect. Meanwhile for Article 38(2) regarding the marriage of parents-in-law and children-in-law, it is considered "offensive to one's sensibilities[,]" as well as the close relationship between the child-in-law.[303] For Article 38(3) to (8) regarding relationships related to an adoption, the reason behind such prohibitions are the relationships created by legal fiction.[304] In same-sex marriages, there is no inherent pre-existing relationship that could be interfered with by the marriage. Besides this, the second set refers to the situations where one kills for marriage.[305] The reason behind this appears to be self-explanatory, and obviously would not apply to same-sex marriages. Thus, same-sex marriages cannot even be considered analogous to any of those marriages prohibited under the Family Code.

In claiming a violation of public policy, Honorato Aquino quotes part of Articles 1 and 2 of the Family Code regarding the definition and different sex requirement of marriage respectively.[306] I offer two responses.

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[301] FAM. CODE, art. 38.

[302] ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES, 56 (2010 ed.).

[303] *Id.* at 57.

[304] *Id.* at 57–58.

[305] FAM. CODE, art. 38(9).

[306] H. AQUINO, *supra* note 11, 50–51, *quoting* FAM. CODE, arts. 1–2.

First, Articles 1 and 2 of the Family Code make no mention or attempt to define public policy.[307] It is Article 38 of the Family Code that does.[308] Moreover, there is a difference between the rule on what marriage celebrations are permissible in the Philippines, and the rule on what marriages should be recognized. The latter is treated more liberally under Philippine law. As noted earlier, the definition of marriage under conflicts of law is broader than the definition of marriage under Philippine internal law.[309] Sub-sections (2) and (3) of Article 35 regarding the authority of the solemnizing officer and marriage licenses respectively,[310] would make marriages void if celebrated in the Philippines, but are excluded in the list of exceptions in Article 26, paragraph 1.[311] Thus, one must distinguish between a public policy that supposedly prohibits same-sex marriages to be celebrated in the Philippines, like a public policy that prohibits marriages without a license in the Philippines, with a public policy regarding the *recognition* of same-sex marriages validly celebrated abroad. For example, while it can be said that public policy prohibits marriages without a license in the Philippines, recognizing marriages celebrated abroad without a license cannot be considered contrary to public policy. Similarly, assuming there is a public policy against same-sex marriage celebrated in the Philippines, it does not follow that there is a public policy against recognizing same-sex marriages celebrated abroad.

In the United States, a Maryland court, in discussing the possible recognition of out-of-state same-sex marriages which were internally prohibited in their state, also made a similar distinction:

> Regarding the statutory prohibition exception, Family Law Article § 2–201 does not forbid expressly valid-where-formed foreign same-sex marriages. The plain wording of § 2–201 provides that "[o]nly a marriage between a man and a woman is valid in this State." It does not preclude from recognition same-sex marriages solemnized validly in another jurisdiction, only those sought-to-be, or actually, performed in Maryland. To preclude the former from being valid, the statute in question must express a clear mandate voiding such marriages and abrogating the common law.

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[307] *See* FAM. CODE, arts. 1–2. There is no mention of public policy in any of these provisions.

[308] Art. 38.

[309] II SALONGA, *supra* note 105, at 260; *see supra* Part IV.B.1.

[310] FAM. CODE, art. 35(2), (3).

[311] Art. 26, ¶ 1.

> *Molesworth v. Brandon,* 341 Md. 621, 630, 672 A.2d 608, 613 (1996) ("'[A]bsent a statute expressing a clear mandate of public policy, there ordinarily is no violation of [it].' " (quoting *Watson v. People's Ins. Co.,* 322 Md. 467, 478, 588 A.2d 760, 765 (1991))); *Azarian v. Witte,* 140 Md.App. 70, 95, 779 A.2d 1043, 1057 (2001) (citing *Robinson v. State,* 353 Md. 683, 693, 728 A.2d 698, 702–03 (1999)).[312]

Similarly, Articles 1 and 2 of the Family Code do not have any express prohibition of marriages celebrated outside the Philippines.[313]

Second, a general violation of any provision in the Family Code cannot be considered contrary to public policy. Otherwise, Article 26(1), in relation to Article 38 of the Family Code, which specifies marriages contrary to public policy, would be rendered nugatory.[314] Again, an interpretation that renders a part of a statute nugatory should be avoided.[315]

To illustrate, one can again use the example of the marriage license requirement as provided by Article 3 of the Family Code.[316] One could then say that because Article 3 of the Family Code requires a marriage license,[317] and a violation of such would make the marriage *void ab initio* as pursuant to Articles 4 and 35(3),[318] as well the numerous provisions that were dedicated to govern the license requirement Articles 8, 9, 10, and 11,[319] any marriage without a license would be contrary to Philippine public policy. Thus, applying this reasoning, even if Article 35(3) is not included in the list of exceptions in Article 26(1),[320] a marriage validly celebrated abroad without a license cannot be recognized in the Philippines. This position would be absurd.

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[312] Port v. Cowan [hereinafter "*Port*"], 44 A.3d 970, 977–78 (Md. 2012). (Citations omitted.)

[313] FAM. CODE, arts. 1–2.

[314] Art. 26, ¶ 1, *in relation to* Art. 38.

[315] AGPALO, *supra* note 96, at 364, *citing Gatchalian,* 104 Phil. 664; *See e.g. Sajonas*, 258 SCRA 79, 95–98.

[316] FAM. CODE, art. 3(2).

[317] *Id.*

[318] Arts. 4, 35(3).

[319] Arts. 8–11.

[320] Art. 26, ¶ 1.

ii. Public Policy generally

Since Article 38 defines public policy in the context of marriages, then such should be applied in assessing marriages. However, even if one were to use the general definition of public policy, same-sex marriages are not contrary to Philippine public policy. The Court has previously held:

> And what is public policy? In the words of the eminent Spanish jurist, Don Jose Maria Manresa, in his commentaries of the *Codigo* Civil, public policy (*orden público*):
>
> > [R]epresents in the law of person the public, social and legal interest, that which is permanent and essential of the institutions, that which, even if favoring an individual in whom the right lies, cannot be left to his own will. It is an idea which, in cases of the waiver of any right, is manifested with clearness and force.[321]

Magante claims that this definition is similar to the Judge Cardozo's definition in *Loucks v. Standard Oil Co*.[322] In synthesizing definitions of public policy, Magante writes:

> The lesson from *Loucks* and *Avon* is that courts should be slow to invoke the doctrine of public policy in refusing to recognize a foreign law or judgment in cases where recognition will not violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal[,"]or where the State cannot claim some "public, social or legal interest" which is "permanent and essential[."][323]

Given that these definitions are somewhat subjective, it may help to examine specific cases when the Court did find there to be a violation of public policy. In *Cadalin v. Philippine Overseas Employment Administration's Administrator*,[324] the Court had to resolve whether, for the purposes of the prescription of an action, the applicable law is that of Bahraini or Philippine law.[325] The Court refused to apply Bahraini law on the ground that such "would contravene the public policy on the protection to labor."[326] As basis,

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[321] Avon Cosmetics, Inc. v. Luna, 540 Phil. 389, 404 (2006), *citing* VIII JOSE MARIA MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 606.

[322] Magante, *supra* note 12, at 388.

[323] *Id.* at 389.

[324] G.R. No. 104776, 238 SCRA 721, Dec. 5, 1994.

[325] *Id.* at 760–61.

[326] *Id.* at 762.

the Court invoked the Constitution,[327] and in particular, Article II, Sections 10 and 18, as well as Article XIII, Section 3 regarding the promotion of social justice and the protection of labor.[328]

Meanwhile, in *Saudi Arabian Airlines v. Rebesencio*,[329] the Court invoked the public policy exception as a basis for applying Philippine law to the illegal termination case.[330] In determining the public policy, the Court invoked Article III, Section 1 and Article II, Section 14 of the Constitution on equal protection and the equality of men and women respectively.[331] The Court also invoked the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which made effective Article II, Sec. 14 of the Constitution, and the Court particularly Article 1, which defined discrimination.[332]

Thus, the Court concluded that:

> The *constitutional exhortation to ensure fundamental equality, as illumined by its enabling law, the CEDAW*, must inform and animate all the actions of all personalities acting on behalf of the State. It is, therefore, the bounden duty of this court, in rendering judgment on the disputes brought before it, to ensure that no discrimination is heaped upon women on the mere basis of their being women. This is a point so basic and central that all our discussions and pronouncements – regardless of whatever averments there may be of foreign law – must proceed from this premise.[333]

In addition, the Court also invoked Article 1700 of the Civil Code which declares the public interest in labor contracts and invoked the Court's ruling in *Pakistan International Airlines Corp. v. Ople*.[334]

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[327] *Id.*

[328] *Id., quoting* CONST. art. II, §§ 10, 18 *and* CONST. art. XIII, § 3.

[329] Saudi Arabian Airlines v. Rebesencio, G.R. No. 198587, 746 SCRA 140, Jan. 14, 2015.

[330] *Id.* at 174.

[331] *Id.* at 171, *quoting* CONST. art II, § 14 *and* CONST. art. III, § 1. The text cites CONST. art. II, § 1, however, the text quoted appears to be from CONST. art. III, § 1. Thus, I believe that this was the source intended to be cited.

[332] *Id.* at 171–72, *quoting* Convention on the Elimination of All Forms of Discrimination against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.

