

# BEYOND *MALAKAS* AND *MAGANDA*: RE-WELCOMING *BAYBAYAN* INTO THE FILIPINO FAMILY

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## I. INTRODUCTION

To have no one is perhaps the unhappiest truth anyone can ever face. It surpasses any and all kinds of misery and material misfortune the world can thrust upon a human being. Man was created a social being, and he, no matter how self-dependent, needs other people. He needs to belong and he wants to feel needed. His security lies in a feeling of affiliation while his self-worth is largely measured by his importance to other people. He wants to be cared for but he also wants to be able to take care of other people. He needs a group he can share his aspirations and frustrations with, a group from which he can draw courage and strength, a group to turn to for enlightenment, a group he could always return to when all else fails. He needs people who can serve both as guide and witness to his lifelong search for being and identity.

Thus was born the family. The family is said to be one of the oldest social institutions created by and for man. Its scope and form, however, varies with time, culture and law. Its definition is abstract, and perhaps, even unknowable. Nevertheless, all societies agree that an institution called the family exists and that it exists for a myriad of purposes. The significance of the family to its members as well as to the larger community cannot be doubted. It has come to assume a particular role in society and in the life of every state, thus inviting the state's interest and undivided attention. Seeing the undeniable importance of the family, the state saw it fit to begin taking an active participation in the preservation of the family. Thus, the concept of Family Law came about.

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Family Law is that specific branch of law that deals with the family and family relations. It represents the concrete effort of the state to promote the protection and growth of the family. Nevertheless, as many as there are states in the world, Family Law cannot be a unitary concept derived from a single area of legislation or a particular branch or field of law. It is rather a creature of diverse sources of influences and concepts which defines rules pertaining to the roles and duties of men and women, parents and children, families and strangers, that underlie their personal, social, political, commercial and cultural relationships.<sup>1</sup> For this reason, Family Law is said to perform different functions for different populations.

### A. Functions of Family Law

Carl Schneider, in his article, *The Channeling Function in Family Law*, enumerated the five-fold function of family laws: the expressive function, the facilitative function, the dispute resolution function, the protective function, and the channeling function.<sup>2</sup>

The *expressive* function refers to the ability of the law to affect its subjects' lives and shape their culture not just through the procedures, rules and regulations it embodies, but more significantly in the stories and experiences it seeks to impart behind its wordings and expressions.<sup>3</sup> It is based on the idea that the concept of a family does not rest on fictitious legal distinctions but on the reality of family life.<sup>4</sup> Elaborating on this function, Mary Ann Glendon, in her study comparing abortion and divorce law in the United States and Western Europe, writes:

(I)n addition to all the other things it does, it tells stories about the culture that helped shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going.<sup>5</sup>

In fulfilling the expressive function, Family Law invites citizens to interpret the law in the context of the relevant human experiences and then challenges them to determine the issues that led to the adoption of institutions that it is helping to strengthen and develop. Behind the rules and standards adopted by the various

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<sup>1</sup> Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of a Family*, 104 HARV. L. REV. 1640-41 (1991).

<sup>2</sup> Carl Schneider, *The Channelling Function In Family Law*, 20 HOFSTRA L. REV. 495 (1992)

<sup>3</sup> Jennifer Wriggins, *Marriage Law And Family Law: Autonomy, Interdependence, and Couples Of The Same Gender*, XLI B.C. L. REV. 272 (2000).

<sup>4</sup> *Braschi v. Stahl Assocs.*, 543 N.E. 2d 49, 53 (N. Y. 1989).

<sup>5</sup> MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 8 (1987).

state family laws, therefore, are the stories that reflect their values and traditions as a people. The words and symbols used in the law seek to impart ideas that help us understand the policies underlying the provisions.

For instance, the creation of family relations necessarily confers upon parents the authority over their children and at the same time, imposes corresponding duties and rights to the children. The authority is founded on the natural rights of the parents over the person and property of their children until they attain the age of majority, or in some instances, even after such age.

The *facilitative* function enables the state's subjects to organize and arrange their lives, affairs and activities in the manner they prefer. This allows citizens to determine for themselves the direction they want their undertakings to follow. To assist the people in this aspect, family laws provide for rules governing the execution and enforcement of contracts, capacity of parties, and validity and effectivity of private agreements.

The contract of marriage, for instance, gives rise to a host of rights and obligations between the parties. An example of such obligation in the Family Code of the Philippines is the duty to cohabit, observe mutual love, respect and fidelity, and to render mutual help and support.<sup>6</sup> Breach of such obligation allows the aggrieved spouse to apply to the courts for relief and in such cases, courts may take proper measures under the law to address the particular breach of duty complained of, such as awarding of damages or separate maintenance to the aggrieved spouse or denying applications for support in cases involving interference to the right to consortium.<sup>7</sup>

The second function, *dispute resolution*, allows citizens to resolve their disputes in an orderly and peaceful manner through the modes of dispute resolution provided by family laws. This is particularly evident in the field of divorce and dissolution of marriages where divorce courts are constituted to exclusively hear and decide petitions for dissolving marriages. Family laws espouse the policy of arbitration as it generally provides for non-adversarial modes by which issues of alimony and support are adjudicated.<sup>8</sup>

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<sup>6</sup> FAMILY CODE, art. 68.

<sup>7</sup> I ARTURO M. TOLENTINO, CIVIL CODE OF THE PHILIPPINES 352-353 (1996).

<sup>8</sup> Schneider, *supra* note 2, at 497.



In the Philippines, failure to prove earnest efforts towards a compromise in suits among members of the family results in the dismissal of the case on the ground that a condition precedent for filing the claim has not been complied with.<sup>9</sup> Spouses are also disqualified from testifying for or against each other without the consent of the affected spouse<sup>10</sup> and generally, descendants cannot be compelled to give testimony against their parents and grandparents in a criminal case.<sup>11</sup>

Pertaining to the *protective* function, Schneider contends that one of the primary functions of family law is to see to it that its citizens are shielded from harm done by other citizens. This includes protection both from physical and psychological injuries.<sup>12</sup> Within the law, safeguards and limitations are imposed so that injury and harm may be controlled and prevented.

Philippine penal laws exempt spouses from criminal liability incurred in defense of one's spouse<sup>13</sup> but also increase the penalties in serious crimes committed by one spouse against the other.<sup>14</sup> In light of the duty of fidelity imposed upon spouses, the law also prosecutes adultery and concubinage.<sup>15</sup>

Lastly, the *channeling* function works to recruit, mold, and sustain social institutions into which it channels people.<sup>16</sup> This particular function begins by supporting and endorsing certain social institutions that are seen as serving socially desirable purposes. Thereafter, it rewards those who take part in such institutions, disregards those that compete with the established ones, and, finally, sanctions the non-use of particular institutions. In effect, the institutions supported by the channeling function create distinct boundaries or posts that mark or establish the status of people, making it easier for them to determine the consequences of their own actions.<sup>17</sup>

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<sup>9</sup> FAMILY CODE, art. 151, in relation to RULES OF COURT, Rule 16, sec. 1 (j). The above rule does not apply to issues that are non-compromisable such as the civil status of persons, grounds for legal separation, and claims for future support.

<sup>10</sup> RULES OF COURT, Rule 130, sec. 22. The disqualification does not apply to civil cases instituted by one against the other, or to criminal cases for crimes committed by one against the other or the latter's direct ascendants or descendants.

<sup>11</sup> FAMILY CODE, art. 215.

<sup>12</sup> Schneider, *supra* note 2, at 497.

<sup>13</sup> REV. PEN. CODE, art. 11.

<sup>14</sup> REV. PEN. CODE, art. 246.

<sup>15</sup> REV. PEN. CODE, art. 333 and 334.

<sup>16</sup> Schneider, *supra* note 2, at 502.

<sup>17</sup> *Id.*, at 521.

Philippine Family Law is primarily expressive and channeling in that it seeks to embody the sentiments and beliefs of Filipinos as regards what the family means for each member and for the community. Together with the expressive and protective functions, the channeling function of Philippine Family Law determines the state's responses to the evolving concept of the family and its treatment of the various institutions comprising the foundation of the family. It reveals the institutions which it seeks to strengthen, and marginalizes what it labels deviant.

This paper examines how Philippine Family Law, in assuming the channeling function, has excluded from the family a "specie" of people called homosexuals and lesbians without having real grounds therefor. It proceeds from the purported constitutional recognition of the family as being anterior to the state and probes into the two tiers of the current framework in which the state recognizes the family, *i.e.* marriage and children. It looks at the state's actions and searches for the possible reasons for such actions, with the end in view of showing that the very means by which the state tries to secure the stability of the family subverts the very purpose for which such mechanisms were established.

The paper shall discuss in the Constitutional and Statutory framework governing the institutions of family and marriage and illustrate how the Philippines treats and regards these social institutions. In Chapter Two, it begins to examine how the Constitution and Family Law discriminate against a particular class of people. This chapter shall focus on the marginalization of homosexuals in the institution of marriage—the prohibition against same-sex marriages and the recurring ground of "homosexuality and lesbianism" in the various modes of dissolving a (heterosexual) marriage. It also raises the all-important question, "What is 'homosexuality' or 'lesbianism' as referred to by law?" Chapter Three deals with parenting, a component of family life, and attempts to show the strong possibility that homosexuals and lesbians will also be deprived of this right. It concentrates on custody and adoption, and, by examining what may be called the "*res gestae*" of the state, *i.e.* past conduct of the state in the form of Supreme Court decisions, enunciated state policies, and existing legislation, predicts how the courts will act when confronted with a case involving children and homosexual or lesbian parents. Chapter Four opens a window in the condemned room where homosexuality and lesbianism have been tucked away, to take more than a cursory look at these concepts that the state has refused to confront and accept.

### B. The Filipino Family: A Search for a Definition

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.<sup>18</sup>

The genesis of the constitutional state policy reveals a trend towards the strengthening of the recognition of the family as an autonomous social institution. It shows the intensification of the state's desire towards protecting the sanctity of the family, both from fragmentization and from untoward state intrusion. The purpose of the constitutional recognition was purportedly to "formalize the adoption of an ideology which recognized the family as the basic social institution."<sup>19</sup>

Three things are significant about this constitutional provision. First, there is the recognition of the "sanctity of family life," which is entirely new to the 1987 Constitution. Second, there is a recognition of a family as being "autonomous," a word that was absent from the 1973 Constitution, which recognized the family as being merely the "basic social institution."<sup>20</sup> Bernas makes the comment that "[c]alling the family a 'basic' social institution is an assertion that the family is anterior to the state and is not a creature of the state, confirming the expressive function of Family Law. The categorization of the family as 'autonomous' is meant to protect the family against instrumentalization by the state."<sup>21</sup> Third, there was the affirmation of the state's positive duty with regard to providing support for the right and duty of parents in the rearing of youth, which, in the 1935 Constitution, was merely a state-proclaimed goal.<sup>22</sup>

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<sup>18</sup> CONST. art. II, sec. 12.

<sup>19</sup> JOAQUIN BERNAS, *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 76 (1996), citing Speech of Delegate Corpus, Session of November 24, 1972.

<sup>20</sup> CONST. (1973), art. II, sec. 4. The provision reads in full: "The State shall strengthen the family as a basic social institution. The natural right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the aid and support of the government." This was constitutional recognition of art. 216 of the Civil Code, which reads: "The family is a basic social institution which public policy cherishes and protects."

<sup>21</sup> BERNAS, *supra* note 19, at 77, citing IV RECORD 808-809; V RECORD 54-55.

<sup>22</sup> CONST. (1935) art. II, sec. 4. The provision reads in full: "The natural right and duty of parents in the rearing of the youth for civic efficiency should receive the aid and support of the government."

Interestingly, there remains no clear-cut constitutional definition as regards what may constitute a family.<sup>23</sup> This gives rise to a whole gamut of questions. First, what does the term actually refer to: People or relationships? Is the family composed of people or is it composed of relationships? The resolution of this controversy is significant because it reveals the real subject of the state protection of the family, which in turn should determine the nature and scope of that protection. Second, to what does it extend? If the term refers to people, who are the members of the family? If it refers to relationship, which relationships are subsumed under the term "family?" Further, how big or how small must it be? Is a couple already a family or must they have children first before they can be called a family? Is it required that the couple be married?

There are no clear answers to these questions primarily because neither the 1987 Constitution nor the Family Code explicitly defines what is meant by "family." However, clues may be discovered behind the provisions on family that finally saw their way to the present law. Article XV of the Constitution, for instance, implies that the definition of a family is inextricably linked with the concept of marriage. It provides:

Section 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

Section 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.

Whereas there is no definition of what may constitute a family, marriage, the "inviolable social institution," is perceived to be absolutely foundational, and the state is thus mandated to protect marriage.<sup>24</sup> This idea finds support, *inter alia*, in article 150 of the Family Code of the Philippines, which provides that family relations include those between husband and wife,<sup>25</sup> implying that there can be no family without this relationship.

To link the concept of a family with that of marriage is not without problems. Although the Family Code provides that "[m]arriage is a special

<sup>23</sup> Note, however, that Bernas makes the assertion that "[t]he family here is to be understood as a stable heterosexual relationship whether formalized by civilly recognized marriage or not." BERNAS, *supra* note 19, at 77, citing IV RECORD 808-809; V RECORD 54-55.

<sup>24</sup> This is often cited as the reason for the absolute prohibition on divorce in the Philippines.

<sup>25</sup> This will be discussed in depth in a later chapter.

contract of permanent union between a man and a woman,"<sup>26</sup> the basic definition is circular: Article 1 of the Family Code goes on to define marriage as the "foundation of the family and an inviolable social institution," thus alluding once more to the constitutional definition, in an ever-confusing spiral. In addition, the basic problem is compounded by the fact that marriage is always "governed by law," and its "nature, consequences and incidents... [are] not subject to stipulation,"<sup>27</sup> in apparent contradiction to the basic autonomy of the family unit.

Article XV, section 3, paragraph 1 provides more hints as regards the definition of a family:

The State shall defend :

(1) The right of spouses to *found a family* in accordance with their religious convictions and the demands of responsible parenthood (emphasis supplied)

The idea presented in this provision is that *spouses* have the right to found a family; but other persons may not, or, at the very least, their right to found a family does not receive constitutional recognition.

Further, the definition of a family seems linked with the concept of *children*. Note that spouses have the right to *found a family*. From the language of the provision, it seems as though marriage *per se* does not transform into a family unit. Bernas makes the claim that "[t]he intent to prohibit coercive methods of family size limitation is clear;"<sup>28</sup> but this is with regard to maximum limits, not minimum limits. As a working definition, therefore, a family is understood to be defined in terms of marriage and in terms of children.

As to who the members are or what relationships are included in the family, article 150 again provides the clue by enumerating the family relations: a) Between husband and wife; b) between parents and children; c) among other ascendants and descendants; and d) among brothers and sisters, whether of the full or half-blood. Being the Code Committee's response to the question raised by Justice Caguioa, "What is the family being referred to in the Constitution? Is it a clan or the immediate family?,"<sup>29</sup> article 150 apparently shows that the Philippines

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<sup>26</sup> FAMILY CODE, art. 1.

<sup>27</sup> FAMILY CODE, art. 1.