[333] *Id.* at 172. (Emphasis supplied.)

[334] *Id.* at 173–74, *quoting* CIVIL CODE, art. 1700 *and* Pak. Int'l Airlines Corp. v. Ople, 268 Phil. 92, 103–05 (1990).

It can be extrapolated from these cases that some of the previous invocations of public policy by the Court involved not only a contravention of a statutory rule, but rather a larger constitutional policy. Moreover, in both these cases, the foreign law would possibly deny a protection afforded Filipinos.

There is no constitutional mandate that prohibits same-sex marriage. The Constitution does not define a marriage to be between a man and a woman.[335] Instead, the Constitution merely declares that, "[m]arriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State."[336] In *Falcis*, the Court noted that "[f]rom its plain text, the Constitution does not define or restrict marriage on the basis of sex, gender, sexual orientation, or gender identity or expression."[337] Further, there is no clear protection afforded to Filipinos that would be denied if same-sex marriages were recognized.

Moreover, prior to *Obergefell*, some courts in the United States have had to deal with the question of whether to recognize same-sex marriages validly celebrated in another state, while not being legal in the forum state. These decisions may aid in concretizing the standard for public policy, especially in relation to the specific question of foreign same-sex marriages.

In *Port,* despite the State law restricting marriage to be between a man and a woman,[338] the Maryland court found that same-sex marriages outside the state were not "repugnant" to Maryland public policy.[339] The State Court held that "[t]he bar in meeting the 'repugnancy' standard is set intentionally very high, as demonstrated in *Fensterwald* and *Henderson*."[340] It distinguished same-sex marriage from *Henderson*, which did not recognize an interracial marriage celebrated in another state,[341] noting that Maryland did

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[335] *See* CONST; *see also*, RAPPLER (Day 1), *supra* note 38; RAPPLER, *LIVE: Supreme Court oral arguments on same-sex marriage*, (YOUTUBE, June 26, 2018), https://www.youtube.com/watch?v=zCwM7sFxbkU&t=364s [hereinafter "RAPPLER (Day 2)"]. Here, the lack of textual limitation in the Constitution was raised in the discussion between the parties and the justices.

[336] CONST. art. XV, § 2.

[337] *Falcis*, 861 Phil. 388, 429–30. (Citations omitted).

[338] *Port*, 44 A.3d. 970, 974–75.

[339] *Id.* at 980.

[340] *Id.* at 979.

[341] *Id.*

not impose a "serious criminal penalty" for performing same-sex marriages.[342]

Similarly, there is no specific crime for celebrating same-sex marriages in the Philippines. However, Art. 350 of the Revised Penal Code provides that:

> The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon any person who, without being included in the provisions of the next preceding article, shall contract marriage knowing that the requirements of the law have not been complied with or that the marriage is in disregard of a legal impediment.[343]

Luis Reyes has enumerated the elements of this crime:

1. That the offender contracted marriage
2. That he knew *at the time that* –
   a. the requirements of the law were not complied with; or
   b. the marriage was in disregard of a legal impediment.[344]

Thus, it could be argued that celebrating a same-sex marriage, in violation of Article 2(1) of the Family Code[345] can be penalized under this provision. This possibility is also recognized by Maria Janina Ann Bordon.[346] *Prision correccional*, however, is classified as a correctional penalty, and not classified as capital punishment or even an afflictive penalty.[347] Thus, it can also be said that it is not severely punished.

In *In Re Marriage of J.B. and H.B.,* to resolve the issue of whether Texas had subject-matter jurisdiction over a Massachusetts same-sex marriage,[348] the Court invoked public policy as an exception to comity,

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[342] *Id.* at 979–80, *citing as an example,* MD. CODE ANN., Fam. Law § 2-406(d)(2) (LexisNexis 2006).

[343] REV. PEN. CODE, art. 350.

[344] II LUIS REYES, THE REVISED PENAL CODE: CRIMINAL LAW 1231 (2021 ed.). (Updated by Rhoda Regina Reyes.)

[345] FAM. CODE, art. 2(1).

[346] Bordon, *supra* note 151, at 910.

[347] REV. PEN. CODE, art. 25.

[348] *In Re* Marriage of J.B. and H.B. [hereinafter "*J.B. and H.B.*"], 326 S.W.3d. 654, 658–59 (Tex. App. 2010).

because of the following reasons: (1) the Texas Constitution defined marriage to be between a man and a woman,[349] (2) same-sex marriages were statutorily declared as contrary to Texan public policy,[350] and (3) claimed that statutory voidness allows the denial of comity.[351] The Court distinguished the case from the then recent New York cases because in New York, there was no law declaring same-sex marriages as void for public policy.[352]

Similarly, in *Kern v. Taney*, where the court had to resolve "whether Pennsylvania should recognize the marriage performed in Massachusetts as a valid marriage[,]"[353] the court based the non-recognition of same-sex marriage on Section 1102 of the Marriage Law that limited the definition of marriage to a man and a woman,[354] and Section 1704 declaring same-sex marriages abroad to be void and contrary to public policy.[355]

In *Port*, the Court there distinguished *Kern* and *J.B. and H.B.* from other cases involving recognition, by claiming that in those states "expressed clear public policies against honoring *foreign same-sex marriages*."[356]

The Philippine situation is more like Maryland, and not Texas and Pennsylvania, which rejected recognition, when those cases were decided. First, unlike Texas, the Philippines does not have a constitutional prohibition or limitation that marriage is between a man and a woman.[357] Second, unlike Texas as discussed earlier, there is no statutory declaration that same-sex marriages are contrary to public policy. Article 38, which lists out the marriages that are contrary to public policy, does not include same-sex marriages.[358] Third, unlike Pennsylvania, while the Philippines has statutory provisions that would declare a same-sex marriage under Philippine law void,[359] the Philippines does not have a statutory provision that declares same-sex marriages abroad to be void. In contrast, the Pennsylvanian law when *Kern* was decided expressly includes same-sex marriages entered into

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[349] *Id.* at 669, *quoting* TEX. CONST. art I, § 32(a).

[350] *Id.*, *citing* TEX. FAM. CODE ANN. § 6.204(b).

[351] *Id.*, *quoting* Loughran v. Loughran, 292 U.S. 216, 223 (1934).

[352] *Id.*

[353] *Kern v. Taney* [hereinafter "*Kern*"], 11 Pa. D. & C. 5th 558, 562 (Pa. Dist. & Cnty. 2010).

[354] *Id.* at 562, *quoting* 23 Pa.C.S. §1102.

[355] *Id.* at 562–63, *quoting* 23 Pa.C.S. §1704.

[356] *Port*, 44 A.3d 970, 982. (Emphasis supplied.)

[357] *See supra* Part IV.E.1 regarding the Constitution not defining marriage to be between a man and a woman.

[358] FAM. CODE, art. 38.

[359] Art. 2, *in rel*ation to Art. 4.

abroad.[360] As discussed earlier, in the Philippines, attempts to prohibit such marriages did not go beyond the committee level.[361]

Furthermore, it can be said that the Philippines has abandoned a policy of discrimination in favor of recognition of same-sex marriages. Luis Jose Geronimo has identified the positive shifts in law, administrative regulation, and jurisprudence.[362] Instead, the policy of the State seems to be to promote equality. Some of these developments were also recognized in *Falcis*.[363] Moreover, the DOJ has also shifted its view in relation to same-sex marriages.[364] In 2002, the DOJ said that a same-sex marriage between two foreigners where it was valid, "cannot be countenanced under Philippine laws for reasons of public policy."[365] In 2017, this view was reiterated by Secretary Aguirre to still be applicable at that time.[366] However, such opinions were superseded in 2019 by Secretary Guevara's opinion, which concluded that foreign same-sex marriages of foreign government officials can be recognized in the Philippines.[367] This suggests that the view that same-sex marriages being contrary to public policy has been abandoned by the DOJ. In fact, regarding the morality of same-sex unions, the 2019 Opinion said, "[w]e note that same-sex marriages are valid in several countries around the world and may not, therefore, be considered to be universally immoral."[368]

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[360] *Kern*, 11 Pa. D. & C. 5th 558, 562–63 (2010), *quoting* 23 Pa.C.S. §1704.

[361] *See supra* Part II.

[362] Luis Jose Geronimo, *Rising Above Contempt: SOGIESC Equality and LGBTQI+ Rights in Philippine Law Through the Lens of Falcis v. Civil Registrar General*, 64 ATENEO L.J. 1309, 1365–1408 (2020).

[363] See *Falcis*, 861 Phil. 388, 469–73.

[364] *See* Malaya & Iglesias, *supra* note 11, at 78–80. Malaya & Iglesias trace the development of different Department of Justice issuances with respect to the recognition of same-sex marriages of foreign government officials.

[365] Sec'y of Justice Op. No. 99 (Nov. 20, 2002).

[366] Sec'y of Justice Op. No. 44 (Oct. 26, 2017).

[367] Sec'y of Justice Op. No. 11 (Mar. 6, 2019).

[368] Sec'y of Justice Op. No. 11 (Mar. 6, 2019). For context, the standard of "universally incestuous or highly immoral" is used by the Secretary of Justice as the only exception to the *lex loci celebrationis* rule for marriages between aliens abroad. Thus, the conclusion of "universally immoral" appears to apply such standard. The 2019 Opinion said: "With respect to the latter [marriages between aliens abroad], the validity of their marriages solemnized outside the Philippines is governed principally by the principle of *lex loci celebrationis*. The only instance when the validity of their marriages will not be recognized here in the Philippines is when their marriages are considered universally incestuous or highly immoral, based on the writings of distinguished authors on Conflict of Laws." Nevertheless, such indicates the shift in the view of the DOJ regarding the morality of same-sex marriages.

Ultimately, the question that must be asked is this: what is so repugnant about same-sex marriages to Philippine public policy that would justify the non-recognition of marriages that are recognized in other countries? NCC 15 and NCC 17(3) should not be read as hurdles against the recognition of same-sex relationships.

E. Constitutional Analysis

Beyond the Civil Code, the Court in *Manalo* relied on another intertextual basis: the Constitution.[369] Here, the Court applied the equal protection clause to justify its interpretation and rejected an interpretation which would violate such provision.[370] Given the unique nature of the Constitution, I separate this discussion from the other intertextual arguments.

To clarify, I argue that on the strength of the previous bases cited, there is already sufficient basis to rule that same-sex marriages abroad should be recognized. Thus, the constitutionality of the prohibition of same-sex marriages in the Philippines is immaterial to this argument. Further, there does not appear to be a credible argument that recognizing same-sex marriages is unconstitutional. Even some of those who have argued against its current recognition in the Philippines still recognize that Congress may legalize same-sex marriages.[371] Thus, the failure to prove that the Constitution *demands* the recognition of same-sex marriages abroad is not equivalent to the prohibition of such recognition if there is an alternative statutory basis for such. In other words, if this argument is not accepted, recognition of same-sex marriages abroad through Article 26(1) is still viable.

Given this, similar to *Manalo*, I argue that an interpretation of Article 26(1) that does not recognize marriages between same-sex Filipinos abroad but recognizes marriages between heterosexual Filipinos abroad would also violate the equal protection clause. Therefore, the interpretation that same-

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[369] *Manalo*, 831 Phil. 33, 59–62.

[370] *Id.*

[371] *See, e.g.,* Norhabib Bin Suod Sumndad Barodi, *Same-Sex Marriage: Exploring the Implications of Obergefell v. Hodges on the Philippines' Muslim Law of Marriage and the 1987 Constitution*, 25 IIUM L.J. 197, 203–04 (2017); STA. MARIA, *supra* note 11, at 205. However, in the discussion between Justice De Castro and the Solicitor General, during the oral arguments of *Falcis*, the latter claimed that there may be issues with the Constitution if same-sex marriages would be legalized. RAPPLER (Day 2), *supra* note 335.

sex marriages between Filipinos abroad can be recognized by Article 26(1) must be adopted.[372]

Previously, Pacifico Agabin has argued that the limitation of marriages to be between a man and a woman violates the equal protection clause especially in its expanded iteration in the Philippines and the right to privacy.[373] Further, during the oral arguments of *Falcis*, the petitioners also raised questions of equal protection as one of their arguments in favor of the unconstitutionality of the prohibition on same-sex marriages.[374] While I believe that a prohibition of same-sex marriages in the Philippines is itself a violation of the equal protection clause, for the purposes of this Article, I shall focus on the recognition of same-sex marriages abroad, which I believe has an even stronger basis. However, I note that there may be overlaps in the constitutional case for recognition of same-sex marriages abroad and existing arguments in favor of the recognition of same-sex marriages in the Philippines.

Legal classifications made by Congress are subject to judicial review.[375] The Court has held that such rules apply to the Family Code, despite not being a congressional creation. [376] The test to be used was also clearly laid by the Court:

> If a legislative classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class *strict* judicial scrutiny is required since it is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve

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[372] A similar line of reasoning was used by the petitioners in the Oral Arguments of *Falcis*, as an alternative claim in which they asked the Court to liberally construe Articles 1 and 2 of the Family Code as to not exclude same-sex marriage. RAPPLER (Day 1), *supra* note 38. This case differs, however, as textually Articles 1 and 2 of the Family Code are quite clear about the prohibition on same-sex marriages, in contrast with Article 26(1).

[373] Pacifico Agabin, *Reaction to Justice Vitug's Professorial Chair Lecture, Coping with the Changing Landscape in Civil Law*, 88 PHIL. L.J. 948, 950–51 (2014).

[374] RAPPLER (Day 1), *supra* note 38.

[375] *Manalo*, 831 Phil. 33, 59, *citing* Ass'n. of Small Landowners in the Phil., Inc. v. Sec'y of Agrarian Reform, 256 Phil. 777, 808 (1989) *and* Sameer Overseas Placement Agency, Inc. v. Cabiles, 740 Phil. 403, 436 (2014).

[376] *Id.* at 61.

> a compelling state interest and that it is the least restrictive means to protect such interest.[377]

In other words, if there is a fundamental right being interfered with, or a suspect class being disadvantaged, then one should apply strict scrutiny, in which the government must establish the classifications necessity in relation to a compelling state interest, and the application of the least restrict means. [378] Here, a fundamental right is interfered with, and thus strict scrutiny should be applied. [379]

1. Fundamental Right

The non-recognition of same-sex marriages abroad violates the fundamental right to marry. There are at least two ways that this right can be established. The first—and admittedly the more intuitive way—is to follow the path charted by US jurisprudence and import such doctrines. To do so, it is argued that the Philippine situation permits such importation. Meanwhile, the second approach is to root the fundamental right to marry in provisions indigenous and unique to the Philippine Constitution.

First, such right can be derived from the equal protection and due process clauses. In *Manalo*, the Court expressly recognized the *right to marry* as a fundamental right.[380] As basis, the Court referenced Justice Conchita Carpio-Morales's dissenting opinion in *Central Bank*,[381] which itself was based on the US case of *Loving v. Commonwealth of Virginia*.[382] The basis,

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[377] *Id.* at 59–60, *citing* Serrano v. Gallant Maritime Services, Inc. [hereinafter *"Serrano"*], 601 Phil. 245, 282 (2009); Mosqueda v. Pilipino Banana Growers & Exporters Ass'n., Inc. [hereinafter *"Mosqueda"*], G.R. No. 189185, 800 SCRA 313, 360, Aug. 16, 2016; *Biraogo*, 651 Phil. 734, 550 (Brion, *J.*, *concurring)*; Int'l Serv. For the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Se. Asia (Phils.) [hereinafter *"Int'l Serv."*], 774 Phil. 508, 706 (2015) (Leonen, *J.*, *concurring*); *and* Poe-Llamanzares v. COMELEC [hereinafter *"Poe-Llamanzares"*], G.R. No. 221697, 786 SCRA 1, 904, Mar. 8, 2016 (Jardeleza, *J., concurring).* (Emphasis in the original.)

[378] *Id.*

[379] The Petitioners in *Falcis* also attempted to make strict scrutiny the applicable test in assessing the constitutionality of the prohibition on same-sex marriages in the Philippines. RAPPLER (Day 1), *supra* note 38.

[380] *Id.* at 60, *citing Central Bank*, 487 Phil. 531, 697–98 (Carpio-Morales, *J., dissenting*). This was also cited by the petitioners in *Falcis* during the oral argument. RAPPLER (Day 1), *supra* note 38.

[381] *Id.*, *citing Central Bank*, 487 Phil. at 697–98 (Carpio-Morales, *J., dissenting*).

[382] *Central Bank*, 487 Phil. At 697–98 (Carpio-Morales, *J., dissenting*), *citing* Loving v. Commonwealth of Virginia [hereinafter *"Loving"*], 388 U.S. 1, 12 (1967).

therefore, of the Court's pronouncements on the fundamental right to marry was imported from the United States.[383]

In *Loving*, Jeter and Loving, an interracial couple who got married in the District of Columbia, were charged for violating an interracial marriage ban in Virginia.[384] The Court had to determine if such prohibition would violate the guarantees of Equal Protection and Due Process under the Fourteenth Amendment.[385] The US Supreme Court found that the ban violates the Due Process Clause, and held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[386] Further, it held that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[387]

The Philippine Constitution also has a due process and equal protection clause under Article III, Section 1. Thus, applying the basis of this Court's precedent,[388] our Constitution also includes the protection of the fundamental right to marry.

However, does the right to marry *exclude* the recognition of same-sex marriages?[389] In the United States, the Supreme Court in *Obergefell* answered in the negative.[390] The US Supreme Court had to address two questions: 1) "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex" and 2) "whether the Fourteenth Amendment requires a State to recognize a same-sex marriage

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[383] US jurisprudence on the right to marry has been classified into two: "'interference with marriage' cases" that refer to "the parties bringing the constitutional challenges claimed that the state was impermissibly interfering with their *already existing* marital relationships." and "'failure to recognize' cases" that refer to parties bringing forth challenges when "the state refused to recognize their relationships as marital." Carlos Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas,* 88. MINN. L. REV. 1184, 1192 (2004).

[384] *Loving*, 388 U.S. 1, 3–4.

[385] *Id.* at 2, *citing* U.S. CONST. amend. XIV.

[386] *Id.* at 12.

[387] *Id., citing* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) *and* Maynard v. Hill, 125 U.S. 190 (1888).

[388] *Manalo*, 831 Phil. 33, 60, *citing Central Bank*, 487 Phil. 531, 697–98 (Carpio-Morales, *J., dissenting*).