<sup>28</sup> BERNAS, *supra* note 19, at 1131, citing V RECORD 58-59.

<sup>29</sup> Civil Code Revision and Family Code Committees, 178<sup>th</sup> Meeting (March 28, 1987) (unpublished, filed with the U.P. College of Law Library).

has chosen to expand the scope of the family to include not only what has been traditionally referred to as the nuclear family but ascendants and descendants as well.

From the provisions thus discussed, it may be surmised that the Filipino Family is, first, a social institution; second, it is the foundation of the state; third, it is composed of relationships, not people; fourth, it is entitled to special protection from the state; fifth, it has the following requisites:

1. There must be a marriage;
2. Said marriage must have children;
3. The following relationships are established:
  - a. between husband and wife;
  - b. between parents and children;
  - c. among other ascendants and descendants;
  - d. among brothers and sister.

The absence of any of these requisites negates the existence of a family. Any group short of this is not and can never be called a family and therefore not deserving of special protection. Consequently, individuals can *build* a family only if they are capable of having the first two relationships enumerated above and if they are capable of establishing the last two relationships among the future members their family. Incapacity for such excludes the individual from the institution called the family. Whether or not such exclusion is desirable is a question that remains unanswered.

This paper seeks to examine the exclusion of the homosexual and the lesbian from two major prongs of family life: Marriage and parenting. The next chapter, Chapter Two, discusses how homosexuals and lesbians are excluded from marriage, not merely by virtue of the definition of marriage, but from the grounds that wreak havoc on the stability thereof.



## II. MARITAL OUTLAWS: MARRIAGE AND THE EXCLUSION OF THE HOMOSEXUAL

Marriage has been described as the "highest public recognition of personal integrity."<sup>30</sup> This is perhaps why the state guards this institution with such zealotry, careful to grant this supreme recognition only to the deserving few. It is for the same reason that the past decade has been characterized by an intensifying fight for same-sex marriage in the Philippines. Although gay and lesbian groups have heavily criticized marriage as an inherently defective institution,<sup>31</sup> the struggle for recognition continues because of a felt need to fill the void in homosexual unions, which lack "the dignity of identification as...equal citizens."<sup>32</sup> Philippine Law, however, has remained deaf to this plea and has instead served as a mechanism of state-sponsored discrimination against homosexuality.

### A. Same-Sex Marriage: A Contradiction in Terms

The marginalization of homosexuals begins with the definition of "marriage" in the Family Code, the very first provision of which emphasizes that "marriage" is "a special contract of permanent union *between a man and a woman*."<sup>33</sup> Legalizing a union between two people of the same sex is totally impossible because of its basic defect: It does not come within the ambit of what the state recognizes as a marital union. The immediately succeeding article, which states the essential requisites for marriage, further emphasizes this by specifically requiring that the contracting parties be a male and a female.<sup>34</sup> Aside

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<sup>30</sup> Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, August 28, 1989, at 20,22; see, also, ANDREW SULLIVAN, VIRTUALLY NORMAL 179 (1995).

<sup>31</sup> See, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1536 (1993), where it was stated that "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematical institution that betrays the promise of both lesbian and gay liberation and radical feminism."

<sup>32</sup> Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 683-84 (1990).

<sup>33</sup> Interestingly, in the Civil Code, the definition of "marriage" was devoid of any indication as to the sexes of the contracting parties, rather focusing on the character of marriage as an inviolable social institution. Article 52 thereof provided: "Marriage is not a mere contract but an inviolable social institution. Its nature, consequences and incidents are governed by law and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations during the marriage." That the contracting parties be of different sexes becomes apparent only two provisions later. Article 54 reads: "Any male of the age of sixteen years or upwards, and any female of the age of fourteen years or upwards, not under any of the impediments mentioned in articles 80 to 84, may contract marriage."

<sup>34</sup> Art. 2 of the Family Code provides:

from these main provisions, the Family Code is replete with provisions underscoring the concept of marriage as a heterosexual union.<sup>35</sup> The biggest stumbling block to recognition of same-sex marriages is therefore *definitional*: Marriage is essentially different-sex,<sup>36</sup> a definition traced back to centuries of tradition as far back as Adam and Eve.<sup>37</sup>

Various reasons have been given for requiring marriage to be between two individuals of different sexes. One that stands out is the alleged main purpose of marriage: Procreation.<sup>38</sup> Advocates of this position point to Biblical passages, not infrequently to the last lines uttered by a priest officiating the sacrament of matrimony, "Go forth and multiply." Since homosexuals are incapable of fulfilling this purpose with each other, there can be no marriage between them.<sup>39</sup>

This argument appears reasonable until one considers that heterosexual unions do not uniformly result in the production of offspring. It is no secret that many married couples remain childless, some by choice, but many because of a physical disability of either spouse, present even at the time of marriage. If procreation indeed is the proper purpose of marriage, then the law should specifically include as one of the requisites the ability not only to copulate, but the *positive capacity to sire or bear children*. The Family Code not only does *not* require that heterosexuals must first undergo a physical examination to insure that they do not suffer from any physical defect that would make them incapable of procreation, but it is certainly conscious that some heterosexuals are incapable of having children.<sup>40</sup> The law's allusion to artificial insemination as a means of

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No marriage shall be valid, unless these essential requisites are present:

(1) Legal capacity of the contracting parties who must be a male and a female; xxx

<sup>35</sup> For example, there are frequent references to the contracting parties as husband and wife. See, e.g., FAMILY CODE art. 3, par. (3); art. 22; art. 34; art. 68; art. 69. The Civil Code makes similar references. See, e.g., art. 55; art. 76; arts. 109-117.

<sup>36</sup> William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1427 (1993).

<sup>37</sup> *Id.* at 1430.

<sup>38</sup> *Id.* at 1428.

<sup>39</sup> In *Chi Ming Tsoi v. Court of Appeals*, G.R. No. 119190, January 16, 1997, the Court, through Justice Justo P. Torres, Jr., explained: "Evidently, one of the essential marital obligations under the Family Code is '[t]o procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage.'"

<sup>40</sup> The Family Code recognizes artificial insemination as a means of having legitimate children. Art. 164 reads in part:

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of

having legitimate children means that the state is certainly conscious that although marriage is for procreation, some heterosexual unions are incapable of naturally producing children. On one hand, it might be argued that the existence of this provision in fact affirms the procreative purpose of marriage in that it assists the couple in "consummating" the sexual act by supplementing it with a form of "constructive procreative sex" wherein the sperm of the husband and the egg of the wife can still meet and grow into a fetus. In the interest of procreation, at the risk of being too intrusive, the state takes an active participation in the sexual act. On the other hand, the allowance of introducing the sperm of a donor, as long as consented to by the husband, raises a curious question why such assistance cannot be extended to homosexuals. Is it because of the natural expectation that sexual intercourse between a man and a woman should yield a fertilized ovum and it is not really the fault of the husband that he happens to be sterile? If so, does this mean then that homosexuality on the other hand is a fault of the individual so that such person does not merit the assistance of the state? If not, then why does the state not mind that the husband is in fact incapable of procreation but takes a different approach with homosexuals? Where might the distinction lie?

Since marriages between persons unable to bear offspring are in fact allowed and recognized, it is absurd to argue that the inability to fulfill marriage's procreative aspect is a valid ground for the disallowance for homosexual marriages. That heterosexual marriages of individuals incapable of procreation are allowed is patent proof of arbitrariness and discrimination.

As the traditional argument for legalizing homosexual unions goes, this is a violation of the right to equal protection because of the absence of a valid classification.<sup>41</sup> If the purpose of regulating who may marry is to insure procreation, there are then no substantial distinctions between heterosexuals incapable of procreation on one hand and homosexuals on the other that would justify the exclusion of the latter class alone.

Furthermore, if the state can lend its hand to childless heterosexual couples, why can it not do the same for homosexual couples so that the

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the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

Since artificial insemination usually happens when the husband is sterile (see I TOLENTINO, CIVIL CODE OF THE PHILIPPINES 522 [1990]), this provision is a recognition that some marital unions are in fact incapable of naturally producing children.

<sup>41</sup> This paper does not attempt to discuss whether or not the prohibition against same-sex marriage is a violation of equal protection. Neither does it assert a right to marry of every individual.

procreative purpose may likewise be fulfilled and the objection against the legalization of their union is addressed? Heterosexual couples may seek a sperm donor and have his sperm introduced into the woman's body as long as the consent of the husband is sought. Why can a homosexual couple not avail of a parallel right? For instance, a gay couple can seek an egg donor to be fertilized by sperm from either, and then find a willing surrogate mother. While this seems to be too tiresome as compared to the option given to heterosexual couples, it nevertheless affords an opportunity for homosexuals to "procreate" without violating the well-guarded moral principle that false strain of blood should not be introduced into the family.<sup>42</sup> The process is easier for lesbian couples because all they have to do is seek a sperm donor and all the state has to do is establish similar safeguards. Furthermore, with the onset of rapid technological development in this area, solutions to this "procreative disability" of homosexuals may soon pour out and in all probability dissolve the procreation objection.

Apparently, therefore, the purported purpose of marriage does not suffice to justify the discrimination. Might there be other possible bases of the discrimination?

The constitutional protection afforded to marriage suggests that its special recognition and legal safeguards are in tune with state policies and principles. Marriage is recognized as the foundation of the family and both institutions must be protected if the state is to continue its existence. An essential element of the state is *people*, who "must be numerous enough to be self-sufficing and to defend themselves and small enough to be easily administered and sustained."<sup>43</sup> Hence, a state must endeavor to stabilize its population. Since the family is the basic unit of society, the state understandably has an interest in regulating marriage and family as a means of ensuring the existence of unions that will give birth to the next generation of citizens. For such objectives, the state can hardly be faulted. However, whether this interest justifies exclusion of homosexuals from such protection and special benefits because they cannot reproduce, is another matter.

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<sup>42</sup> Consent of the husband is required in artificial insemination if semen is obtained from another person because although it does not involve sexual intercourse between the wife and the third person, it involves the voluntary surrender of reproductive powers or faculties of the wife and any such submission to the service or enjoyment of any person other than the husband is adultery. Any act of the wife that would involve the possibility of introducing into the family of the husband a false strain of blood would be adulterous. See I TOLENTINO, *supra* note 11, citing *Orford v. Orford*, 58 D.L.R. 251.

<sup>43</sup> ISAGANI A. CRUZ, *PHILIPPINE POLITICAL LAW* 15 (1996).

Here, the argument that heterosexual unions incapable of reproduction should therefore not be allowed resurfaces. For again, such unions are just in the same category as homosexual unions. Granting, however, that the distinction lies in the fact that heterosexual unions are expected to bear offspring and the inability of some to do so is but due to the capriciousness of nature, while homosexual unions will never bear offspring no matter how kind nature is, what harm is there in recognizing homosexual unions anyway?

Whereas heterosexual unions that can perpetuate themselves are desired, allowing homosexual marriages does not necessarily run counter to the interests of the state in insuring its continued existence. By allowing same-sex marriages, the possibility of the formation of heterosexual unions is not thereby reduced. Both types of union thrive independently of the other and are in no way in a relation of inverse proportionality. Giving homosexual unions the same protection does not lessen the protection of heterosexual unions. Conversely, *not recognizing* homosexual unions does not necessarily *encourage* heterosexual unions. In other words, if the purpose is to protect marriage and the family pursuant to the larger goal of self-preservation, the means used is overbroad<sup>44</sup> since it included the prohibition of same-sex marriages - something not in any manner related to the avowed purpose. Whereas there is no question as to the validity of the *purpose*, the same cannot be said of the *means* employed. The object of the prohibition is elusive and the reasonable connection between the means employed and the purpose sought to be achieved is nowhere to be found. It is difficult to understand how the prohibition of same-sex marriages furthers the object of self-preservation of the state. There is therefore a violation of that most highly regarded of rights: Substantive due process.<sup>45</sup> Considering that same-sex marriage does not defeat the intent of the state to protect itself from extinction, prohibiting same-sex marriage appears to be anything but fair, reasonable, and non-arbitrary.

Refuge might be taken, however, in the character of marriage as both a *social institution* that the state may rightfully define as it wishes, and a *privilege* that the state may grant and withhold as it pleases. As a social institution, marriage can and will be defined by the state. As a privilege, the license to marry will be granted, withheld, or withdrawn by the state as it thinks proper. But even

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<sup>44</sup> See *U.S. v. Toribio*, 15 Phil. 23, 85 (1910) and *Ynot v. IAC*, G.R. No. 74457, March 20, 1987, 148 SCRA 659. For state regulation to be valid, the purpose must be valid and the means employed must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

<sup>45</sup> While there is no precise definition of due process, the standard is more or less fixed — "responsiveness to the supremacy of reason, obedience to the dictates of justice." See *Ermata-Malate Hotel and Motel Operators v. City of Manila*, G.R. No. 24693, July 31, 1967.



granting that this were so, still it brings one to ask why the state would not want to grant such privilege to homosexuals. The records of the Constitutional Commission and the deliberations of the Family Law Revision Committee and Civil Code Revision Committee are bereft of any trace of the state's reasons.

One reason offered by groups against same-sex marriages is the instability of homosexual unions as compared to heterosexual unions. The fact is they are different and "it would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages;"<sup>46</sup> permitting same-sex unions "would place government in the dishonest position of propagating a false picture of [this] reality."<sup>47</sup> If this were true, withholding the privilege of marriage from homosexuals may perhaps be defensible. The question, however, is, is this true? Interviews with some long-term "homosexual" couples shows that these relationships can be just as stable, just as secure, and just as rewarding as heterosexual marriages, despite the absence of legal bonds.

It seems therefore, that the reasons proffered for the disallowance of same-sex marriages are either insufficient or unrelated to the policies and purposes claimed. Rather, the disallowance springs from unspoken biases against homosexuality itself, and recognizing same-sex marriages would only "be widely interpreted as placing a stamp of approval on homosexuality,"<sup>48</sup> which, as it appears, most states would not want to do.

#### B. Homosexuals and Lesbians in Different-Sex Marriages: Still at a Disadvantage

Not a few homosexuals and lesbians have opted to remain in the closet, with entry into a heterosexual marriage as the ultimate form of concealment, perhaps under the belief that marriage will end attraction to the same sex.<sup>49</sup> Since same-sex marriage is not allowed, the intense desire to build their own family induces some homosexuals to marry someone of the opposite sex because this is the kind of union that the state recognizes and protects. This is the kind of union that the state believes is stable, and this is the only kind of union that has the

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<sup>46</sup> RICHARD A. POSNER, *SEX AND REASON* 312 (1992).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at 311.

<sup>49</sup> Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role, Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 594-595 (1992).



state's assurance of full support to keep it stable and permanent because it is the foundation of the family.