[389] *Obergefell*, 135 S.Ct. 2584, 2602. Instead, the issue should be "asking if there was a sufficient justification for excluding the relevant class from the right." *Id.* Parenthetically, the petitioners in *Falcis* also utilized this case. RAPPLER (Day 1), *supra* note 38.

[390] *See Obergefell*, 135 S.Ct. 2584.

licensed and performed in a State which does grant that right."[391] The Court drew on the pronouncements on the right to marry from *Loving*.[392] The Court held that:

> These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. *The Court now holds that same-sex couples may exercise the fundamental right to marry.*[393]

Thus, following *Obergefell*,[394] same-sex couples also not excluded from the fundamental right to marry.

To be clear, however, I do not suggest for blindly applying US jurisprudence without assessing whether such is applicable to the Philippine legal context. During the discussion between the petitioners and Justice Leonen during the oral arguments of *Falcis*, the petitioners limited citing US precedent as persuasive and recognizing it is not binding.[395] Further, doing so extends the colonial influence of the United States over the Philippines. However, even with such caution, the non-exclusion of same-sex couples in the protection of the fundamental right to marry is warranted by the Philippine legal regime. The Philippine legal framework, in contrast to the United States, provides an even stronger basis for the proposition that the right to marry includes the recognition of same-sex relationships. The compatibility of the context is evidenced by the fact that the arguments raised in the Dissents against the recognition of same-sex marriage are less applicable in the Philippine context.

Chief Justice John Roberts's dissent concerned itself with the insufficiency of the text in the Due Process Clause to conclude the existence of a right to marry. He noted that there was no allegation of a violation of an *enumerated* right but only a right *implied* by the Fourteenth Amendment.[396] While he did not advocate for "disavowing the doctrine of implied

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[391] *Id.* at 2593.
[392] *See, e.g., id.* at 2598, *citing Loving*, 388 U.S. 1, 12.
[393] *Id.* at 2604–05.
[394] *Id.*
[395] RAPPLER (Day 1), *supra* note 38.
[396] *Id.* at 2616 (Roberts, *C.J.*, *dissenting*).

fundamental rights[,]" such require "'judicial self-restraint[.]'"[397] Chief Justice Roberts noted that "[o]ur precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[398]

This is not a concern in the Philippines. The right to marry is an *enumerated* right, and thus questions of whether there is a proper exercise of judicial self-restraint is immaterial. Unlike in the United States, the right to marry can be textually anchored in the Philippine Constitution. Section 2, Article XV mandates the State to protect marriage.[399] Further, Section 12, Article II mandates the State to "protect and strengthen the family as a basic autonomous social institution."[400] While the Constitution admittedly does not use the precise phraseology of "right to marry," the only way for this protection to have meaning is if the person can demand such protection, thus necessitating that people have such right to marry that they can enforce. A similar line of argumentation was raised during the discussion of Justice Leonen and the petitioners during the oral arguments in *Falcis*, in which it was argued that the right to marry is a right provided in the Constitution in contrast to the US Constitution and in relation to the dissents in *Obergefell*, which can be implied from provisions on family and marriage in Article II, Section 12 and Article XV, Sections 2 and 3 of the Constitution.[401]

In *Obergefell*, the Court admitted that despite the changing definition of marriage in the United States, such was historically restricted to heterosexual relationships.[402] This admission is cited by Chief Justice Roberts's dissent in claiming that historically marriage was confined to be between a man and a woman in the United States.[403] Philippine history differs. As earlier discussed, during pre-colonial times, "[i]t is readily apparent that the local concept of matrimony was not imprisoned into male-and-female only."[404] Interestingly, the Court has utilized this historical

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[397] *Id.* at 2618 (Roberts, *C.J.*, *dissenting*), *citing* Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

[398] *Id.* (Roberts, *C.J.*, *dissenting*), *quoting* Washington v. Glucksberg, 521 U.S. 702, 720–21.

[399] CONST. art. XV, § 2.

[400] Art. II, § 2.

[401] RAPPLER (Day 1), *supra* note 38.

[402] *Obergefell*, 135 S.Ct. 2584, 2595.

[403] *Id.* at 2613 (Roberts, *C.J.*, *dissenting*).

[404] Quintos, *supra* note 150, at 159.

finding in *Falcis*.[405] Thus, it can be said that the long history of marriage in the Philippines, in contrast to the United States, includes same-sex marriages.

In rejecting the claim that one must advance the dignity of same-sex couples, Justice Clarence Thomas points out that the US Constitution does not have a dignity clause, and the understanding of dignity is a distinct concept out of the reach of the state.[406] In contrast, the Philippine Constitution recognizes the active role of the State in advancing dignity. Article II, Section 13 underscores the importance of dignity, as it provides that "[t]he State values the dignity of every human person and guarantees full respect for human rights."[407] In line with this, Article XIII, Section 1 obligates Congress to "give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."[408] During the oral arguments of *Falcis*, Justice Leonen also pointed out how such clause does not limit its application based on one's identity which includes homosexuals and lesbians.[409]

Justice Samuel Alito also notes the interest of some states to preserve the procreative function of marriage.[410] As will be further discussed later, the Philippine Constitution does not have procreation as an essential feature of marriage.[411] Neither is this procreative purpose included in the definition of marriage[412] nor the requisites of marriage.[413]

Second, while the similarities of the Philippine Constitution with the US Constitution allow one to source a fundamental right to marry from the

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[405] *Falcis*, 861 Phil. 388, 469, *citing* Quintos, *supra* note 150, at 161. Although, it seems that the proper citation should have been, Quintos, *supra* note 150, at 159.

[406] *Obergefell*, 135 S.Ct. 2584, 2639 (Thomas, *J.*, *dissenting*).

[407] CONST. art. II, § 13.

[408] Art. XIII, § 1.

[409] RAPPLER (Day 2), *supra* note 335.

[410] *Obergefell,* 135 S.Ct. at 2641–42 (Alito, *J., dissenting*).

[411] *See* i*nfra* Part IV.E.3.

[412] *See* FAM. CODE, art. 1. While Article 1 does provide that marriage is "for the establishment of conjugal and family life[,]" Article 50 defines "[f]amily relations" to include a relationship "[b]etween and husband and wife[.]" FAM. CODE, arts. 1, 50. Thus, family in this sense could still refer to a childless marriage.

[413] *See* FAM. CODE, arts. 2–3.

equal protection and due process clauses, I alternatively argue that its nuances permit such right to be alternatively rooted beyond such clauses.[414]

Article XV, Section 2 of the Constitution is clear, that marriages are entitled to protection by the State.[415] Meanwhile, Article XV, Section 1 obligates the State to promote the solidarity of the family.[416] Thus, reading both provisions together the State is obligated to strengthen the solidarity of marriage, being the foundation of the family.[417] Therefore, the State is obligated to protect the solidarity of marriage.

The question then is: what is the constitutional meaning of "marriage?" If one is not able to comprehensively answer such, at minimum, one must answer the question: does "marriage" exclude same-sex marriages?

I do not attempt to provide a comprehensive constitutional definition of marriage. It is not necessary for as long as I am able to establish that such definition *does not exclude same-sex marriages*. This claim, therefore, is has two limbs. First, I argue that there is insufficient basis to conclude that same-sex marriages are excluded by the constitutional definition of marriage. Second, given this uncertainty, I conclude that the prudent choice of action is to recognize same-sex marriages.

On the first limb, admittedly, some have taken the position that "family" refers to "a stable heterosexual relationship."[418] However, the Constitution does not textually limit marriages to unions between a man and a woman.[419] Further, the Court noted that "[l]acking a manifestly restrictive textual definition of marriage, the Constitution is capable of accommodating a contemporaneous understanding of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC)."[420]

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[414] As noted earlier, a similar line of reasoning was applied in the *Falcis* oral arguments in the discussion between Justice Leonen and petitioner on how our Constitution has provisions on the protection of marriage. RAPPLER (Day 1), *supra* note 38. In contrast, however, this analysis seeks to directly link such with the recognition of same-sex marriages abroad.

[415] CONST. art. XV, § 2.

[416] Art. XV, § 1.

[417] Art. XV, § 2, *in relation to* Art. XV, § 1.

[418] JOAQUIN G. BERNAS, THE 1987 PHILIPPINE CONSTITUTION A REVIEWER-PRIMER 24 (3rd ed. 1997); Sec'y of Justice Op. No. 99 (Nov. 20, 2002), *citing* JOAQUIN G. BERNAS, THE 1987 PHILIPPINE CONSTITUTION A REVIEWER-PRIMER 20 (2002 ed.).

[419] *Falcis,* 861 Phil. 388, 429–30.

[420] *Id.* at 431.

Moreover, one cannot claim that marriage was *understood by the Filipino people* to be between a man and a woman. If one applies the statutory textual definition of marriage at the time of the adoption of the Constitution, marriage was not expressly limited to be between a man and a woman. The Civil Code, which was in force at the time of the ratification of the 1987 Constitution, did not define marriage to be between a man and a woman.[421] It was only the Family Code that expressly defined marriage to be between a man and a woman,[422] which has led to suggestions that the Civil Code was more progressive.[423] The later amendment supports the position that the original understanding of marriage was that it was not restricted to be between different sexes. What would be the point of making such amendment if that was already established?[424]

If one were to assess the *historical practice* of marriage, it cannot also be said that marriage obviously was between a man and a woman especially in the context of the Philippines. In pre-colonial times, "[i]t is readily apparent that the local concept of matrimony was not imprisoned into male-and-female only."[425] Interestingly, the Court has adopted this historical finding.[426] Therefore, prior to the ratification of the Constitution, there were times when same-sex marriages existed.

One cannot also claim that marriage was *intended by the framers* to be between a man and a woman. The question of what the meaning of marriage was discussed by the framers of the Constitution:

> MR. BENNAGEN. […] May I know the understanding of the committee on the word "marriage," since there seems to be a premise here that is left unstated?
>
> MS. NIEVA. Generally, I think the accepted definition of marriage is the union of a man and a woman.

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[421] CIVIL CODE, art. 52; Agabin, *supra* note 373, 951. "In this sense, we can say that the Civil Code's provisions on marriage were more progressive than that of the Family Code, for the former had no express provisions specifying that the parties to a marriage contract should be male and female."

[422] FAM. CODE, art. 1.

[423] Agabin, *supra* note 373, 951.

[424] *But see* Romero, *supra* note 146, at 12; UNIVERSITY OF THE PHILIPPINES COLLEGE OF LAW, *supra* note 146.

[425] Quintos, *supra* note 150, at 159.

[426] *Falcis*, 861 Phil. At 469, *citing* Quintos, *supra* note 150, at 161. Although, respectfully, it seems that the proper citation should have been, Quintos, *supra* note 150, at 159.

> MR. BENNAGEN. Is that the same thing as the folk norm of "nagsama sila"?
>
> MS. NIEVA. I think not. We are not defining marriage as just an agreement between the two spouses without the State's sanction.
>
> MS. NIEVA. Mainly we are talking here of marriage as generally known, yes.
>
> MR. BENNAGEN. Is that forcing all spouses to undergo a certain legal or religious ritual but not folk ritual as in the concept of "nagsama"?
>
> MS. NIEVA. We are saying that, in general, marriages are founded on the full consent of spouses.
>
> MR. BENNAGEN. Is it not merely a Christian, middleclass bias?
>
> MS. NIEVA. We are saying that other cultures may have other traditional models of marriage and family life, and we respect them.[427]

The statements of Ms. Nieva was cited by the Solicitor General in claiming that the definition of marriage was limited to heterosexual relationships.[428] However, while Ms. Nieva claimed that "marriage is the union of a man and a woman[,]"[429] such definition was not absolute as it was qualified by the word "[g]enerally[.]"[430] Moreover, there was opposition from Mr. Bennagen on imposing a Christian conception of marriage.[431] And later on, Ms. Nieva appeared to have accepted the possibility of alternative models of marriage.[432] Further, in discussing the provisions on marriage, there was opposition by Mr. Bengzon to adding Catholic doctrine to the Constitution.[433] It is thus clear from the discussion that there was no unanimously accepted definition of marriage. In contrast, there was a willingness to respect and recognize diverse models of marriage. Returning to same-sex marriages celebrated abroad, if such is acceptable within the

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[427] 5 RECORD CONST. COMM'N 1, 44–45 (Sept. 24, 1986).
[428] RAPPLER (Day 2), *supra* note 335.
[429] 5 RECORD CONST. COMM'N 1, 44 (Sept. 24, 1986).
[430] 5 RECORD CONST. COMM'N 1, 44 (Sept. 24, 1986).
[431] 5 RECORD CONST. COMM'N 1, 44–45 (Sept. 24, 1986).
[432] 5 RECORD CONST. COMM'N 1, 45 (Sept. 24, 1986).
[433] 5 RECORD CONST. COMM'N 1, 54 (Sept. 25, 1986).

culture where it was celebrated, then it could even be said that it would be akin to the to "other traditional models of marriage and family life" that was considered respected.

Thus, as a preliminarily conclusion, there is no clear evidence that same-sex marriages are excluded from the constitutional understanding of marriage. Proceeding to the second limb of the argument, given this uncertainty, what must be done?

One may be tempted to claim that Congress may then define what marriage is. Joaquin Bernas takes the position that, "[i]t remains the province of the legislature to define all legal aspects of marriage and prescribe the strategy and the modalities to protect it."[434] During the Oral Arguments of *Falcis,* the petitioners similarly adopted the position as laid out in *Antonio v. Reyes* that Congress has the power to set the parameters of marriage, subject to the qualification that such is consistent with the Constitution.[435] In contrast, however, respectfully submit that this view must be qualified.

First, the fact that the Constitution does not define a particular term or concept does not necessitate that Congress should be able to define such. In fact, the question of the power of the Congress to define has been left open by the Court in *Falcis*.[436]

The Constitution does not expressly delegate to Congress the power to define the meaning of marriage. This is unlike other terms in the Constitution such as "idle or abandoned agricultural lands"[437] and "political dynasties"[438] which provide that they "may be defined by law."[439] Julia Therese Pineda argues that "[a]ppreciating the Constitution as a whole, it becomes evident that it employs phrases such as 'defined by law,' 'provided by law,' 'determined by law,' 'made by law,' and others of similar import when it intends to delegate to Congress the power to supplement its

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[434] JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1314 (2009 ed.), *citing* Antonio v. Reyes, G.R. No. 155800, 484 SCRA 353, Mar. 10, 2006.

[435] RAPPLER (Day 1), *supra* note 38.

[436] *Falcis*, 861 Phil. 388, 434.

[437] CONST. art. XVIII, § 22.

[438] Art. II, § 26.

[439] Art. XVIII, § 22; Art. II, § 26.

provisions."[440] As noted by Bryan Dennis Tiojanco and Paolo Tamase, the 1987 Constitution has over 100 clauses, known as by-law clauses, that delegate the "fleshing out of certain norms to future legislation"[441] Thus, it cannot be assumed that it is Congress that has the power to define marriage or family.

In the context of public utilities, Pineda similarly argues that a lack of a definition in the Constitution does not mean that Congress is given the power to define such, as opposed to using a judicial interpretation, similar to the Bill of Rights which does not empower Congress to define such.[442] Pineda claims, that "in the absence of any express language written into Section 11, Article XII, there is no constitutional grant of authority to Congress to supplement the Constitution with statutory definition of a public utility."[443]

I do not intend to take a position on whether, in all cases, a "by law" clause is necessary for Congress to be permitted to supply a definition of a constitutional term. However, at least in matters involving rights and protections intended to limit the power of the government, Congress's power to define should be restricted without an express authority by the Constitution. The power to define carries with it the power to limit. If a right is constitutionally recognized for the purpose of preventing its limitation, then Congress would be able to frustrate such protection by limiting the scope of the statutory definition. For example, the Constitution does not define "religion."[444] Can Congress, in the absence of such definition, pass a Religion Code and, in Article 1 of such Code, define religion to be "a faith that believes in Jesus Christ?" Can the State then deny protection to people

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[440] Julia Therese Pineda, *A Pound of Flesh for Foreign Investment: A Study on the Constitutionality of Liberalizing Foreign Ownership of Public Utilities Through Legislative Action*, 93 PHIL. L. J. 732, 746–47 (2020). (Citations omitted.)

[441] Bryan Dennis Gabito Tiojanco & Paolo S. Tamase, *Parrying Amendments: The Philippines' Multi-Tiered System of Constitutional Change*, *in* COMPARATIVE CONSTITUTIONAL LAW, VOL. 2: CONSTITUTIONAL AMENDMENTS 254 (Bui Ngoc Son & Mara Malagodi eds. 2024). (Citations omitted.)

[442] Pineda, *supra* note 440, at 746. Pineda, further, argues that the power to statutorily define should be expressly delegated by the Constitution, similar to other provisions. *Id.* at 746–50. I do not necessarily subscribe to such strict express requirement before delegation can take place. However, in the context of rights and particularly protections intended to limit the power of the government, then Congress's power to define should be restricted.

[443] *Id.* at 750.

[444] *See* CONST.

whose faith does not include believing in Jesus Christ, because they do not fit under the definition provided by law? I hope not.

To clarify, this position slightly differs from the position taken by the petitioners during the oral arguments in *Falcis* when they conceded that pursuant to the case of *Antonio v. Reyes*, Congress does have Congressional authority to define, but such is limited by the Constitution. Instead, I suggest that Congress cannot define marriage but at most apply the Constitutional meaning of marriage.

Second, the Constitution does not create marriage, but merely recognizes such, and the bounds of marriage are sourced from the social institution as it is, and not Congress. The text of the Constitution recognizes marriage as a social institution, which is the foundation of the family,[445] which in turn, is the foundation of the nation.[446] This phraseology suggests that marriage and family have a separate existence from the State. Further, Article II, Section 12 of the Constitution recognizes the "autonomous" nature of the family,[447] which further supports its separate existence. I argue, therefore, that extent to which the State is given power over marriage is to protect such. This *power to protect* should be distinguished from the *power to limit*. Protection presupposes existence. The metes and bounds of marriage already exist and is thus not subject to congressionally constructed limitations.

If marriage is not up for Congress to define, what is the definition, then? Again, this Paper does not aim to provide a clear-cut definition of marriage. While I argue that such definition exists, as an institution, marriage's borders may be porous or even evolving. Given this, I suggest an alternative way to deal with the definitional question with respect to marriages.