To promote the stability and permanence of the inviolable social institution that is marriage, the Philippines, despite popular clamor, has never allowed divorce, save for that period in history when Japan occupied its territory.<sup>50</sup> Divorce was and still is regarded to be against public policy because it disturbs the stability of the foundation of society. The only law that the Philippines has that might be remotely akin to divorce is found in article 36 of the Family Code,<sup>51</sup> but it has been repeatedly stressed that this provision is not a euphemism for divorce,<sup>52</sup> and was never meant to destabilize marriage.<sup>53</sup>

The stability of marriage is enhanced by the fact that dissolution thereof is allowed only for specific and limited grounds. Articles 35,<sup>54</sup> 37,<sup>55</sup> 38,<sup>56</sup> 41,<sup>57</sup> and

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<sup>50</sup> Before the Family Code, the New Civil Code did not admit absolute divorce, as explained by the Supreme Court in *Tenchavez v. Escañó* (G.R. No. 19671, November 29, 1965, 15 SCRA 355): "The Civil Code of the Philippines, now in force, does not admit absolute divorce *quo ad vinculo matrimonii*; and in fact it does not even use that term, to further emphasize its restrictive policy on the matter, in contrast to the preceding legislation that admitted absolute divorce on grounds of adultery of the wife or concubinage of the husband (Act 2710)."

<sup>51</sup> Art. 36 of the Family Code reads:

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

<sup>52</sup> Despite the absence of a precise definition of psychological incapacity, which was intentionally left open for judicial interpretation by the Family Law Revision Committee, the appreciation of this ground by the courts have become more stringent through the years as exhibited, *inter alia*, in the landmark case of *Santos v. Court of Appeals*, G.R. No. 112019, January 4, 1995.

<sup>53</sup> See Civil Code and Family Law Committees, Minutes of the 186<sup>th</sup> Meeting, at 3 (July 4, 1987) (unpublished, on file with the U.P. College of Law Library). It is for this reason that the Committee thought it best to give a prescriptive period for the filing of an action for declaration of nullity based on this ground. Said the Committee:

Marriage is an important element in the stability of the family. The stability of the family is based on the stability of the marriage. Anything that would render the marriage unstable should therefore be avoided. The imprescriptibility of the action for declaration of nullity of the marriage, considering that it is a new action, would render the marriage unstable.

<sup>54</sup> Art. 35 of the Family Code reads:

The following marriages shall be void from the beginning:

- (1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians;
- (2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;

44<sup>58</sup> of the Family Code enumerate the grounds for declaration of nullity, while articles 45<sup>59</sup> and 46<sup>60</sup> enumerate the grounds for annulment of marriage. These

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(3) Those solemnized without license, except those covered the preceding Chapter;

(4) Those bigamous or polygamous marriages not failing under Article 41;

Those contracted through mistake of one contracting party as to the identity of the other; and

Those subsequent marriages that are void under Article 53.

<sup>55</sup> Art. 37 of the Family Code reads:

Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:

(1) Between ascendants and descendants of any degree; and

(2) Between brothers and sisters, whether of the full or half blood.

<sup>56</sup> Art. 38 of the Family Code reads:

The following marriages shall be void from the beginning for reasons of public policy:

(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.

<sup>57</sup> Art. 41 of the Family Code reads:

A marriage contracted by any person during the subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present has a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient. xxx

<sup>58</sup> Art. 44 of the Family Code reads:

If both spouses of the subsequent marriage acted in bad faith, said marriage shall be void *ab initio* and all donations by reason of marriage and testamentary dispositions made by one in favor of the other are revoked by operation of law.

<sup>59</sup> Art. 45 of the Family Code reads:

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

(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardians, or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

(2) That either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;

grounds are *exclusive*, and there is no leeway whatsoever for grounds nearly or remotely analogous to those enumerated. This is one area where the courts unwaveringly apply the principle *inclusio unius est exclusio alterius*. Furthermore, courts are cautious in issuing annulment decrees notwithstanding the existence of grounds therefor. Procedural safeguards in the 1997 Rules of Court, including the disallowance of judgment on the pleadings in actions for annulment of marriage,<sup>61</sup> and the prohibition on declaring defending spouses in default,<sup>62</sup> enhance the stability of the marital union.

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

(4) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;

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

(6) That either party was afflicted with a sexually transmissible disease found to be serious and appears to be incurable.

<sup>60</sup> Art. 46 of the Family Code reads:

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

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

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

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

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

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

<sup>61</sup> RULES OF COURT, Rule 34, sec. 1. The provision reads:

*Judgment on the Pleadings.*— Where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, the court may, on motion of that party, direct judgment on such pleading. *However, in actions for declaration of nullity or annulment of marriage or for legal separation, the material facts alleged in the complaint shall always be proved.* (italics supplied)

<sup>62</sup> RULES OF COURT, Rule 9, sec. 3, par. (e). The provision reads:

*Where no defaults allowed.*— If the defending party in an action for annulment or declaration of nullity of marriage or for legal separation fails to answer, the court shall order the prosecuting attorney to investigate whether or not a collusion between the parties exists, and if there is no collusion, to intervene for the State in order to see to it that the evidence submitted is not fabricated.

Clearly, the state has put in place every possible safeguard against the destabilization of marriage. Although it permits annulment, it guards this remedy with extreme jealousy. The same is true for legal separation, or what is otherwise known as divorce from bed and board, or *a mensa et thoro*. In spite of the retention of the marriage bond, the state is no less vigilant in the issuance of decrees of legal separation. Concededly, the grounds for legal separation have been increased under the Family Code, but the list remains exclusive and the procedural safeguards mentioned above also apply. Theoretically therefore, marriage in the Philippines is the safest haven for couples. A man and a woman who enter into this special contract are somehow insulated from the whimsical attacks of evanescence.

Yet, homosexuals and lesbians who decide to marry someone from the opposite sex remain unsafe even under the mantle of matrimonial protection. While homosexuals are not allowed to marry each other, their homosexuality is a possible ground for dissolving their marriage with the opposite sex. Quite interestingly, the very safeguards of marriage serve as the destabilizing factor in marriages of this type.

1. "Till death and homosexuality do them part?":  
Homosexuality and the Annulment of Marriage

Article 45 of the Family Code provides that a marriage may be annulled if the consent of either party was obtained by fraud. The practice of fraud is made a ground for annulment because the parties must be properly and adequately apprised of the facts that form the basis of the incentive to the mutual undertaking.<sup>63</sup> The Family Code is careful to enumerate what constitutes fraud and expressly states that "[n]o other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage."<sup>64</sup>

This last paragraph in article 46 suggests the basis for the enumeration of what constitutes fraud. To constitute a ground for annulment, the misrepresentation must relate to essential matters affecting the parties. In keeping with the interest of maintaining marital stability, the Committee took great pains to sift through all possible misrepresentations in entering the contract of marriage

<sup>63</sup> I TOLENTINO, *supra* note 11, at 291.

<sup>64</sup> FAMILY CODE, art. 46.

and came up with a measly enumeration of four. Fascinatingly, homosexuality and lesbianism found their way into these four:

Art. 46. Any of the following circumstances shall constitute fraud referred to in Number 3 of the preceding Article:

x x x

(4) Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of the marriage.<sup>65</sup>

Under the New Civil Code, the said circumstance was absent. Article 86 reads:

Art. 86. Any of the following circumstances shall constitute fraud referred to in number 4 of the preceding article:

- (1) Misrepresentation as to the identity of one of the contracting parties;
- (2) Non-disclosure of the previous conviction of the other party of a crime involving moral turpitude, and the penalty imposed was imprisonment for two years or more;
- (3) Concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband.

No other misrepresentation or deceit as to character, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage.<sup>66</sup>

When the Committee was deliberating regarding the amendment of this provision, the following suggested formulation was put forth:

Art. 86. Any of the following circumstances shall constitute fraud referred to in number 4 of the preceding article:

- (1) That either party acted under a misrepresentation regarding the identity of the other at the time of the celebration of the marriage;

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute as grounds for the judicial declaration of invalidity of marriage.

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<sup>65</sup> FAMILY CODE, art. 46.

<sup>66</sup> Rep. Act No. 386 (1949).

(2) Non-disclosure of the previous conviction of the other party of a crime involving moral turpitude, unless it is shown that said party has reformed subsequent to the celebration of the marriage;

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

(4) Non-disclosure of incurable homosexuality or lesbianism which was existing at the time of the marriage and appears to be incurable;

(5) Concealment of a contagious or venereal disease at the time of the marriage unless it is proved that the same is curable;

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage.<sup>67</sup>

Further revisions were made, and, at the time the Committee was reviewing the Proposed Family Code, the provision read:

Art. 46. Any of the following circumstances shall constitute fraud referred to in number 3 of the preceding article:

(1) That either party acted under a misrepresentation regarding the identity of the other at the time of the celebration of the marriage;

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

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

(4) Concealment of a sexually transmissible disease, regardless of its nature, existing at the time of marriage.

No other misrepresentation or deceit as to character, health, rank, fortune or chastity shall constitute such fraud as will give grounds for action for the annulment of marriage.<sup>68</sup>

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<sup>67</sup> Civil Code Revision and Family Law Committees, Minutes of the Joint Meeting, at 12 (July 6, 1984) (unpublished, on file with the U.P. College of Law Library).

<sup>68</sup> Civil Code and Family Law Committees, Minutes of the 154<sup>th</sup> Meeting, at 11 (September 6, 1986) (unpublished, on file with the U.P. College of Law Library).



The Committee, however agreed to delete subparagraph (1) because it was a ground for declaring a marriage void *ab initio* under the proposed article 35. Justice Caguioa, to accommodate a suggestion earlier made by Judge Diy, then proposed the addition of the following subparagraph:<sup>69</sup>

(4) Concealment of serious drug addiction, habitual alcoholism or incurable homosexuality.<sup>70</sup>

The reintroduction of this subparagraph was unquestioned except for a slight revision where the word "incurable" was first substituted with "serious" but which was ultimately deleted per suggestion of Dean Gupit for the reason that the nature of homosexuality is immaterial since the ground is concealment.<sup>71</sup> Other than these revisions, the ground itself was accepted as part of the enumeration.

At this point, it would do well to examine whether there is a common thread among the grounds that constitute fraud and whether these circumstances do really go together. It must be pointed out at the outset that while it is understood that the basic ground for the annulment is the fact of *concealment*, the choice of *what facts if concealed would constitute fraud* reveals an underlying belief that such circumstances are so grave as to affect both the marital relation and the spouses themselves. In other words, in coming up with an exclusive enumeration, the Committee is implying that it is these, and only these, circumstances that can be detrimental to the spouses. This, therefore, warrants an examination of the circumstances themselves.

### *a. Previous Conviction of Crime Involving Moral Turpitude*

The first circumstance mentioned is the non-disclosure of a previous conviction by final judgment of the other party of a crime involving moral turpitude. While the minutes of the deliberations of the Civil Code Revision and Family Law Committees do not expressly state the rationale behind the inclusion of this ground, the reason can readily be discovered. By its very definition, "moral turpitude"<sup>72</sup> relates to the tendency of the person to commit immoral acts, thus

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<sup>69</sup> *Id.*, at 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, at 13.

<sup>72</sup> See *Zari v. Flores*, A.M. No. (2170-MC) P-1356, November 21, 1979. Moral turpitude was defined thus:

[It is] an act of baseness, vileness, or depravity in the private and social duties which a man owes his fellow men, to society in general contrary to the accepted and customary rule of right and duty between man and woman or conduct contrary to justice, honesty, modesty, or good morals. It implies something

affecting the fitness of the individual for marital life. The fact that the person is able to actually carry out an act of baseness and vileness indicates depravity of which the prospective partner must be apprised. Examples of crimes held by the courts to involve moral turpitude may shed light on this matter: adultery, concubinage,<sup>73</sup> rape, arson, evasion of income tax, barratry, bigamy, blackmail, bribery,<sup>74</sup> criminal conspiracy to smuggle opium, dueling, embezzlement, extortion, forgery, libel, making fraudulent proof of loss on insurance contract, murder, mutilation of public records, fabrication of evidence, offenses against pension laws, perjury, seduction under promise of marriage,<sup>75</sup> *estafa*,<sup>76</sup> falsification of public document,<sup>77</sup> *estafa* thru falsification of public document.<sup>78</sup> Clearly, the state is only trying to protect the other spouse who was unaware and consequently unprepared to deal with living with somebody who has committed such vile crimes and who may at anytime commit one against him or her. It is important to stress, however, that a *final conviction* is required, and mere *allegation* of commission of a crime of moral turpitude is insufficient.

### *b. Concealment of Pregnancy*

The second circumstance is concealment by the wife of the fact that at the time of the marriage, she was pregnant by a man other than her husband. It is said that this concealment goes to the very essence of marriage, considering that the declared purpose of marriage is procreation.<sup>79</sup> This gives rise to a right of the husband to "require that his wife shall not bear to his bed aliens to his blood lineage."<sup>80</sup> The evil in this concealment lies in surreptitiously bringing a stranger's child into the family without the knowledge of the husband and making the latter

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immoral in itself, regardless of the fact that it is punishable by law or not. It must not merely be *mala prohibita*, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute fixes the moral turpitude. Moral turpitude does not, however, include such acts as are not of themselves immoral but whose illegality lies in the fact of their being positively prohibited.

<sup>73</sup> *In re Basa*, 41 Phil. 275 (1920). See, also, *In re Isada*, 60 Phil. 915 (1934).

<sup>74</sup> *In re de los Angeles*, Adm. Case No. 350, August 7, 1959.

<sup>75</sup> *In re Basa*, 41 Phil. 275 (1920).

<sup>76</sup> *Medina v. Bautista*, Adm. Case No. 190, September 25, 1964; *In re Venzon*, Adm. Case No. 561, April 27, 1967, cited in *Zari v. Flores*, A.M. No. (2170-MC) P-1356, November 21, 1979.

<sup>77</sup> *De Jesus Paras vs. Vailoces*, Adm. Case No. 439, April 12, 1961, 7 SCRA 954; *In re Avanceña*, Adm. Case No. 407, August 15, 1967, 20 SCRA 1012, cited in *Zari v. Flores*, A.M. No. (2170-MC) P-1356, November 21, 1979.

<sup>78</sup> *Zari v. Flores*, A.M. No. (2170-MC) P-1356, November 21, 1979, citing *In re Basa*, 41 Phil. 275 (1920).

<sup>79</sup> I TOLENTINO, *supra* note 11, at 298.

<sup>80</sup> *Id.*, at 299.

acknowledge and support the said child. Supporting this reasoning is the existence of specific guidelines in determining the legitimacy of a child.<sup>81</sup>

In appreciating this ground, however, courts are meticulous in the examination of the factual circumstances. Thus in *Buccat v. Buccat*,<sup>82</sup> the Court refused to decree annulment on the ground that the wife did not disclose pregnancy at the time of marriage. It did not give credence to the husband's claim that he did not even suspect the pregnancy of his wife, it having been proven that the latter was already in her seventh month of pregnancy at the time of their marriage. The Court ruled out the possibility of fraud because at such a stage, the pregnancy of a woman would be obvious to anyone. On the other hand, in *Aquino v. Delizo*,<sup>83</sup> the Court reversed the ruling of the Court of Appeals that there was no fraud and remanded the case for trial. The *Buccat* ruling was not applicable because the circumstances were different: In *Aquino*, the wife was only five months pregnant and was naturally plump, which made it harder to suspect that she was pregnant at the time of marriage.

From these two cases, it will be seen that' in appreciating this ground, the Court looks at three things: First, the conduct of the wife in concealing the

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<sup>81</sup>See, e.g., FAMILY CODE, art. 166. The provision states:

Legitimacy of a child may be impugned only on the following grounds:

(1) That it was physically impossible for the husband to have sexual intercourse with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child because of:

(a) the physical incapacity of the husband to have sexual intercourse with his wife;

(b) the fact that the husband and wife were living separately in such a way that sexual intercourse was not possible; or

(c) serious illness of the husband, which absolutely prevented sexual intercourse;

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Article 168 further provides:

If the marriage is terminated and the mother contracted another marriage within three hundred days after, such termination of the former marriage, these rules shall govern in the absence of proof to the contrary:

(1) A child born before one hundred eighty days after the solemnization of the subsequent marriage is considered to have been conceived during the former marriage, provided it be born within three hundred days after the termination of the former marriage;

(2) A child born after one hundred eighty days following the celebration of the subsequent marriage is considered to have been conceived during such marriage, even though it be born within the three hundred days after the termination of the former marriage.

<sup>82</sup>G.R. No. 47101, April 25, 1941.

<sup>83</sup>G.R. No. 15853, July 27, 1960.

pregnancy; second, the obviousness of the pregnancy and the possibility or impossibility of concealing the same; and third, the conduct of the husband, *i.e.* whether he was indeed defrauded or he simply chose to close his eyes.

### *c. Sexually Transmissible Disease*

The third circumstance is concealment of sexually transmissible disease, regardless of its nature, existing at the time of marriage. The reason behind this is more or less patent: The possibility of infecting the spouse. This may also be gathered from the deliberations of the Committee:

On paragraph (5) [referring to the ground under consideration], Justice Caguioa objected to the last phrase "unless it is proved that the same is curable." Prof. Balane suggested that the word "incurable" be inserted before "contagious", with which Judge Diy concurred. Justice Reyes, however, pointed out that the cause of the annulment of the marriage is not the fact that one is suffering from a contagious or venereal disease but that he infected the other party. On the other hand, Director Romero remarked that it is the possibility of infecting the other party if he conceals the fact that he is suffering from said disease. Hence, the Committee agreed to delete the phrase "unless it is proved that the same is curable."

Dean Gupit suggested that they specify that it is a major disease to exclude colds and the like. Prof. Balane, however, pointed out that colds cannot be concealed. Judge Diy proposed that they indicate in the provision that the disease is "serious." Prof. Balane, however, commented that "serious" is a relative term since it is a medical term.

Director Romero remarked that the important thing is that if one wants to get married, good faith requires that he reveals such kind of information.

Prof. Balane and Dr. Cortes proposed that "contagious or venereal disease" be substituted with the accepted medical term "sexually-transmitted disease." The Committee approved the proposal. The Committee likewise approved Justice Caguioa's suggestion that "existing" be inserted between "disease" and "at."<sup>84</sup>

Noticeably, the Committee took pains to clarify what it meant when it included this ground. While the initial formulation was broader in scope as it referred to "contagious or venereal disease," the final formulation covers only *sexually*

<sup>84</sup> Civil Code Revision and Family Law Committees, Minutes of the Joint Meeting, at 22 (July 14, 1984) (unpublished, on file with the U.P. College of Law Library).

transmissible disease. By thus limiting the scope, the Committee once more shows that the fact concealed must be really grave; concealment of just any other contagious disease will not warrant a dissolution of the marriage.

*d. Drug Addiction, Habitual Alcoholism, Homosexuality or Lesbianism*

Now comes the fourth circumstance: Concealment of drug addiction, habitual alcoholism or homosexuality or lesbianism existing at the time of marriage.

Initially, all three grounds were each preceded by an adjective: "serious" (drug addiction), "habitual" (alcoholism), and "incurable" (homosexuality), which again illustrates the intention of the Committee to include only those grounds grave enough to affect the consent of the other spouse. Curiously, however, these terms were not defined anywhere in the Code. In response to a comment that these terms be clearly defined, the Committee perfunctorily said: "These terms are already well accepted, well defined and well understood."<sup>85</sup>

Yet before the Committee came up with the present provision, they could not even agree whether drug addiction had to be serious, and if so, what exactly would constitute "serious drug addiction." They faced a similar dilemma with homosexuality. The initial formulation referred to "incurable homosexuality," but the adjective was deleted altogether when the question of proof of incurability could not be answered. It seems that although the Committee felt sure that these three circumstances should be included, they were not sure how to take them out of the sphere of "character" so that their non-disclosure would constitute deceit. Mere drug addiction, alcoholism, or homosexuality or lesbianism largely pertain to "character" and might not be as grave as the other circumstances enumerated. In the end, the mere *status*es of drug addiction and homosexuality or lesbianism were thought enough; alcoholism had to be habitual.

Although commentators agree that subsequent rehabilitation will not cure the defect because the ground is not the addiction or alcoholism, there is no explanation as to why concealment of these facts constitute fraud, as opposed to, say, concealment of pregnancy of the wife, for which commentators offer a host of reasons. One can only infer from discussions of these circumstances as grounds for legal separation, and the oft-cited reason is that drug addiction and habitual

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<sup>85</sup> Civil Code and Family Law Committees, Minutes of the 186<sup>th</sup> Meeting, at 12 (July 4, 1987) (unpublished, on file with the U.P. College of Law Library).

alcoholism lead to violence which puts the other spouse and the entire family in danger. Drug addiction and habitual alcoholism have been proven to affect not only the behavior of a person but his brain as well. A person under the influence of drugs or alcohol is led to do things without his full consciousness.<sup>86</sup> It is for these reasons perhaps that the disclosure of addiction and alcoholism by an individual suffering therefrom to his or her prospective spouse is required. The dangers brought about by these evils are known, verified, and very real.<sup>87</sup>

We now turn to homosexuality and lesbianism. The immediate impression that one gets upon looking at the enumeration is that the circumstances share some common characteristics. From a cursory look at the other grounds, it would seem that "homosexuality and lesbianism" is an odd item. The most plausible reasons for the inclusion thereof are the underlying assumptions and prejudices against homosexuality and lesbianism. In contrast to the other circumstances, homosexuality and lesbianism have to do with status not within the control of the person. The other circumstances enumerated in this provision relate to the concealment of a *status* (of being a convict, or a woman pregnant prior to marriage, or a drug addict, or an alcoholic) resulting from *an act* of the individual (commission of a crime of moral turpitude, engaging in sexual relations, taking illegal drugs, drinking too much alcohol). On the other hand, gayness is not the result of some positive act on the part of the person; it is not so much a choice but a state of being.<sup>88</sup> Yet, the inclusion of this circumstance conveys the idea that it is *a fault that must be confessed* by the person who committed it.

Second, homosexuality and lesbianism do not pose any immediate danger to the spouse or to the family. It is neither something that the spouse can be inflicted with through intercourse nor is it something that can infect the children, like sexually transmissible disease. Its inclusion, however, strengthens the traditional notion that homosexuality is an illness, or, at the very least, a psychological disorder<sup>89</sup> - a notion that is supported in some other jurisdictions.<sup>90</sup>

<sup>86</sup> For example, lysergic acid diethylamide (LSD) is said to produce derangement of sensory experience and other mental functions. See JAMES L. GOULD AND WILLIAM T. KEETON, *BIOLOGICAL SCIENCE* 1014 (1996).

<sup>87</sup> Needless to say, use of prohibited drugs is in itself prohibited by the law. On the other hand, state regulation of sale and consumption of liquor in the form of license requirements for dealers, age requirement for entrance into bars, and ultimately, excise tax on liquor, implies state policy against intoxication.

<sup>88</sup> MICHAEL RUSE, *HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY* 129 (1988).

<sup>89</sup> See Rachel Rosenbloom, *Introduction*, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, *UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS* (Rachel Rosenbloom ed., 1996) [hereinafter *UNSPOKEN RULES*], where, interestingly, it was said that the World



The entertainment of this idea is further evidenced by the initial formulation of the provision that characterized the ground as "incurable homosexuality or lesbianism" - as if it were some disease subject to medicinal treatment - and that if the prospective spouse was suffering from was *curable* homosexuality or incurable lesbianism, there was no obligation to disclose.

Neither does it pose the kind of danger drug addiction and habitual alcoholism may bring. It does not cloud the brain as to result in violent acts which the individual is unconscious of, like prohibited drugs or alcohol. Grouping homosexuality and lesbianism along with drug addiction and habitual alcoholism connotes that it is a bad thing, like illegal drugs that must not be taken by sensible individuals or like alcohol which one might have only occasionally and moderately.

Third, it does not result in the introduction of a stranger's blood into the family like pregnancy of a woman by a man other than her husband. Yet it seems to be as grave and preposterous.

Fourth, it is not a crime penalized under the Revised Penal Code for which the individual can be convicted and bring stigma to the family. Based on the definition of "moral turpitude" as given above, it would not involve the same. Yet somehow, the notion propagated is that homosexuality is in itself immoral and is of the same category as crimes involving moral turpitude,<sup>91</sup> only that *no conviction is required*, which makes it a lot worse.

It is difficult to quiet these misgivings as to why homosexuality and lesbianism were included. The minutes of the Committee meetings contain nothing from which one might infer possible reasons. Whereas the Committee would discuss lengthily the other grounds whether in terms of substance or form, the same cannot be said of homosexuality and lesbianism. Nevertheless, let us endeavor to find out the possible reasons behind the inclusion of this ground.

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Health Organization has specifically issued guidelines stating that homosexuality is *not* a "sexual abnormality" or a disease.

<sup>90</sup> See Miriam Martinho, *Brazil*, in UNSPOKEN RULES, *supra* note 60, at 16. In Brazil, for example, homosexuality and lesbianism were until recently classified as psychological disturbances. After their declassification as such, however, persons exhibiting "deviant" behavior continued to be subjected to psychological treatments and shock therapy.

<sup>91</sup> This interpretation is bolstered by jurisprudence. See, e.g., *Montemayor v. Araneta University*, G.R. No. 44251, May 31, 1977; *Gonzalez v. Kalaw Katigbak*, G.R. No. 69500, July 22, 1985. These and other cases are further discussed in Chapter Four, *infra*.

One probable reason is the definition of marriage, and corollarily, its purpose. Marriage is between a man and a woman. Homosexuality of the man or lesbianism of the woman might be interpreted to be a defect in the capacity of the parties. In other words, the man is not really a man or is less than the man who may enter into a marriage. The woman is not really a woman or is less (or more?) than the woman contemplated in the provision on marriage. To pursue the argument, the purpose of marriage is invoked. If one of the spouses is not sexually attracted to his or her spouse because he or she is actually attracted to somebody of the same sex, then how can the procreative purpose be fulfilled? Further, one of the rights between husband and wife is the right of cohabitation,<sup>92</sup> which includes domestic and sexual community of the spouses.<sup>93</sup> If the husband is a homosexual or the wife is a lesbian, then he or she may not be able to discharge this obligation that in turn would be violative of the right of the other spouse.

The foregoing arguments may seem very sound and acceptable until a closer examination is made of the underlying assumptions. First, one premise is that homosexuality or lesbianism makes the homosexual not a man and the lesbian not a woman. This is a distortion of reality in a very roguish kind of way. If gays are not men and lesbians are not women, then what are they? To this day, society is said to be made up of men, women, and children. If this is how society defines itself, then by its own admission, homosexuals and lesbians would have to be either men, women, or children. It cannot disregard their existence for one purpose, then recognize them only to exclude them. Further, homosexuality is really more of an adjective rather than a noun; it refers to the sexuality of an individual. Thus, there are heterosexual men and women, and there are homosexual men and women. The bottom line is, by society's own definition, a homosexual is still a man and a lesbian is still a woman. Thus, the first argument crumbles. The second premise is that homosexuality or lesbianism is contrary to procreation and the fulfillment of the obligation of cohabitation. This is not entirely true. Gays and lesbians do engage in heterosexual sexual activity.<sup>94</sup> In fact, some enter into marriage precisely because they want to have children.<sup>95</sup> Yet, whether they can fulfill such obligations and requirements will not constitute a

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<sup>92</sup> FAMILY CODE, art. 68. The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support.

<sup>93</sup> I TOLENTINO, *supra* note 11, at 339.

<sup>94</sup> Fajer, *supra* note 49, at 548-549.

<sup>95</sup> HOWARD BROWN, FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY 237-238 (1976). In the Philippines, the names Jun Encarnacion, Soxy Topacio, and Arnel Ignacio figure as homosexuals who entered into heterosexual marriage and had children sired by them.

defense because the ground for the annulment is the concealment. Thus, the second argument also falls.

The difficulty in sustaining these arguments actually lies in the absence of a definition of "homosexuality" or "lesbianism." It is indeed unfortunate that the Committee did not even bother to define it, saying that it is already well-defined and well-accepted. This is hardly the case. As explained in the discussion on the concept of homosexuality,<sup>96</sup> it is difficult to define homosexuality. It is a continuously evolving term such that even the essence of it is hard to grasp. Nevertheless, this is not an excuse for not defining what it means in the Family Code. On the contrary, it is the very looseness of the usage of the term that demands that the Family Code define what it means when it uses the term. If gay groups themselves could not even adequately define what homosexuality is, how could the term be "well-defined" as claimed by the Committee? One look at the provisions concerning homosexuality and lesbianism would betray the domino of questions created by this omission.

The provision states that homosexuality or lesbianism should exist at the time of marriage for the concealment to be a ground for annulment; otherwise the case merely falls under legal separation. However, how does one prove that it was already existent at the time of marriage? What happens if the party himself was not fully aware of his homosexuality? A person's not being fully aware of a thing does not necessarily mean that it is not there. It is entirely possible for it to take years before a person finally realizes that he is a homosexual, but this does not mean that his homosexuality only begins to exist from that time on. Perhaps he had felt before that he was attracted to "feminine things" or that he tends to admire the male physique a bit more than other men do, but he dismisses them as simple idiosyncrasies. Because of society's treatment of gays and lesbians, it is possible that a person unconsciously conceals his gay identity until he comes to a realization that he *was, has been, and is* gay. In such a case, may he defend himself in a case for annulment by saying that he did not know or at least was not sure? Or was he already under an obligation to divulge to his prospective wife the facts just mentioned? Do those facts already amount to homosexuality? Or does the provision only refer to sexual activity and not merely sexual orientation? If so, how does one treat sexual activity among male prisoners or among female prisoners for instance? Is a singular sexual encounter by a male with another male or a female with another female constitutive of homosexuality or lesbianism? If

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<sup>96</sup> See Chapter IV., *infra*.

not, what about just two or three encounters? Where is the line drawn? What exactly does the provision require to be disclosed?

These questions, which figure prominently in the application of this provision, inevitably lead back to the main question of why homosexuality is made one of the circumstances enumerated in article 46. It is bad enough that same-sex marriages are not allowed in the Philippines, but what is worse is that even when a homosexual or a lesbian attempts to surrender into oblivion his homosexuality or her lesbianism and enters into a heterosexual marriage, it may be used as a ground to annul his marriage if discovered later. On the other hand, if he is able to keep it to himself and manages to carry out "heterosexual duties" without much ado, the spouse will never have a ground for annulment. This is significant because it sends the message that it is all right to be a homosexual or a lesbian *as long as one does not practice it and keeps it to oneself*. It is an unsolicited commentary on homosexual behavior, which is perceived to be scandalous and immoral. It serves as a warning to homosexuals to remain in their closets forever or their marriage may be annulled. One might argue that the same is true for the other grounds: If the erring spouse manages to hide the fact from the other spouse forever, then the latter will never have cause for annulment. However, discovery of the other circumstances is, unlike homosexuality and lesbianism, not entirely dependent on the spouse's behavior. Other proofs may be availed of: Criminal records, blood type tests, DNA tests, and medical examinations. For homosexuality and lesbianism, only the spouse himself can betray such. Thus, as long as he is careful not to exhibit any signs of whatever the law means by homosexuality or lesbianism, he is safe. Thus our laws contribute to the further closeting of the homosexual.