As preliminary matter, perhaps, one can agree that there are certain relationships that would uncontrovertibly fall under the constitutional definition of marriage (e.g., a heterosexual marriage between two consenting adults who were never previously married). Similarly, there are certain relationships that are uncontrovertibly not marriages (e.g., two acquaintances who did not undergo any ceremony or proceeding). The problem only arises with respect to relationships which have some uncertainty or doubt as to

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[445] Art. XV, § 2.
[446] Art. XV, § 1.
[447] Art. II, § 12.

whether they comply with the definition of marriage—which I will call *gray marriages* (e.g., a couple where one is a divorcee, or for the purposes of this argument, a homosexual couple who celebrates a marriage).

In the absence of the power of the Congress to define, how then should Courts rule on the validity of a gray marriage? I note two possible approaches. First, one can take a conservative approach which excludes such gray marriage from the definition of marriage. Second, one can take a liberal approach which includes such gray marriage. A liberal approach in favor of recognizing its validity must be taken as it better fulfills the constitutional mandate.

The policy of the Constitution with respect to marriage is to mandate its protection.[448] Assuming it is impossible to know if a purported marriage *is truly* a marriage under the Constitution, one must evaluate the trade-offs of a conservative approach and a liberal approach.

The trade-off of the *conservative approach* is that it could result in *false negatives*—or marriages that should be recognized but are not recognized. In such situations, the constitutional mandate to protect such marriage[449] is violated. In contrast, the trade-off of a *liberal approach* is that there may be *false positives*—or marriages that should not be recognized but are recognized. The Constitution does not prohibit the protection of non-marriages, or even to protect marriages to the exclusion of non-marriages. In other words, if the State were to protect a relationship that would not fall under the category of a marriage, no constitutional provision is necessarily violated. Thus, if one were to apply the liberal approach, there is no violation of the Constitution. When weighing both alternatives, therefore, the conservative approach risks violating the Constitution, while the liberal approach does not. Prudence therefore dictates that the liberal approach must be adopted.

2. Strict Scrutiny Analysis

The next question that must be asked then is, what is the compelling state interest in recognizing only heterosexual marriages celebrated abroad?

To be clear, given the applicability of strict scrutiny, this interpretation would be presumed to be unconstitutional, and it is the burden

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[448] CONST. art. XV, § 2.
[449] Art. XV, § 2.

of the government to justify the classification.[450] Unfortunately, there is no sufficient basis to justify the classification. The difficulty in initiating this analysis is that it is very difficult explain what the state interest is in not recognizing same-sex marriages celebrated abroad. The text of the law offers no explanation.[451] The deliberations of the Civil Code Revision Committee regarding such change also do not offer any clear explanation for why the different sex requirement was added[452] and the inclusion of man and woman in the marriage definition was made.[453]

Perhaps, this is because there was and is really none in the first place, and thus making the law—if read to not recognize same-sex couples—unconstitutional. The Solicitor General in the oral arguments in *Falcis* made the claim that the State has the interest to maintain the traditional conception of marriage.[454] However, as noted earlier, the conception of marriage has changed over time and included same-sex marriages.[455] During the Oral Arguments, in the discussion with Justice Leonen, it was also pointed out how the laws of marriage has changed over time.[456] To me, the only reasonable argument is the state interest is procreation. The inability to procreate is the substantial distinction proffered by Barodi, "rights and benefits given by the State to opposite-sex marriages by reason of possibility of procreation, reproduction, rearing of children 'produced,' etc., can be validly denied to same-sex unions where there is zero possibility of procreation."[457] This was also raised by the Solicitor General in *Falcis* and the intervenor-oppositors.[458] Similarly, Romero claims that procreation is

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[450] *Manalo*, 831 Phil. 33, 59–60, *citing Serrano*, 601 Phil. 245, 282; *Mosqueda*, 800 SCRA 313, 360; *Biraogo*, 651 Phil. 734, 550 (Brion, *J.*, *concurring)*; *Int'l Serv.*, 774 Phil. 508, 706 (Leonen, *J.*, *concurring*); *and Poe-Llamanzares*, 786 SCRA 1, 904 (Jardeleza, *J., concurring).* This position was also similarly taken by the petitioners in *Falcis*. RAPPLER (Day 1)*, supra* note 38.

[451] *See* FAM. CODE.

[452] *See* Minutes of the Meeting of the Civil Code and Family Law Committees, at 2–4, May 10, 1983.

[453] *See* Minutes of the 177th Meeting of the Civil Code and Family Law Committees, at 37, Mar. 21, 1987.

[454] RAPPLER (Day 2), *supra* note 335.

[455] Quintos, *supra* note 150, at 159; *Falcis*, 861 Phil. 469, 429–30, *citing* Quintos, *supra* note 150, at 161. Although, respectfully, it seems that the proper citation should have been, Quintos, *supra* note 150, at 159. Further, during the oral arguments in *Falcis*, it was discussed by Justice Leonen and the petitioners that the definition of marriage has changed. RAPPLER (Day 1)*, supra* note 38. *See also* RAPPLER (Day 2), *supra* note 454.

[456] RAPPLER (Day 2), *supra* note 335.

[457] Barodi, *supra* note 371, at 223–25.

[458] RAPPLER (Day 2), *supra* note 335.

"the unstated primary and primal purpose of the union between a male and a female[.]"[459]

This is insufficient. First, if that were indeed the goal, this would go against a corollary right guaranteed by the Constitution. Article XV, Section 3(1) "[t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood[.]"[460] Bernas notes that "[a]t heart of this provision is the desire to protect the right of parents to determine the size of their family."[461] Although it appears that the focus was on laws that would limit the size of the family,[462] necessarily included therefore would be the right *not* to have children. Thus, if the state interest was to compel procreation, such could run afoul with this right. Second, in the oral arguments of *Falcis*, the discussion of Justice Leonen and Falcis also suggested that marriage does not necessarily require procreation.[463] In its decision, the Court in *Falcis* has already noted the evolution of family from placing a great focus on procreation as its end goal, to marriage being "based on free choice, romantic love, and companionship[.]"[464] Third, it is not clear why "procreation" must refer to biological procreation. Under the law, an adopted child is "entitled to all the rights and obligation provided by law to legitimate children […] without discrimination of any kind."[465] Thus, it would be absurd to suggest that the state policy is to signal a preference for having biological children over adopting a child.

Thus, it would be absurd to suggest that the state policy is to signal a preference for having biological children over adopting a child.

Finally, assuming there is a state interest, it is made even more difficult with the focus of this Article on the question of same-sex marriages celebrated abroad, as opposed to those celebrated in the Philippines. Since the marriage is already celebrated abroad, such interest must be balanced

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[459] Romero, *Concerns and Emerging Trends*, *supra* note 146, at 12.

[460] CONST. art. XV, § 3(1).

[461] BERNAS, *supra* note 434, at 1315.

[462] *Id.*, *citing* V RECORD CONST. COMM'N. 92, 58–59 (Sept. 25, 1986).

[463] RAPPLER (Day 1), *supra* note 38.

[464] *Falcis*, 861 Phil. 388, 432–33. (Citations omitted.) In the discussion between Justice Martires and the Solicitor General it was also pointed out that evidence of the capacity to procreate is not a requirement to apply for a marriage license. RAPPLER (Day 2), *supra* note 335.

[465] Rep. Act No. 11642 (2022), § 41.

with the interest in preserving the validity of marriages,[466] and the supposed competing state interest.

Further, the second requirement of least restrictive means[467] is not met. If the goal is really to encourage procreation, then perhaps the law should have been written or interpreted to make procreation (or the capacity to procreate), and not being of different sexes, the basis of the classification. Thus, marriages abroad between heterosexual couples who are unable to procreate should not be recognized.[468] Meanwhile, same-sex couples who adopt or have biological children should have their marriages recognized. Therefore, an interpretation of Article 26(1) that results in non-recognition of all same-sex marriages celebrated abroad is not the least restrictive means.

In sum, if the law were interpreted to only classify and recognize only heterosexual marriages abroad and not homosexual marriages, such classification infringes on a fundamental right. Strict scrutiny must be applied, and if it is applied, such law would violate the equal protection clause. Thus, the proper interpretation that does not violate the Constitution is to recognize same-sex marriages celebrated abroad.

F. Conclusion

After reviewing the relevant authorities, like the approach taken by the Court in *Manalo*, judicial positivism requires that same-sex marriage should be recognized.

In its hesitation to outrightly recognize same-sex marriage in *Falcis*, the Court has noted the role of the political branches of Government in protecting freedom.[469] At most, this argument could be applied to same-sex marriages celebrated in the Philippines. This Article argues that, through Article 26(1), such political branches have already acted. There is no longer

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[466] *See supra* Part IV.D.1.iii.

[467] *Manalo*, 831 Phil. 33, 59–60, *citing*, *Serrano* 601 Phil, 245, 282; *Mosqueda*, 800 SCRA 313, 360; *Biraogo*, 651 Phil. 734, 550 (Brion, *J.*, *concurring)*; *Int'l Serv.*, 774 Phil. 508, 706 (Leonen, *J.*, *concurring*); *and* Poe-Llamanzares, 786 SCRA 1, 904 (Jardeleza, *J., concurring).*

[468] A similar line of argumentation was also raised during the oral arguments of *Falcis* in the discussion between Justice Leonen and the petitioners in the context of same-sex marriages in the Philippines. RAPPLER (Day 1), *supra* note 38.

[469] *Falcis*, 861 Phil. 388, 413. "This Court does not have a monopoly in assuring this freedom. With the most difficult political, moral, and cultural questions, the Constitution requires that we share with the political departments of government, especially with Congress, the quest for solutions which balance interests while maintaining fealty to fundamental freedoms."

a need to wait for legislation to sharpen judicial fiat.[470] Under the weight of legal authorities discussed, certain same-sex marriages are *already* recognized.

PART V: THE CASE FOR A JUDICIAL PRAGMATIST

If the Court were to take a pragmatist approach, would the conclusion be the same? I argue that it would. Again, the goal of pragmatist judge is to arrive at the "best decision" that caters to the current and future needs.[471] Thus, authorities such as law and jurisprudence are important, but not determinative.[472] In this regard, the entire discussion of Part IV would still be considered by a pragmatist judge. However, I focus this section on the arguments not strictly rooted in legal authority. In *Manalo*, the Court applied pragmatism when it effectively conducted a cost-benefit analysis of its interpretation, and recognized changes in technology and society.[473]

I do not aim to provide a comprehensive empirical case for the recognition of same-sex marriages. This a matter beyond the scope of this study, and better established by experts in the relevant social or natural sciences. Instead, I will focus on the potential policy considerations in recognizing same-sex marriages abroad in the Philippines.

There is no clear harm to recognizing same-sex marriages celebrated abroad. At most, one could make a vague notion that this would be contrary to morals. However, in *Ang Ladlad LGBT Party v. Commission on Elections*, the Court already rejected an argument against homosexuality rooted in morality:

> We are not blind to the fact that, through the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval. It is not difficult to imagine the reasons behind this censure— religious beliefs, convictions about the preservation of marriage, family, and procreation, even dislike or distrust of homosexuals themselves and their perceived lifestyle. *Nonetheless, we recall that the Philippines has not seen fit to criminalize homosexual conduct. Evidently, therefore, these "generally*

[470] *See id.*
[471] Posner, *supra* note 42, at 238.
[472] *Id.*
[473] *Manalo*, 831 Phil. 33, 72–73.

> *accepted public morals" have not been convincingly transplanted into the realm of law.*[474]

In contrast, recognizing the marriage would clearly benefit the couple. In addition, Dante Gatmaytan makes the argument that recognizing LGBTQI marriages is a pareto-improving policy, since no one is harmed by this recognition and heterosexual marriages will retain their rights.[475] In 2014, Bordon listed several benefits that are deprived of LGBTQ couples due to the lack of same-sex marriage such as "benefits in terms of taxes, insurance benefits, succession, exculpating or mitigating circumstances under criminal law, governmental benefits, remedial law benefits and privileges[.]"[476] Beyond this, such recognition "will remove the stigma that feeds discrimination against LGBTQI couples and their families."[477] Aguiling-Pangalangan notes that "there is good reason to uphold the validity of marriages when possible, in order to protect the rights and interests of children and parties who in good faith believed that they were legally married."[478] While Aguiling-Pangalangan was not specifically referring to same-sex marriages, [479] it submitted that this reasoning could also apply to children of same-sex couples.

Salonga identifies three policy considerations in determining the appropriate choice of law that must be balanced: predictability, upholding good-faith marriages and protecting justified expectations, and the public concern regarding marriage.[480]

The first consideration highlights the importance of predictability and prevent the socially undesirable situation of a "limping marriage[,]" which is when a couple is "to be considered married in one State, but not in another."[481] This harm is equally applicable to same-sex marriages contracted by Filipinos abroad. If two same-sex Filipinos get married abroad

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[474] Ang Ladlad LGBT Party v. COMELEC [hereinafter *"Ang Ladlad"*], G.R. No. 190582, 618 SCRA 32, 60–61, Apr. 8, 2010. (Emphasis supplied, citation omitted.)

[475] Dante Gatmaytan, *Finding Fault: Marriage Equality, Judicial Deference, and Falcis*, at 20, *available at* https://law.upd.edu.ph/wp-content/uploads/2020/06/Finding-Fault-Falcis.pdf, *citing* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents: or, I Give Him the Best Years of My Life,* 16 J. LEGAL STUD. 267, 275 (1987). (Gatmaytan's original document, however, is unnumbered.)

[476] Bordon, *supra* note 151, 915. (Citations omitted.)

[477] Gatmaytan, *supra* note 475, at 20.

[478] Aguiling-Pangalangan, *supra* note 160, at 10.

[479] *Id.*

[480] II SALONGA, *supra* note 105, at 261–62.

[481] *Id. at* 261.

where it is legal, then they would be considered married there, but not in the Philippines. In contrast, applying the foreign law, and recognizing the same-sex marriage would prevent such situation.

The next consideration is the protection of justified expectations, noting that "[o]rdinarily[,] the parties enter into marriage with forethought. They normally seek a place to get married where the marriage will be valid, and if the law of that place governs[,] they know their status at once."[482] This can be done by a policy of upholding marriages.[483] This consideration clearly sways in favor of recognizing same-sex marriages celebrated abroad, as it would protect the expectations of both parties who decide to get married.

Salonga also notes, however, that the policy consideration must be balanced with the fact that "[m]arriage is a matter of public concern and all States have rules stating how marriages may be contracted and prohibiting certain marriages."[484] Thus, another consideration is "that the forum, when confronted by a marriage deemed particularly offensive to its own standards, will strike down a marriage validly contracted in other jurisdictions, if, in the circumstances of the case, it is against its own norms of public policy and morality."[485] The question now is: are same-sex marriages "particularly offensive" to Philippine standards? As noted earlier, the Court has already rejected a morality argument against homosexuality.[486] Beyond this, the examples provided by Salonga such as incestuous and polygamous marriages[487] are expressly provided for in Article 26(1).[488]

Thus, the first two considerations heavily sway in favor of recognizing the marriage, while the last consideration does not clearly make a case for non-recognition. Thus, the balance should tip in favor of recognition.

Following *Manalo*,[489] the Court should not be blind to modern developments. Same-sex relationships have become increasingly common,

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[482] *Id. at* 262.
[483] *Id.*
[484] *Id.*
[485] *Id.*
[486] *Ang Ladlad*, 618 SCRA 32, 62.
[487] II SALONGA, *supra* note 105, at 262.
[488] FAM. CODE, art. 26, ¶ 1, *in relation to* Arts. 35(4), 37.
[489] *Manalo*, 831 Phil. 33, 73.

or at least visible. More and more states have recognized same-sex marriage.[490]

A. Responding to the Evasion Argument

One may argue that such interpretation would effectively allow Filipinos to go abroad to evade the current Philippine prohibition of celebrating same-sex marriages in the Philippines. The Court has shown some aversion to acts of evasion. In *Barretto Gonzalez v. Gonzalez*, two Filipino citizens married in the Philippines.[491] The husband went to Nevada and obtained an absolute divorce.[492] The wife sought the recognition of the divorce in Manila.[493] The Court rejected the recognition,[494] and noted the *modus* of evasion:

> The entire conduct of the parties from the time of their separation until the case was submitted to this court, in which they all prayed that the Reno divorce be ratified and confirmed, *clearly indicates a purpose to circumvent the laws of the Philippine Islands* regarding divorce and to secure for themselves a change of status for reasons and under conditions not authorized by our law.[495]

In this case, the Court also invoked Article 9 of the old Civil Code, which is similar to NCC 15,[496] and Article 11 of the old Civil Code, which is similar to NCC 17(3) of the Civil Code:[497]

> While the decisions of this court heretofore in refusing to recognize the validity of foreign divorce has usually been expressed in the negative and have been based upon lack of matrimonial domicile or fraud or collusion, we have not overlooked the provisions of the Civil Code now in force in these Islands. Article 9 thereof reads as follows:
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> > "The laws relating to family rights and duties, or to the status, condition, and legal capacity of persons, are binding upon Spaniards even though they reside in a foreign country."

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[490] *See Same-sex marriage*, *supra* note 5. EQUALDEX shows that the number of same-sex marriage has increased over the last 25 years.

[491] *Barreto Gonzalez*, 58 Phil. 67, 68.

[492] *Id.* at 68.

[493] *Id.* at 69.

[494] *Id.* at 72.

[495] *Id.* at 71. (Emphasis supplied.)

[496] *See* CIVIL CODE, art. 15.

[497] *See* Art. 17, ¶3.

And article 11, the last part of which reads:

> "* * * the prohibitive laws concerning persons, their acts and their property, and those intended to promote public order and good morals, shall not be rendered without effect by any foreign laws or judgments or by anything done or any agreements entered into in a foreign country[.]"[498]

By analogy, therefore, it could be argued that recognizing the same-sex marriage of two Filipinos who go abroad for the sole purpose of getting married, and return to the Philippines, effectively allows them to evade Philippine law. Thus, such should not be recognized under Article 26(1). For brevity, I will call this the *evasion argument*.

The response to this argument will be structured in two parts. First, I will assume that Filipino same-sex couples go abroad specifically for the purpose of evading the Philippine prohibition on same-sex marriage, and still argue why such marriages should be recognized. Second, I will dispute such premise.

First, *Barreto Gonzalez* involved the question of the recognition of divorce and not a marriage.[499] Article 26(1) is limited to marriages and not divorce.[500] Pragmatically, this distinction is important. The difference between marriage and divorce is that divorce frees one from certain obligations, while marriage makes one incur obligations. For marriage, if a person is not already married, there is no obligation disregarded by virtue of "evading" to a foreign land.