## 2. "In some sickness and in health?":

### Homosexuality and Psychological Incapacity

Another ground by which a marriage can be permanently dissolved is psychological incapacity.<sup>97</sup> Again, the Committee did not define this, explaining that it did not want to unduly limit this term. Judge Diy and Undersecretary Romero initially thought of defining the term thus:

Art. \_\_\_\_ . Psychological or mental impotency to discharge the essential obligations of marriage may be made manifest:

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<sup>97</sup> FAMILY CODE, art. 36.

1) By the refusal of one party to dwell with the other after the marriage ceremony, without fault of the other party; or

2) By the refusal or inability of the party primarily obligated to give support to the other or to their common children through causes other than his or her voluntary intent, desire or laziness; or

3) When either party or both of them labor under an affliction that makes common life as husband and wife impossible or unbearable, such as compulsive gambling or unbearable jealousy or other psychic or psychological causes of like import and gravity.<sup>98</sup>

However, Justice Puno said that "there is no need for the above provision and that judges and others concerned should refer to the minutes of the Committee meetings or consult the Committee members on this matter."<sup>99</sup> Thus, in 1994, Mr. Justice Josue N. Bellosillo did quote Mme. Justice Alicia V. Sempio-Diy, a member of the Code Committee, in his decision in *Salita v. Magtolis*.<sup>100</sup>

The Committee did not give any examples of psychological incapacity for fear that the giving of examples would limit the applicability of the provision under the principle of *ejusdem generis*. Rather, the Committee would like the judge to interpret the provision on a case-to-case basis, guided by experience, the findings of experts and researchers in psychological disciplines, and by decisions of church tribunals which, although not binding on the civil courts, may be given persuasive effect since the provision was taken from Canon Law.<sup>101</sup>

This became subject to abuse, forcing the Supreme Court to lay down specific guidelines in determining whether there was psychological incapacity.<sup>102</sup> Mr. Justice Vitug cited Justice Sempio-Diy, citing the work of Dr. Gerardo Veloso, a former Presiding Judge of the Metropolitan Marriage Tribunal of the Catholic Archdiocese of Manila, who said that psychological incapacity must be characterized by (a) gravity, (b) juridical antecedence, and (c) incurability.<sup>103</sup> Hence, the incapacity must be grave or serious as to render the party incapable of

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<sup>98</sup> Civil Code and Family Law Committees, Minutes of the 188<sup>th</sup> Meeting at 7 (July 16, 1987) (unpublished, filed with the U.P. College of Law Library).

<sup>99</sup> *Id.*

<sup>100</sup> G.R. No. 106429, June 13, 1994.

<sup>101</sup> *Salita v. Magtolis*, G.R. No. 106429, June 13, 1994, citing ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE (1988).

<sup>102</sup> For a general discussion, see Jose Ramon R. Pascual IV, Note, *Understanding the Nature of Psychological Incapacity*, 72 PHIL. L.J. 139 (1997).

<sup>103</sup> *Santos v. Court of Appeals*, G.R. No. 112019, January 4, 1995.



carrying out the ordinary duties required in marriage. Also, it must be rooted in the history of the party antedating the marriage, although the overt manifestations may emerge only after the marriage. Finally, it must be incurable, or, even if it were otherwise, the cure would be beyond the means of the party involved.<sup>104</sup> The Court stressed that the use of the phrase "psychological incapacity" under article 36 of the Code has not been meant to comprehend all such possible cases of psychoses as extremely low intelligence, immaturity, and like circumstances. It said:

Article 36 of the Family Code cannot be taken and construed independently of but must stand in conjunction with, existing precepts in our law on marriage. Thus correlated, "psychological incapacity" should refer to no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support. There is hardly any doubt that *the intendment of the law has been to confine the meaning of "psychological incapacity" to the most serious cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage.* This psychological condition must exist at the time the marriage is celebrated. The law does not evidently envision, upon the other hand, an inability of the spouse to have sexual relations with the other. This conclusion is implicit under Article 54 of the Family Code that considers children conceived prior to the judicial declaration of nullity of the void marriage to be "legitimate."<sup>105</sup> (*italics supplied*)

Thus, the Court restricted the scope of "psychological incapacity" to include only such disorders which were grave, incurable, and existent at the time of marriage.

It is important to stress that this ground involves only disorders as this entails a counterpart burden on the plaintiff to prove that the ground being sued upon can be first and foremost be characterized as a disorder, even before he or she begins to prove that it is grave, incurable, and present at the time of marriage. Further, it must be one that affects the fulfillment of essential marital obligations.<sup>106</sup> In a nutshell, it involves a lack of appreciation of one's marital obligations, or, as the proposed provision stated, "wanting in the sufficient use of

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Republic v. Court of Appeals, G.R. No. 108763, February 13, 1997; Chi Ming Tsoi v. Court of Appeals, G.R. No. 119190, January 16, 1997.



reason or judgment to understand the essential nature of marriage or was psychologically or mentally incapacitated to discharge the essential marital obligations."<sup>107</sup> It was stressed during the deliberations that it does not really refer to vitiation of consent, although consent is also affected. Neither does it refer to insanity or want of reason; rather, it refers to want in the exercise thereof.

Interestingly, this term is said to encompass homosexuality and lesbianism. Although the Committee did not have an exact definition of psychological incapacity or of homosexuality and lesbianism, one thing was clear: homosexuality and lesbianism can be appreciated as manifestations of psychological incapacity. During the deliberations on article 46 paragraph (4), it was pointed out that should homosexuality or lesbianism be proven to amount to psychological incapacity, they become grounds for declaring the marriage void *ab initio*.<sup>108</sup> Similarly, the Court in *Santos* said:

The other forms of psychoses, if existing at the inception of marriage, like the state of a party being of unsound mind or concealment of drug addiction, habitual alcoholism, *homosexuality or lesbianism*, merely renders the marriage contract voidable pursuant to Article 46, Family Code. If drug addiction, habitual alcoholism, *lesbianism or homosexuality* should occur only during the marriage, they become mere grounds for legal separation under Article 55 of the Family Code. *These provisions of the Code, however, do not necessarily preclude the possibility of these various circumstances being themselves, depending on the degree and severity of the disorder, indicia of psychological incapacity.*<sup>109</sup> (italics supplied)

Once more, one is led to ask why homosexuality and lesbianism are made yardsticks for measuring a disorder. This is a transposition back to the time when homosexuality was indeed viewed as a disease, at a time when Immigration and Naturalization Service deported homosexual aliens on the ground that they were "afflicted with psychopathic personality."<sup>110</sup> This kind of interpretation reintroduces the characterization of homosexuality in the 19<sup>th</sup> century as an "inversion" or a "misdirected impulse by men to act as women or women to act as men."<sup>111</sup> If we were to follow the Court's explanation in *Santos* as quoted above,

<sup>107</sup> Civil Code and Family Law Committees, Minutes of the 148<sup>th</sup> Meeting, at 8 (July 26, 1986) (unpublished, on file with the U.P. College of Law Library).

<sup>108</sup> Civil Code and Family Law Committees, *supra* note 39, at 13.

<sup>109</sup> *Santos v. Court of Appeals*, G.R. No. 112019, January 4, 1995.

<sup>110</sup> Cain, at 1593.

<sup>111</sup> Sylvia A. Law, *Homosexuality and Social Meaning of Gender*, 1988 WIS. L. REV. 187, at 203-206, 213 (1988).

homosexuality is a serious case of personality disorder clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage.

Aside from implying that homosexuality is a disorder, it also insinuates that homosexuality and lesbianism indicate want in the sufficient exercise of reason to appreciate the meaning of marital obligations. As to where the link is between homosexuality and failure to appreciate the essence of marriage, there are no clear answers. Clearly, sexual impotence is no longer an argument for at least two reasons. First, cohabitation is not a viable defense. Second, bearing of children does not cure psychological incapacity. In fact, the law contemplates the possibility that the marriage will bear children because it provides that children of such marriages shall be legitimate if conceived or born prior to the dissolution of the marriage.<sup>112</sup>

The underlying assumption seems to be that homosexuals and lesbians are incapable of keeping a marriage, that they are incapable of fulfilling the obligations of love, fidelity, respect, help, and support. If these are the assumptions, then for all intents and purposes, article 36 has become the biggest stumbling block to a married life by a homosexual, whether to another homosexual, or to one of the opposite sex. If homosexuality indicates disability to appreciate marital obligations, then it matters not who the partner is. The individual is liable to be adjudged psychologically incapacitated.

Article 36 as construed thus endorses not only discrimination but *condemnation* of homosexuality. There is no way for a homosexual to have any sort of stable marriage because any marriage entered into by a homosexual will either be prohibited (if to another homosexual) or forever open to dissolution by annulment. It is difficult to imagine what defense might be available to him to prevent the annulment if his being a homosexual itself is the very indication of psychological incapacity. Since any marriage entered into by a homosexual is open to attack, he is likely to find himself in the same situation over and over again unless he decides to live a life of single blessedness.

This construction of psychological incapacity has greater implications that call into question the state's purported protection of the Filipino family. A

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<sup>112</sup> The termination of the subsequent marriage referred to in the preceding Article shall produce the following effects:

(1) The children of the subsequent marriage conceived prior to its termination shall be considered legitimate;

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new source of discrimination arises: Families of unions where both parties are heterosexuals are given better treatment than families where either the husband is a homosexual or the wife is a lesbian. A new classification of families not contemplated in the Constitution is born based on the sexual orientation of one of the spouses. Some families are now less protected than the others.

### 3. "For better or for worse?": Examining Legal Separation

Homosexuality or lesbianism is also one of the grounds for temporary dissolution of marriage along with habitual drunkenness and drug addiction, circumstances also mentioned in article 46, paragraph (4). These grounds may be used in an action for legal separation if they come to exist after the celebration of the marriage. However, while habitual drunkenness and drug addiction are nearly universal grounds for legal separation or divorce in a good number of states, homosexuality or lesbianism is peculiar to the Philippines. It might be that it can be subsumed under some broader ground like incompatibility<sup>113</sup> or irreconcilable differences,<sup>114</sup> but the fact remains that it in itself is not a ground explicitly stated in the laws of other countries. Article 55 of the Family Code reads:

Art. 55. A petition for legal separation may be filed on any of the following grounds:

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

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<sup>113</sup> In Nevada, a wide variety of reasons for divorce, is admitted, and incompatibility is a common cause for divorce.

<sup>114</sup> In Illinois, Rhode Island, and Guam, this is a common ground for divorce.

- (7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;
- (8) Sexual infidelity or perversion;
- (9) Attempt by the respondent against the life of the petitioner; or
- (10) Abandonment of petitioner by respondent without justifiable cause for more than one year.

For purposes of this Article, the term "child" shall include a child by nature or by adoption.

Virtually the same problems discussed in concealment figure under article 55, though not without addition. Using the same method of analysis and reasoning in article 46, one would find that there is a characteristic shared by the rest of the grounds in article 55, except homosexuality or lesbianism. All the other grounds pertain to some willful illegal or immoral act committed by the spouse that warrants legal separation. Paragraphs (1), (2), and (3) pertain to some direct act of the erring spouse against either the petitioner spouse or a common child or a child of the petitioner. Paragraph (1) relates to the commission of physical violence or abusive conduct *per se*. Aside from having a direct effect on the person, whether in the form of physical injuries or mental and emotional disturbance, it is a violation of the person of an individual and no such person violated should be required to continue to live with the very individual who committed such violation. Moreover, it puts in danger the life of the entire family at all times. Paragraph (2) relates to the commission of physical violence that is resorted to for the purpose of compelling change of beliefs or religion, an act that even the State is not allowed to do. Freedom of religion is guaranteed by the Constitution in no uncertain terms. Paragraph (3) relates to coercion or inducement of the petitioner or a common child or a child of the petitioner to engage in prostitution, which is prohibited under article 202 of the Revised Penal Code<sup>115</sup> that treats prostitution as an offense against decency and good customs.<sup>116</sup> Thus, a person who coerces his spouse or child to engage in prostitution commits two wrongs: First, he induces the spouse or the child to commit a crime; and

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<sup>115</sup>"Prostitutes" are women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct. See REV. PEN. CODE (1930), art. 202.

<sup>116</sup> See *In re SyCip*, G.R. No. X92-1, July 30, 1979, 92 SCRA 12. "Decency" means propriety of conduct and proper observance of the requirements of modesty, good taste, and the like while "customs" refer to a "rule of conduct formed by repetition of acts, uniformly observed as a social rule, legally binding and obligatory."

second, he places the spouse or the child in a life and reputation of indecency that would forever stick as a stigma. Paragraph (4) relates to conviction of a crime which may affect the family in various ways but the most important reason seems to be the dishonor that it brings to the family which even pardon cannot remedy much less erase. The reasons for paragraph (5) are the same as those discussed under concealment. Paragraphs (7) and (8) are somehow related because they both involve infidelity, a violation of a basic marital obligation. Paragraph (7) is more serious because it also involves a crime. In bigamy, the spouse is not only an infidel but even makes a mockery out of the inviolable social institution that is marriage. It does not only affect the offended spouse, it affects the children as well. In fact, it affects both the families of the first marriage and the bigamous marriage. Paragraph (9) is acutely related to paragraph (1) in that it endangers the life of the spouse and it would be unreasonable to require the offended spouse to continue living with the person who is threatening to kill him or her. Paragraph (10) is not unusual as it is in fact present in the laws of other states. Separation in fact for a considerable period and desertion<sup>117</sup> constitute grounds for divorce.<sup>118</sup> This is to highlight the obligation of cohabitation essential in marriage.

Why homosexuality and lesbianism are included as grounds for legal separation reopens the alley of speculations already discussed. Homosexuality is not like the grounds under paragraphs (1) to (3) that inflict direct harm on the spouse or the children. It does not pose danger like drug addiction or habitual alcoholism and attempt on the life of the spouse. It is not a crime. If it is to fit the enumeration, therefore, it would have to share some common characteristic with either paragraph (4) or (8). Paragraph (4) is made a ground because of the dishonor it brings while paragraph (8) goes into the essential obligation of fidelity. If these are the only grounds possibly related to paragraph (6), then the underlying assumptions on homosexuality again become apparent. First, it brings dishonor to the family. Although gay groups have become more active in their fight for recognition, societies have continued to be hesitant, uncertain, and sometimes cynical to the cause of these groups. The stance has been to acknowledge that homosexuality exists, but with a caveat that homosexuals should not practice it too much. By thus including homosexuality expressly as a ground for legal separation, this stance is strengthened and the belief that homosexuality is a disgrace to the family is further cultivated. Second, homosexuals are perceived to

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<sup>117</sup> Willful desertion in Guam is a ground for divorce. "Desertion" is generally defined in its statute as absence or separation with the intent to desert. In New Jersey, desertion of at least 12 months is sufficient; in Rhode Island, five years.

<sup>118</sup> In New York, a separation of one and a half years is a ground for divorce; in Rhode Island, three years, and in New Jersey, 18 months.

be incapable of fidelity primarily because they are attracted to their own sex and their spouse is anything but that. Furthermore, homosexuals are pictured to be incapable of maintaining long-term relationships and are rather inclined to jump from one relationship to another or even have multiple relationships at the same time. Surely, homosexuals would roar over such a conclusion, and understandably so. But assuming this were true, does this warrant the inclusion of homosexuality as a ground for legal separation?

It must be stressed that article 55 makes no qualifications as regards this ground. The ground is homosexuality and lesbianism *per se*. Other than proof that the respondent spouse is not homosexual or lesbian, there are no available defenses. He cannot say that he has never engaged in sexual relations with another person and was therefore never unfaithful. Neither can he say that he has always been discreet in public so as not to invite the attention of the public to his sexuality. He cannot claim that while he is a homosexual, he has been behaving properly. Neither can he invoke the compassion of the court and say that even if he is a homosexual, he loves his spouse and his children and cannot live without his family. These things will not change the fact that he is a homosexual and this is sufficient to decree a legal separation.

Some may cite article 56 as a response to these concerns. Article 56 provides for instances when legal separation will not be granted. It states:

Art. 56. The petition for legal separation shall be denied on any of the following grounds:

- (1) Where the aggrieved party has condoned the offense or act complained of;
- (2) Where the aggrieved party has consented to the commission of the offense or act complained of;
- (3) Where there is connivance between the parties in the commission of the offense or act constituting the ground for legal separation;
- (4) Where both parties have given ground for legal separation;
- (5) Where there is collusion between the parties to obtain decree of legal separation; or
- (6) Where the action is barred by prescription.



Among these grounds, only paragraph (6) may be applicable. Thus, by the passage of time, the homosexual may be saved from legal separation. Or so it seems. The lack of a definition for homosexuality presents a large stumbling block here because the determination of when to begin counting the prescriptive period is left open. Article 55 speaks of grounds, which exist after the marriage. Hence, when does the spouse begin counting? What particular act or conduct would be enough to say that the spouse is homosexual? If for instance, the husband puts on some make-up and wears a skirt today, does the prescriptive period begin to run today? Or must the spouse wait for other signs? The uncertainty of this matter gives way to the possibility that the prescriptive period may never begin to run or will begin to run depending upon the appreciation of the facts by the petitioner spouse. In the example above, the petitioner spouse can simply claim that such conduct was not sufficient to make the respondent spouse a homosexual. Perhaps this is true. But what if the respondent spouse goes out on a date with another person of the same sex? Does this make the spouse a homosexual or a lesbian? What if it was only a one-time thing and no other possible sign of homosexuality is seen?

Apparently, article 56 is no assurance of stability of the marriage of the homosexual. The marriage is open to a decree of legal separation at any time, and there is no viable defense for the spouse except to prove that he is not a homosexual.

His family is forever unstable for the simple reason that he is homosexual.

### III. PARENTING: LESSONS FROM SOLOMON AND SODOM

No love can be as unconditional and as pure as the love of parents for their children. It springs forth from the deepest bonds uniting individuals in a way no one can truly fathom. For the parents, to give love and to rear the child in that love is not only their life's greatest joy but also their most fundamental duty.

The individual's capacity to fulfill the duty to give love, guidance, and protection to a child is the central issue in the determination of parental suitability. Parents and those wanting to become parents are subjected to the court's most searching scrutiny in order to determine their fitness to exercise parental responsibilities. As the previous discussion has shown, the mere fact of *being* a homosexual or a lesbian already tends to undermine the stability of *any*

marital union; thus, gays and lesbians are effectively prevented from taking part in the institution of marriage. This chapter shall proceed to discuss whether or not homosexuality and lesbianism are sufficient grounds to deprive a person from participating in the second major factor in the formation of a family, that is, with regard to the raising of children. It shall examine the suitability of the homosexual and the lesbian to become a parent from three major angles: Parental authority, custody and visitation of children, and adoption. These angles are discussed in the light of current statutory and jurisprudential trends, drawing logical conclusions therefrom.

### A. PARENTAL AUTHORITY: BORROWED JOY

Parental authority or *patria potestas* is the "juridical institution whereby parents rightfully assume control and protection of their unemancipated children to the extent required by the latter's needs."<sup>119</sup> It encompasses the mass of rights and obligations granted to parents for the "purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their heart and senses."<sup>120</sup> Otherwise known as *parens patriae*, it may be viewed as a delegation of the state's authority over its citizens, a grant of a part of the authority that the state exercises over its people. It is referred to as the obligation of the state as guardian of the rights of its citizens<sup>121</sup> and is inherent in the supreme power of every State.<sup>122</sup> This authority has been manifested in various ways: State regulation of showing of "obscene" motion pictures,<sup>123</sup> representing legitimate claimants in a suit,<sup>124</sup> legislation for the protection of certain disadvantaged classes of individuals, and perpetuation of doctrines to assist the courts in deciding cases where interests of minorities are concerned.<sup>125</sup>

In recognition of the vastness of the guardian responsibilities of the state and the extent of the population, the state has found it necessary to delegate some of its responsibilities and the accompanying authority for the exercise thereof. Thus, it granted the right of parental authority to its citizens. Nevertheless, it

<sup>119</sup> Santos v. Court of Appeals, G.R. No. 41405, October 22, 1975.

<sup>120</sup> *Id.*

<sup>121</sup> ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 22 (1996).

<sup>122</sup> Cabañas v. Pilapil, G.R. No. 25843, July 25, 1974.

<sup>123</sup> Gonzales v. Kalaw Katigbak, G.R. No. 69500, July 22, 1985.

<sup>124</sup> Government of the Philippine Islands v. Monte de Piedad, 35 Phil. 728 (1916).

<sup>125</sup> An example of this is the marked receptivity on the part of courts to lend credence to the version of rape victims of tender years. See People v. Magpayo, G.R. No. 92961-92964, September 1, 1993; People v. Tamayo, G.R. No. 86162, September 17, 1993; People v. Casipit, G.R. No. 88229, May 31, 1994.

continues to watch over its delegates to insure that they perform their duties. Furthermore, it is always ready to withdraw this power from any person it thinks unfit to be a parent.

### 1. First Commandment: Thou Shalt Be a Good Parent.

The first safeguard established by the state to protect the children is the list of duties it has made for parents found in several statutes: The Civil Code,<sup>126</sup> the Family Code,<sup>127</sup> and the Child and Youth Welfare Code.<sup>128</sup> The lists are

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<sup>126</sup> Art. 356 of the Civil Code reads:

Every child:

- (1) Is entitled to parental care;
- (2) Shall receive at least an elementary education;
- (3) Shall be given *moral and civic training by the parents* or guardian;
- (4) Has a right to live in an atmosphere *conducive to his physical, moral and intellectual development.* (emphasis supplied)

<sup>127</sup> Art. 220 of the Family Code reads:

The parents and those exercising parental authority shall have with respect to their unemancipated children or wards the following rights and duties:

- (1) To keep them in their company, to support, educate and instruct them by right precept and *good example*, and to provide for their upbringing in keeping with their means;
- (2) To give them love and affection, advice and counsel, companionship and understanding;
- (3) To provide them with *moral and spiritual guidance*, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;
- (4) To enhance, protect, preserve and maintain their physical and mental health at all times;
- (5) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, *protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals*;
- (6) To represent them in all matters affecting their interests;
- (7) To demand from them in respect and obedience;
- (8) To impose discipline on them as may be required under the circumstances; and
- (9) To perform such other duties as are imposed by law upon parents and guardians. (emphasis supplied)

<sup>128</sup> Art. 46 of the Child & Youth Welfare Code reads:

General Duties – Parents shall have the following general duties toward their children:

- (1) To give him affection, companionship, and understanding;
- (2) To extend to him the benefits of *moral guidance*, self-discipline, and religious instruction;
- (3) To supervise his activities, including his recreation;

extensive, with the Civil Code focusing on the rights of the child while the Family Code and the Child and Youth Welfare Code expressly pertaining to the duties of parents. These enumerations boast of being expansive enough to aid the development and growth of the child in all aspects: Intellectual, spiritual, emotional, and physical. Each duty is meant to serve a particular purpose that is to benefit the child, whether directly or indirectly. None of these provisions talk of a hierarchy of duties. It may thus be implied that no duty is less important than the others, thus, parents are expected to comply with each and every obligation listed in these three provisions. Performance of one duty cannot be deemed a substitute for the failure to fulfill another, especially if it relates to a different aspect of the child's person. This is to make sure that the child grows into a well-rounded person. For this reason, the state, in article 220, has reserved the right to add more duties as it seems fit for the further enhancement of positive virtues and values of children.

Significantly, however, these laws provide for *abstract* duties and rights which are wide open for interpretation of courts in the determination of whether or not parents can and do comply with such duties and obligations. On one hand, the abstractness of the duties is good because it allows parents to perform them in the manner they prefer. On the other hand, it is lamentable because there is no sufficient guide for parents as to *how* they must perform their duties so as not to be accused of being negligent of their children.

For instance, how does a parent give "moral and civic training" to a child? Would teaching a child how to pray be sufficient? If not, what would be sufficient? What are the marks that will show that this duty is being fulfilled? In connection therewith, what does the law mean when it says "moral and spiritual guidance?" What is not moral anyway? Whose point of view shall govern this question, the parents' or the state's? If it is the former, then it necessarily varies from parent to parent resulting in inequality of moral guidance received by Filipino children. In

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(4) To inculcate in him the value of industry, thrift, and self-reliance;

(5) To stimulate his interest in civic affairs, teach him the duties of citizenship, and develop his commitment to his country;

(6) To advise him properly on any matter affecting his development and well-being;

(7) To always set a good example;

(8) To provide him with adequate support, as defined in Article 290 of the Civil Code; and

(9) To administer his property, if any, according to his best interests, subject to the provisions of Article 320 of the Civil Code.

such a case, equal protection arguments are not entirely remote for how can the state justify that some children will receive better moral guidance than others because some parents are "more moral" than others? It would be surely absurd to claim that the classification is validly based on the morality of the parents. Furthermore, this has far-reaching effects on the children especially when they begin interacting with others. Whereas a child teased about his or her poverty can still explain without being ashamed that his or her parents happen to have low-paying jobs, the same cannot be said of a child teased about being "bad" or "immoral." A child who is teased as such cannot excuse his or her being "bad" or "immoral" by saying that his or her parents are bad and immoral without inviting social stigma. These results are hardly beneficial to the children concerned.

On the other hand, if "morality" is judged according to the point of view of the state, then the parent is put in a disadvantaged position because he is not properly apprised of the state's standards. While it is true that parental authority is more about parental obligations and rights of children than about parental rights, parents should not be deprived of parental authority without some form of due process. Unlike the term "moral turpitude" which the courts have defined, an undefined term like "morality" hardly affords due process. The state can always claim that a parent has been unable to give moral and spiritual guidance and in each instance cite a new ground.

An even vaguer duty is that of giving a "good example." What might this entail? On the other hand, what acts may be interpreted to be giving "bad example?" Again, the difficulty lies in the subjectivity of the terms. What is good? What might be bad? Whereas there are some things that are indubitably "bad," e.g. murder of people, stealing, and the like, there are many things that straddle between good and evil and the strength of each pole varies with each person. The same problems mentioned in "morality" are encountered again. Furthermore, what if the parent is not setting any example at all, whether good or bad?

The broadness of these terms creates a problem for parents in complying with their duties. These duties do not only make it difficult for parents to be parents, but they also potentially exclude those people who to the eyes of the state are immediately and eternally immoral or bad examples to children. Many are bound to fall into this category, given the biases of the state. However, among them is one specie not likely to be given a chance to explain and defend itself: The homosexuals and the lesbians.

Although homosexuals and lesbians are not specifically prohibited from becoming parents, the four duties just mentioned are potential obstacles to the retention of parental authority by homosexuals and lesbians primarily because of the view that they are immoral<sup>129</sup> and therefore incapable of giving moral and spiritual guidance.

## 2. The "Tender Years" Doctrine: Wisdom of Solomon vs. Lessons of Sodom

Another mechanism of protection established by the state in favor of children is the "tender years" doctrine. This doctrine prefers the placement of children who are younger than a certain age – or of "tender years" – exclusively with their mother, except when extraordinary circumstances exist.<sup>130</sup> The Civil Code specifically commands in the second sentence of article 363 that "No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure." The Supreme Court has repeatedly observed that the use of the word *shall* underscores the mandatory character of the provision,<sup>131</sup> which "prohibits in no uncertain terms the separation of a mother and her child below seven years, unless such a separation is grounded upon compelling reasons as determined by a court."<sup>132</sup>

This rationale was enunciated by the Code Commission:

The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for "compelling reasons" for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt.<sup>133</sup>

The Supreme Court has also observed that "[t]he general rule that a child under seven years of age shall not be separated from his mother finds its *raison d'être* in

<sup>129</sup> See discussion in Chapter II, *supra*, and Chapter III, *infra*.

<sup>130</sup> S. CRAM AND N. FRANK, *THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW* 21-41 (1982).

<sup>131</sup> See, e.g., *Lacson v. Lacson*, G.R. No. 23482, 23767, and 24259, August 30, 1968.

<sup>132</sup> *Lacson v. Lacson*, G.R. No. 23482, 23767, and 24259, August 30, 1968.

<sup>133</sup> *Id.*, citing CODE COMMISSION, REPORT ON THE PROPOSED CIVIL CODE 12.



the basic need of a child for his mother's loving care."<sup>134</sup> This doctrine finds further statement in the second paragraph of article 213 of the Family Code.<sup>135</sup>

There seems to be enough basis for the "tender years" doctrine. However, it is hard to overlook the presence of a backdoor in the form of an exception, "unless the court finds compelling reasons." As to what these reasons might be, the law does not explicitly say, thus again leaving the courts wide discretion in determining what would constitute compelling reasons. Thus, in one case, a mother's "moral laxity or the habit of flirting from one man to another" was found to be ample justification for the award of custody to the father, especially since this exposed the children to conflicting moral values.<sup>136</sup> The Code Commission, however, had said that a child of tender years would be unable to understand its mother's "moral dereliction," and that a father's care was an inadequate substitute for a mother's loving nurturing. Accordingly, the Supreme Court held thus: "If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is as yet unable to understand the situation."<sup>137</sup> However, in another case, the Court commented that:

the report of the Code Commission which drafted Article 213 [is] that a child below seven years still needs the loving, tender care that only a mother can give and which, presumably, a father cannot give in equal measure. The commentaries of a member of the Code Commission, former Court of Appeals Justice Alicia Sempio-Diy, in a textbook on the Family Code, were also taken into account. Justice Diy believes that a child below seven years should still be awarded to her mother even if the latter is a prostitute or is unfaithful to her husband. This is on the theory that *moral dereliction has no effect on a baby unable to understand such action*.<sup>138</sup> (emphasis supplied)

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<sup>134</sup> *Perez v. Court of Appeals*, G.R. No. 118870, March 29, 1996. (footnotes omitted)

<sup>135</sup> Art. 213 of the Family Code partly provides that "[n]o child under seven years shall be separated from the mother unless the court finds compelling reasons to order otherwise."