Broadly speaking, the evasion argument under NCC 15 appears to prevent situations where a person would escape obligations owed to others by going to another country. For example, one living in another country so that they would not have to support their child, or a married person moving into a country where divorce is legal, obtaining a divorce, and remarrying. Thus, the cost of "evading" Philippine law is felt by the child who would be deprived of support, or by the other spouse whose marriage would be affected. In contrast, for same-sex marriage, there is no obligation that would be evaded by getting married abroad. There is no cost to a person "evading" the prohibition on same-sex marriage in the Philippines.

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[498] *Barreto Gonzalez*, 58 Phil. 67, 71–72.
[499] *Id.* at 69.
[500] FAM. CODE, art. 26, ¶ 1.

Further, if one were to accept the evasion argument, then one should also apply such to the formal requirements of marriage. For example, if a heterosexual couple wants the solemnizing officer to be a person outside those allowed by Philippine law, and thus goes to a state where such is permitted with the sole purpose of evading Article 3(3) of the Family Code,[501] it seems unthinkable to invalidate such marriage. In both the situation of the homosexual couple and the heterosexual couple there is an intent to evade Philippine law. There does not seem to be reason for a different treatment. Article 26(1) precisely gives some leeway to individuals to determine the applicable law, or "evade" Philippine law, subject to the exceptions provided therein.

While, again, US practice is not dispositive, it may be helpful to make a comparison. In the First Restatement, the governing rule for the validity of marriages was generally the *lex loci celebrationis* as it provided that, "[e]xcept as stated in [sections] 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."[502] Section 131 excepts "remarriage after divorce."[503] Meanwhile, Section 132 lists the following exceptions:

> § 132. Marriage Declared Void by Law of Domicil.
> A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:
>
> (a) polygamous marriage,
> (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
> (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,
> (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.[504]

In contrast, the Second Restatement of Conflict of Laws considers the state of the most significant relationship to the spouses in determining

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[501] Art. 3(3).
[502] Restatement (First) of Conflict of Laws, § 121 (Am. L. Inst. 1934).
[503] *Id.* at § 121.
[504] *Id.* at § 132.

the applicable law.[505] Assuming the provision was intended to mirror US practice, it appears that Article 26(1) which applies the *lex loci celebrationis* rule and has no consideration for the most significant relationship[506] was patterned after the First Restatement and not the Second Restatement.

Under the First Restatement, the *lex loci celebrationis* rule will still apply even to marriages where "parties to the marriage went to that state *in order to evade* the requirements of the law of their domicil."[507] Thus, similarly, Article 26(1) should also apply even if the purpose of the parties was to evade Philippine law.

Further, the opinion by Judge Sempio-Diy,[508] at best suggests that Article 26(1) did not want the grounds under Articles 35(1), (5), and (6) to be subject to evasion, but not that all requirements cannot be subject to evasion. If this was the intent, then there could have been a general provision on evasion. However, Article 26(1) does not list evasion as an exception.[509] In conclusion, even assuming that Filipino same-sex couples go abroad to evade the prohibition on same-sex marriages in the Philippines, this does not justify the non-recognition of their marriage.

Second, the argument presupposes that such Filipino same-sex couples who get married abroad only do so because it is recognized there. This premise must be established by those who argue against the recognition.

A similar evasion argument was raised in *Manalo*, in which it was argued that "the Court's liberal interpretation of Paragraph 2 of Article 26 encourages Filipinos to marry foreigners, opening the floodgate to the indiscriminate practice of Filipinos marrying foreign nationals or initiating divorce proceedings against their alien spouses."[510] The Court did not accept this argument, claiming that such is not based on evidence, that we should presume good faith, that we should take notice of the conservative nature of Filipinos, and that one should not prejudge the motivations behind marriage.[511] Effectively, the Court puts the burden on those against

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[505] Restatement (Second) of Conflict of Laws, § 283 (Am. L. Inst. 1971).

[506] *See* FAM. CODE, art. 26, ¶ 1.

[507] Restatement (First) of Conflict of Laws, § 129 (Am. L. Inst. 1934). (Emphasis supplied.)

[508] Minutes of the 188th Meeting of the Civil Code and Family Law Committees, at 2, July 16, 1987.

[509] FAM. CODE, art. 26, ¶ 1.

[510] *Manalo*, 831 Phil. 33, 64.

[511] *Id.* at 64–65. (Citations omitted).

recognition to establish evasive motivations. There are many reasons that may motivate a same-sex couple to get married abroad beyond the possible implications it has on recognition. They may be domiciled or residing abroad. It might be more convenient for their family members or friends. They could just prefer to have a destination wedding in a different country. In the same way that the Court has said that one should not "prejudge the motive behind a Filipino's decision to marry an alien national[,]"[512] one should not prejudge why a Filipino would decide the marry abroad. One does not usually ask a heterosexual couple why they want to be married abroad. Thus, assuming it is correct that "evasions" should not be allowed, that evasion must first be convincingly proved.

In conclusion, beyond the legal authorities, recognizing same-sex marriages celebrated abroad is just the better decision. It better forwards the State policies on marriage. While there may be some interest of the State in preventing evasion of its laws by going abroad, same-sex marriages should be differentiated from other acts abroad. The balance is clear: the purported harms of recognition are overwhelmingly outweighed by their benefits.

B. Responding to the Confusion Argument

One of the pragmatist arguments raised by the Court in *Falcis* is that declaring Articles 1 and 2 in the Family Code as unconstitutional would have "far-reaching consequences" and cited several laws that have sex-specific burdens.[513] Thus, the Court posited that Congress is in a better position to resolve these issues. Bordon similarly raised the point that the inclusion of same-sex relationships in the Family Code could cause confusion on the application of sex-specific provisions, and thus it was proposed that a separate code, similar to the Code of Muslim Personal Laws, be created to govern LGBTQ relationships.[514] While these points address the broader question of the legality of same-sex marriages in general, this argument could apply to the issue of recognizing same-sex marriages celebrated abroad and what laws would govern their familial relations.

With all due respect, however, I agree with the critique of Gatmaytan with respect to this point. Gatmaytan points out that "these circumstances should be dealt with separately. There will always be consequences whenever

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[512] *Id.* at 65.

[513] *Falcis*, 861 Phil. 388, 522–71. A similar version of this issue was also raised by Justice De Castro during the oral arguments. RAPPLER (Day 1), *supra* note 38.

[514] Bordon, *supra* note 151, 933–34.

the Supreme Court strikes down a law as unconstitutional. The legal system will adjust accordingly."[515] The unique aspect of the question of Article 26(1) and same-sex marriages, however, is that the basis for the recognition is not judicial decree but the law itself. Thus, the apprehension of the Court in "arrogating legislative power unto itself and violating the principle of separation of powers"[516] would be less applicable.

PART VI: THE ROLE OF ADVOCATES AND ADVOCACY IN A SUB-OPTIMAL SOLUTION

Throughout this Article, I set out to conclude that same-sex marriages between Filipinos abroad should be recognized. I have taken a dualist approach that aims to cater to judicial positivists and judicial pragmatists. So, what now?

For the judicial positivist case, the arguments would be largely static, for as long as the authorities are static. The current role for legal advocates would be to consider existing legal authorities, and perhaps craft the legal arguments when necessary.

For the judicial pragmatist case, however, the role of advocates is larger. Since the Court does not "turn a blind eye to the realities of the present time[,]"[517] activism matters, subject, of course, to complying with the rules on contempt[518] and sub-judice.[519] Advocates must further make visible to society the realities of homosexual couples. Factual and empirical questions regarding the likely effects of same-sex marriage recognition, and the harms of non-recognition could be even more decisively answered. The relationship between same-sex marriage and the family must be further studied.

In *Falcis*, the Court recognized the plight of same-sex couples, when it held:

> Those with sexual orientations other than the heteronormative, gender identities that are transgender or fluid, or gender

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[515] Gatmaytan, *supra* note 475, at 9.

[516] *Falcis*, 861 Phil. 388, 526.

[517] *Manalo*, 831 Phil. 33, 73.

[518] *See* RULES OF COURT, Rule 71, § 3.

[519] *See* CODE OF PROFESSIONAL RESPONSIBILITY AND ACCOUNTABILITY, Canon II, § 19.

> expressions that are not the usual manifestations of the dominant and expected cultural binaries—the lesbian, gay, bisexual, transgender, queer, intersex, and other gender and sexual minorities (LGBTQI+) community—*have suffered enough marginalization and discrimination within our society*.[520]

Finally, this Article does not suggest that domestic legal recognition of same-sex marriage is unnecessary. Recognizing same-sex marriages abroad will not recognize marriages between Filipinos who, due to cost or otherwise, are unfortunately unable to leave our borders. The role of advocates there is even larger. This solution is suboptimal.

But a suboptimal solution is a solution. Recognition of even just one Filipino same-sex marriage is better than none. While advocates wait for a proper case or controversy to litigate the constitutionality of the Articles 1 and 2 of the Family Code,[521] or for Congress to heed the demands of equality, Article 26(1), when correctly interpreted, may offer some succor.

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[520] *Falcis*, 861 Phil. at 413. (Emphasis supplied.)
[521] *See id.*