<sup>136</sup> *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995.

<sup>137</sup> *Lacson v. Lacson*, G.R. Nos. 23482, 23767, and 24259, August 30, 1968, citing CODE COMMISSION, REPORT ON THE PROPOSED CIVIL CODE 12.

<sup>138</sup> *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995. (footnotes omitted)

Such inconsistent stands reveal that the Supreme Court does indeed inquire into the morality or immorality of contending parents.<sup>139</sup> Indeed, in several cases, it has pronounced that moral fitness is one relevant factor that courts must look into in order to resolve custody cases.<sup>140</sup> The Supreme Court has said that the "tender years" doctrine is merely a strong presumption but is not conclusive: It can be overcome by "compelling reasons,"<sup>141</sup> among which are "unfitness to exercise sole parental authority."<sup>142</sup> A mother's immorality has been considered an ample justification for depriving her of custody and parental authority.<sup>143</sup> Considering the way these cases have been decided, it is again likely that the mother's lesbianism, which the Court has already seen to be indicative of immorality,<sup>144</sup> may be a compelling reason for non-application of the doctrine.

Lesbian behavior has been deemed sufficient to overturn the tender years presumption in other jurisdictions. In one case, for instance, lesbian behavior was held to be "behavior beyond the pale of the most permissive society," and a lesbian mother was denied custody of her children of tender years.<sup>145</sup> In another case, the Oklahoma Supreme Court held that a mother's homosexual relationship was an adequate change of condition to render a child custody modification. The Court stated that "[the child] would have no idea that the [homosexual] behavior was not morally acceptable by society."<sup>146</sup> This denial of custody to lesbian mothers may be because the "[b]utch stereotype of lesbians seems diametrically opposed to the nurturance and care-taking so closely associated with motherhood."<sup>147</sup>

Apart from these, there are many misconceptions that continue to invade the popular thinking. Among the many reasons for denying custody to homosexual or lesbian parents are the following:

- 1) People fear that children raised by homosexual or lesbian parents will grow up to be homosexuals or lesbians themselves;

<sup>139</sup> See e.g., *Unson v. Navarro*, G.R. No. 52242, November 17, 1980, 101 SCRA 182; *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995; *David v. Court of Appeals*, G.R. No. 111180, November 16, 1995.

<sup>140</sup> *Id.*

<sup>141</sup> *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995.

<sup>142</sup> *Id.*

<sup>143</sup> See e.g., *Cervantes v. Fajardo*, G.R. No. 79955, January 27, 1989; *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995.

<sup>144</sup> See discussion, Chapter II, *supra*.

<sup>145</sup> *Spence v. Durham*, 283 N.C. 671; 198 S.E. 2nd 537 (1973).

<sup>146</sup> *M.J.P. v. J.G.P.*, 640 P.2d 966, at 969 (Okla. 1982).

<sup>147</sup> K. WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 138, 172 (1991).

- 2) Homosexual and lesbian behavior is associated with suicidal behavior, prostitution, substance abuse, HIV infection, premature sexual activity, incest and child molestation, and other harmful and corrupt practices; and
- 3) Homosexual and lesbian parenting creates confusion in the psychosocial development of the child thereby resulting in the shaping of distorted views on gender, identity, and gender roles.<sup>148</sup>

Such allegations, if believed by the courts, are likely to be appreciated as "compelling reasons" sufficient to justify the non-application of the tender years doctrine. In fact, if the court is conservative enough, a mere *allegation* of lesbianism of the mother might be adequate. Yet these are nothing but products of prejudices by heterosexuals.

Studies have inconclusively shown that sexual orientation is "affected by genetic or physiological determinants."<sup>149</sup> Neither is there anything "inherent (or essential or pre-determined) about sexual orientation but that it is determined by an individual's social environment."<sup>150</sup> Sexual orientation or preference is not to be treated as a simple trait or feature that is hereditary. Its formation is the product of a complex process consisting of a combination of many factors, including genetic make-up, social norms, and cultural dynamics;<sup>151</sup> it would be an oversimplification to just assume that children most naturally adopt their parents' sexual preference. Moreover, the argument fails to take into consideration the fact that majority of gays and lesbians are born of heterosexual parents.<sup>152</sup>

On the other hand, if the fear of same-gender orientation is premised on the thinking that the mere exposure to homosexual and lesbian parents will influence the child's decision on his own sexual preferences, then the disqualification of these individuals from exercising parental authority becomes overbroad and constitutionally suspect. For what would then become of heterosexual parents who tolerate and accept their gay and lesbian children?

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<sup>148</sup> Carlos Ball & Janice Farrell Pea, *Warring with Wardle, Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, at 280-289 (1998).

<sup>149</sup> *Id.*, at 287.

<sup>150</sup> *Id.*, at 286, 287.

<sup>151</sup> *Id.*, at 288.

<sup>152</sup> *Id.*, at 289.

### 3. "Best Interests of the Child": Revelations

The unreliability of the "tender years" doctrine has rendered its mechanical application an undesirable path for courts in the Philippines. Courts have treaded the more popular and well-accepted criterion of "best interests of the child." Whether a child is under or over seven years of age, the paramount consideration of custody courts must always be the child's interests.<sup>153</sup> Under this principle, "all relevant factors"<sup>154</sup> are considered, including "material resources, social and moral situations" of parents.<sup>155</sup> The emerging "best interests" test has been applied because an automatic and blind application of the "tender years" test has been thought antithetical to the *raison d'être* of parenting in the first place.<sup>156</sup> Under the "best interests" rule, the psychological relationship, rather than the biological relationship, of the parent and the child is emphasized. Courts thus consider which parent can provide the most love and attention to the child and not only which parent provides the traditional child-rearing role.<sup>157</sup> The court first considers the physical, mental, and emotional well-being of the child. The court then determines the present status of the child, the development of the child with the present custodial parent, and any preference the child may have toward a certain parent. Some relevant factors have included the parent's wishes; the child's wishes; interaction and interrelationship with other persons who may affect the child's interests; the child's adjustment to home, school and community; and the mental and physical health of all individuals involved.<sup>158</sup> If both parents are equally able to provide for a child, and other factors are equal, courts may examine the question of the parent's fitness.<sup>159</sup> Courts have broad discretion to determine the level of fitness a parent must achieve before being awarded custody.<sup>160</sup> Courts will generally consider "alcohol and drug disorders, mental and emotional health, and sexual preference and practices of the parent as information relevant to the fitness of the parent."<sup>161</sup>

The Family Code provision on the "best interests" of the child reads thus:

Article 213. In case of separation of the parents, parental authority shall be exercised by the parent designated by the Court. The Court shall take into

<sup>153</sup> *Espiritu v. Court of Appeals*, G.R. No. 115640, March 15, 1995.

<sup>154</sup> *Perez v. Court of Appeals*, G.R. No. 118870, March 29, 1996.

<sup>155</sup> *Id.*

<sup>156</sup> See, generally, GOLDSTEIN, FREUD, SOLNICH, & GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

<sup>157</sup> D. R. Wichard, Note, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 408-9 (1989) [hereinafter *Homosexual Fathers*].

<sup>158</sup> 24 AM. JUR. 2D *Divorce and Separation* § 974 (1983).

<sup>159</sup> *Homosexual Fathers*, *supra* note 39, at 408-409.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit.

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Justice Cardozo, who first developed the test, claimed that society's view of the parent's moral fitness was irrelevant under the best interests test.<sup>162</sup> However, Cardozo's formulation lacks application in the Philippines, where the rule has always been in favor of the "moral welfare" of the child concerned, and the "respective moral situations of the contending parents" are invariably considered.<sup>163</sup> "In all controversies regarding the custody of minors, the foremost consideration is the moral, physical, and social welfare of the child concerned, taking into account the resources and moral, as well as social, standing of the contending parents. Never has this Court deviated from this criterion."<sup>164</sup>

For fathers, courts have been reluctant to agree that prevailing values regarding family styles do not necessarily correlate with parenting capabilities. Homosexual fathers have a particular difficulty. No matter which doctrine is followed by the particular custody court, fathers are already disadvantaged. For homosexual fathers, these standards are virtually impossible to meet. "The homosexual father must deal not only with the disadvantage of his gender and the abundance of 'Mom Power' in the courts, he must also deal with the unspoken prejudice against his sexual preference and lifestyle in front of a generally homophobic judiciary."<sup>165</sup> In a case decided in Washington, for example, the Trial Court judge strongly expressed his opinion on the unfitness in general of homosexual fathers.<sup>166</sup> He made the definite assertion that "a child should be led in the way of heterosexual preference, not be tolerant of homosexuality, and thus it could not do any good to live in a homosexual environment. It might do some harm."<sup>167</sup>

In granting visitation rights, courts are no less careful. Although they are liberal in the grant of visitation rights, they make sure that the exercise of such rights does not affect the child negatively. Thus, where two lesbian lovers were awarded custody of their respective children, the court imposed the condition that

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<sup>162</sup> *Finlay v. Finlay*, 240 N.Y. 429 at 433-34, 148 N.E. 624 (1925).

<sup>163</sup> *Unson v. Navarro*, G.R. No. 52242, November 17, 1980.

<sup>164</sup> *Cervantes v. Fajardo*, G.R. No. 79955, January 27, 1989.

<sup>165</sup> *Homosexual Fathers*, *supra* note 39, at 410.

<sup>166</sup> *In re Marriage of Cabalquinto*, 100 Wash. 2d 325, 669 P. 2d 886 (1983).

<sup>167</sup> *In re Marriage of Cabalquinto*, 100 Wash. 2d 325 at 328, 669 P. 2d 886 at 888 (1983).

the women live apart.<sup>168</sup> In another case, a divorced gay father was allowed visitation rights as long as he did not see his children in the presence of his lover or in their joint home, and was prevented from discussing gay issues with his children.<sup>169</sup> In *North v. North*,<sup>170</sup> the father was HIV-positive and cohabited with a homosexual HIV-positive partner. The Court did not uphold the mother's claim that the grant of visitation would result in psychological harm and the contracting of AIDS by children due to the homosexual lifestyle. The Court of Appeals remanded the case for further proceedings on whether or not the HIV status might endanger physical health or impair emotional development.

## B. Fitness to Adopt

### 1. *The Basic Adoption Statute*

Another option open to a homosexual or lesbian who wishes to be a parent is the option of adoption. The current adoption statute is Republic Act No. 8552, or the Domestic Adoption Act of 1998. This law provides guidelines with regard, *inter alia*, to the eligibility of both the adopter and the adopted, the proper procedure therefor, and the effects thereof. What is relevant to this discussion are the guidelines as regards the eligibility of the adopter.

### 2. *Adoption by a Homosexual Individual*

The Domestic Adoption Act provides minimum criteria as regards qualifications of the adopting parent. In this regard, homosexuals and lesbians may again find themselves at a disadvantage. One of the basic guidelines for eligibility is that the prospective adopting parent must be of "good moral character."<sup>171</sup> Given that homosexuality and lesbianism are associated with immorality, it would be possible to deny adoption, or to overthrow a grant of adoption, on the ground of the immorality of the prospective adopter. Again, the "best interests" of the child are of primary importance, as explained in a recent Supreme Court decision:

The welfare of a child is of paramount consideration in proceedings involving its custody and the propriety of its adoption by

<sup>168</sup> DIANNE ROSEN, *LESBIANISM: A STUDY OF FEMALE HOMOSEXUALITY* 74 (1974).

<sup>169</sup> *In re J., S., and C.*, 324 A. 2d 90, 92, 97 (N.J. Super. 1974).

<sup>170</sup> Cited in Andrea K.R. Stevens, Note, *The Hysteria Continues: When a Non-Parent's HIV Infection Threatens Parental Rights*, 35 U. LOUISVILLE J. FAM. L. 161, 175-77 (1996-97).

<sup>171</sup> Rep. Act No. 8552, sec. 7, par. (a).



another, and the courts to which the application for adoption is made is charged with the duty of protecting the child and its interests and, to bring those interests fully before it, it has authority to make rules to accomplish that end. Ordinarily, the approval of the adoption rests in the sound discretion of the court. This discretion should be exercised in accordance with the best interests of the child....<sup>172</sup>

The earlier section has already discussed how placing children with "immoral" homosexual or lesbian parents may not be in the child's "best interests." In practice, however, the sexual orientation of the potential adopter is rarely taken into consideration as being relevant *per se* to his or her fitness to be a parent. This practice is more in keeping with the theory that

[a]doption statutes, being humane and salutary, hold the interests and welfare of the child to be of paramount consideration. They are designed to provide homes, parental care and education for unfortunate, needy or orphaned children and give them the protection of society and family in the person of the adopted, as well as to allow childless couples or persons to experience the joys of parenthood and give them legally a child in the person of the adopted for the manifestation of their natural parental instincts. Every reasonable intendment should be sustained to promote and fulfill these noble and compassionate objectives of the law.<sup>173</sup>

Further, the Supreme Court has also claimed that adoption statutes, as well as matters of procedure leading up to adoption, should be "liberally construed to carry out the beneficent purposes of the adoption institution"<sup>174</sup> and to "protect the adopted child in the rights and privileges coming to it as a result of the adoption.... to refuse would be to indulge in such a narrow and technical construction of the statute as to defeat its intention and beneficial results or to invalidate proceedings where every material requirement of the statute was complied with."<sup>175</sup>

Again, the question is one to be considered on a case-to-case basis. Even if the sexual orientation *per se* would not matter, the question to be considered is whether or not that sexual orientation, coupled with actual overt behavior, e.g. actually living with a person of the same gender, would suffice to create an unwholesome atmosphere that would be detrimental to the child's best interests. If this were to be the case, then a lesbian or homosexual desiring to adopt would

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<sup>172</sup> Republic v. Court of Appeals, G.R. No. 92326, January 24, 1992.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

have to make a significant lifestyle choice: Either choose to be a parent, or choose to have a partner. Either way, this forced choice would result in the shutting of some doors.

Further, some authors have discussed the detrimental effects of single parenting on a child's overall development. It has been observed that, "[a]dmittedly, the traditional adoption model does allow for an unmarried person to adopt alone. Single parenting, however, even as an adoptive parent, may be problematic.... Even though single parent families are more common, the 'stigma' that some place on households headed solely by single parents... cannot be ignored."<sup>176</sup>

Thus, ultimately, the question with regard to whether or not a homosexual or lesbian can or should adopt is inextricably linked to the fundamental question regarding lifelong partnering. Since marriage is not allowed, perhaps it is not in the child's best interests in the first place to be placed with a homosexual or lesbian when it would be impossible for that child to ever receive the "holistic" nurturing that only a two-parent atmosphere could provide.

Pertaining to adoption by homosexual partners on the other hand, it was constantly held that adoption by one homosexual partner of the other, in order to establish legal ties through the child of one of the parties, is prohibited.<sup>177</sup> In support of this position, various reasons<sup>178</sup> were given for denying joint adoption based on sexual orientation of potential co-parents:

1. Fear that the homosexual parent will molest the child;
2. Fear that the child will be harassed by other children because of the co-parents' relationship;
3. Fear that the child will become homosexual from the co-parents' influence;

<sup>176</sup> Angela Mae Kupa, *Two Parents are Better Than None: Whether Two Single, African American Adults Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 708-709 (1996).

<sup>177</sup> Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 414 (1996).

<sup>178</sup> Kupa, *supra* note 176, at 715.

4. Fear that the co-parents will harm the child morally;
5. Fear that the child will be exposed to AIDS;
6. Homosexuality in and of itself makes potential parents unfit;
7. The belief that the developmental needs of a child require a stable heterosexual household.

It is to be noted that these arguments are essentially similar to those laid down against the exercise of parental authority by homosexual and lesbian couples. As previously discussed in the preceding section, such grounds do not have legal or factual basis.

Certain developments in jurisprudence, however, point to a seeming reconsideration of the above prohibition in light of the principles adopted in *In re A.J.J.* and *In re Adoption of Evans*.<sup>179</sup>

1. A functional equivalent of a marital unit can act as an equitable marriage. From this flows the idea that a family unit in fact should be treated as a family unit in law.
2. The best interests of the child trumps adverse statutory language, and opens up large new areas of family law to inroads by same-sex couples and their children.

Following these pronouncements, U.S. courts have proposed the following reasons,<sup>180</sup> among others, for allowing gay and lesbian couples to jointly adopt:

1. Co-parents' level of commitment;
2. Longevity of the relationship;
3. Joint and equal participation by both partners as parents;
4. The child's emotional security in the home;

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<sup>179</sup> Green, *supra* note 177, at 414

<sup>180</sup> Kupenda, *supra* note 176, at 714-15.

5. Extended family support available;
6. Maturity, seriousness, and community status of the co-parents;
7. The need for more adoptive parents; and
8. The welfare of the child.

In view of these rulings, the Supreme Court can thus take the opportunity to break new ground: Follow the emergent trend in United States jurisprudence. Our courts can take its cue from *In re Adoption of Evan*,<sup>181</sup> where the court allowed the adoption of a boy by his mother's lesbian partner was on the ground of the best interests of the child, and at the same time allowed the natural parent to retain certain rights. They may also take heart in the studies that "have found that children raised in a two-parent lesbian household are better adjusted than children raised in a single-parent household, whether the single parent is straight or lesbian."<sup>182</sup>

In sum, the moral fitness arguments raised against homosexual parents are entirely based on the acceptance of the premise that homosexual and lesbian conduct is immoral. It is seriously contended, however, "that there is no legitimate, principled basis" for a determination of whether or not such conduct is, in fact, immoral.<sup>183</sup> Reliance on universally accepted standards of morality is not sufficient since there is no settled consensus on morality, let alone the morality of sexual conduct. Nevertheless, homosexuals and lesbians are forced to take defense and tell their side of the story. The misfortune of it all is captured by Carlos Ball and Janice Farrell Pea in their article criticizing Professor Wardle's proposition of adopting a rebuttable presumption that parenting by homosexuals is not in the best interests of children:

It is indeed ironic that gays and lesbians have to defend and explain their desire to love and nurture children when for the rest of the population such a desire is expected (and oftentimes considered by many abnormal when it is lacking). Every human being has a parent, so it is hardly surprising that parenting can be such an important component of what it is to be a human

<sup>181</sup> 153 Mi SC. 2d 844, 583 N.Y.S. 2d 997.

<sup>182</sup> WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 112-13 (1996).

<sup>183</sup> Julie Shapiro, *Custody and Conduct: How the Law Fails Gay and Lesbian Parents and Their Children*, 71 IND. L. REV. 623 (1996).

being. A gay or lesbian, then who wants to have a child and raise that child, is doing nothing more and nothing less than expressing and pursuing his or her humanity.<sup>184</sup>

#### IV. OUT OF THE CLOSET?: THE SEARCH FOR A DEFINITION

From the foregoing discussion, the conclusion is inevitable: Homosexuals and lesbians are specifically disinvited from participation in the family, or, at the very least, treated as unwelcome gatecrashers in that most sacred of institutions. The undesirability of their status exposes them to the constant threat of expulsion therefrom. Can this sort of exclusion be what the Constitutional Commission, or even the Code Commission, intended? The Family Code is sadly bereft of definitions, and the flippant dismissal of the Code Commission as regards the "already well-established" concepts offers no edification either. Nor does jurisprudence offer any enlightenment; the words "homosexuality" and "lesbianism" remain unexplained by our Supreme Court, although they have been used in a number of cases (primarily criminal) as incidental adjectival clauses,<sup>185</sup>

<sup>184</sup> Ball and Farrell Pea, *supra* note 148, at 266.

<sup>185</sup> For the word "homosexual," see, e.g., *People v. Tayapad*, G.R. No. 60471, May 21, 1984: "Steve Castillo, a homosexual friend of Tayapad..." "Franco, admittedly a homosexual..."; *People v. Loreda*, G.R. No. 64167, July 31, 1984: "He is a homosexual."; *People v. Pampanga*, G.R. No. 66046, October 17, 1985: "... what happened at the homosexual dance the night before." "... on the preceding night at the homosexual dance."; *People v. Taruc*, G.R. Nos. 69337-69338, March 8, 1989: "Investigation revealed this person to be Federico Sanchez, a homosexual beautician..." "the observation of the trial court that as a homosexual, Sanchez would have been deterred by his timid nature from testifying against the two accused-appellants..."; *People v. Tac-an*, G.R. Nos. 76338-39, February 26, 1990: "describing Renato as 'bayot' (homosexual)"; *People v. Ritter*, G.R. No. 88582, March 5, 1991: "Pedophilia — A form of sexual perversion wherein a person has the compulsive desire to have sexual intercourse with a child of either sex. Children of various ages participate in sexual activities, like fellatio, cunnilingus, fondling with sex organs, or anal sexual intercourse. Usually committed by a homosexual between a man and a boy the latter being a passive partner."; *Garganera v. Jocson*, A.M. No. RTJ-88-22, September 1, 1992: "Benito C. Jalandoon, Sr. *inter alia* charges that respondent judge: (a) is a homosexual;" *People v. Pat*, G.R. Nos. 95353-95354, March 7, 1996: "he saw a homosexual being stabbed..." "he was at the police station when a homosexual ('bayot') who was being investigated..." "the persons who killed the homosexual was of the same build as me and had curly hair..."

For the word "lesbian," see, e.g., *Gonzalez v. Kalaw Katigbak*, G.R. No. 69500, July 22, 1985: "Another scene on that stage depicted the women kissing and caressing as lesbians." *People v. De La Cruz*, G.R. No. 78582, June 10, 1987: "As affirmative defense, the accused and his witnesses tried to prove that Celia had been seeing a lesbian prior to her marriage to the accused and this lesbian had been making trouble for them ever since as she rejected the offer to go abroad and live together and leave the accused behind. Once, Celia testified she chanced upon the lesbian and Lourdes in bed in their underwears (sic) and it is her theory that said lesbian is behind all these accusations against Dante de la Cruz." "the jewelries were gifts of the lesbian to Celia and the latter wanted to forget everything about the lesbian anyway." *People v. Joaquin*, G.R. No. 98007-98008, August 5, 1993: "the two are lesbian lovers who have conspired to take revenge on Necemio by fabricating their story against him." "Lesbianism is a malicious accusation that should not be made without proof." (italics supplied)

in support of the theory that these words are too well-understood to bear much scrutiny.

Despite the absence of definitions, the specific contexts in which the words are used reveal a judicial tendency toward careless misuse and abuse thereof and a pattern of the overwhelming negativity with which our Supreme Court views homosexuals and lesbians. For example, the word "homosexual" first made its appearance in our jurisprudence in the 1977 case of *Montemayor v. Araneta University*.<sup>186</sup> Petitioner therein, Felix Montemayor, was a full-time professor and head respondent university's Humanities and Psychology Department. He was dismissed, *inter alia*, for making "homosexual advances to certain individuals." The Supreme Court did not discuss exactly what was contained in that charge, but it did make the pronouncement that, if proved, it would amount to a sufficient cause for removal from his professorial job since such conduct was "immoral."<sup>187</sup>

Similarly, in the 1985 case of *Gonzalez v. Kalaw Katigbak*,<sup>188</sup> a movie scene depicting "women kissing and caressing as lesbians" was found to be "obscene," and not covered by the penumbra of freedom of expression.<sup>189</sup> In the 1991 landmark case of *People v. Ritter*,<sup>190</sup> the Court accepted a purportedly scientific definition of "pedophilia:" A "sexual perversion" which is "[u]sually committed by a homosexual between a man and a boy." From this smattering of cases, it is apparent that homosexuality and lesbianism are linked, in the mind of the judiciary, with obscenity, immorality, and perversion. They are "psychoses" similar to being of unsound mind.<sup>191</sup> Thus, one ought to use these labels with care: To call someone a homosexual or a lesbian is a "malicious accusation that should not be made without proof."<sup>192</sup>

The search for a legal definition of homosexuality and lesbianism thus proves elusive. The Code Commission's refusal to even discuss the meanings of these words was indeed unfortunate: There is no such thing as a well-established definition thereof, and entire treatises have been produced by a plurality of scholars in other disciplines, precisely in search of the meanings of these terms. To attempt to understand our family laws, we turn to these other disciplines in search of a viable definition that would be in keeping with our purported state

<sup>186</sup> G.R. No. 44251, May 31, 1977.

<sup>187</sup> *Montemayor v. Araneta University*, G.R. No. 44251, May 31, 1977.

<sup>188</sup> G.R. No. 69500, July 22, 1985.

<sup>189</sup> *Gonzalez v. Kalaw Katigbak*, G.R. No. 69500, July 22, 1985.

<sup>190</sup> G.R. No. 88582, March 5, 1991.

<sup>191</sup> *Santos v. Court of Appeals*, G.R. No. 112059, January 4, 1995.

<sup>192</sup> *People v. Joaquin*, G.R. No. 98007-98008, August 5, 1993.



policy of protecting the autonomy and integrity of the Filipino family. A holistic definition, encompassing all possible gender identities and all realities, is beyond the scope of this paper. Quite interesting, however, are the conclusions arrived at by these scholars; conclusions that are useful in the analysis of the phenomena now under scrutiny.

**A. Everyone is a homosexual? : The Search for a Definition  
Amidst the Essentialist/ Social Constructionist Debate**

Even a cursory examination of the vast array of works devoted to discussing homosexuality and lesbianism will reveal that the Code Commission was sadly deficient in its disregard for the reality that several different phenomena can be contemplated by the blanket terms "homosexuality" and "lesbianism."<sup>193</sup> Further, the Code Commission was myopically unaware of the heated debate ongoing between scholars of various disciplines. These scholars have been sharply split along the question as regards whether or not the homosexual even exists as such. These scholars have invariably addressed, directly or indirectly, the question as regards how far individual behavior is given meaning or shape as a result of concrete socio-historical conditions.

Two main camps exist as regards the study of human sexuality and how far this sexuality must be seen as a product of social conditioning: *Essentialism* and *constructionism*. The various arguments presented by each side are not as simplistic as this paper's treatment would suggest, and the schism is not as sharp as that presented here. Briefly: It is possible to assume that human sexuality is given *a priori* as a result of a fixed, immutable human essence. From this essentialist perspective, human persons are differentiated sexually, and various descriptive categories exist in speech *only because they exist in real life*. Sexual identity, from this perspective, is described in much the same way that sex describes men and women: Gay people are simply those who experience same-sex desire. Homosexuality and heterosexuality are terms used to describe forms of sexual experience, which remain invariably and essentially the same across all human populations. An attempt to define what a homosexual is, therefore, is to assume that there have *always* been people who have identified themselves as

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<sup>193</sup> The authors are aware that the word "lesbian" has sometimes been subsumed under the word "homosexual," and that the word "homosexuality" is used, in other contexts, as a blanket which covers both male and female individuals who have a sexual preference for the same sex. This paper maintains the distinction, however, because this is the phraseology used by Philippine laws.

"homosexuals" in *all* historical periods and all historical contexts, and that the word must be understood unequivocally throughout history.<sup>194</sup>

In contrast to this is the argument that *sexual categories themselves* change. *Social constructionists* suggest that *all* sexual categories and identities are socially constructed and historically specific. For those in this second camp, the *constitution* or *construction* of sexuality must itself be analyzed since "categories of sexual preference and behavior are *created by humans and human societies*."<sup>195</sup> Sexual identity is viewed in terms of *descriptions* of individuals, their social roles, and their relationships to other aspects of social life, with particular emphasis on the family, gender, and sexuality.

Michel Foucault, a seminal philosopher, makes the assertion that *all sexual identities and categories* themselves are in a constant flux. Social constructionist are largely influenced by the Foucauldian perspective, and a passage from the first volume of Foucault's *The History of Sexuality* is often quoted:

Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct: Not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.<sup>196</sup>

Sexuality, in other words, achieves meaning only in the context of the culture that caused it to exist. Using this argument, it is incorrect to say that there were homosexuals in Greece, or in pre-colonial Philippines, or indeed in *any* society or culture in which the discourse of homosexuality is not yet present. It is a category peculiar to mid-nineteenth century Europe and to present-day Western civilization.

Of course, these two positions do not exist absolutely. Moderate social constructionists might be willing to concede that certain aspects as regards gender are "givens," such as, for example, the indisputable fact of biological identity.

<sup>194</sup> For the essentialist perspective, see, generally, JOHN BOSWELL, *SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1974).

<sup>195</sup> J. NEIL GARCIA, *PHILIPPINE GAY CULTURE: THE LAST 30 YEARS* 201 (1996).

<sup>196</sup> MICHEL FOUCAULT, I *THE HISTORY OF SEXUALITY* 105-6 (1979).

Such biological "givens" are, of course, universal aspects that cut across time frames and cultures.

However, the untenability of the strict essentialist perspective has been demonstrated by the fact that "homosexuality" has actually had a very short history. The word "homosexuality" first graced the English language only a little over a hundred years ago, an import from the German language in which the word existed since 1869. The history of "homosexuality," therefore, dates back only to 1892, when the word first appeared in the Oxford English Dictionary. The history of *heterosexuality*, on the other hand, is traced back only to 1900, when the word first appeared.<sup>197</sup>

This is not to suggest that new words pertained to entirely novel human experiences. Obviously, there *was* same-sex love prior to 1892, and (equally obviously) different-sex relationships prior to 1900. The introduction of these new words into the English language is significant, however, because they indicate new ways in which sexual relations *themselves* were understood. The phenomenon of the sexual *invert* was widely analyzed in the nineteenth century,<sup>198</sup> and the "invert" is often regarded as the precursor of the modern-day homosexual. However, "inversion" as deviant behavior<sup>199</sup> referred primarily to *gender* inversion, not *sexual* inversion.<sup>200</sup> The invert was a "masculine" woman or a "feminine" man, and *not necessarily* a person who preferred same-sex relationships. Crucial to nineteenth-century studies was the idea that the individual himself or herself was *not defined* by manifestations of such behavior.<sup>201</sup>

Before the emergence of the labels, it was impossible to speak of homosexual *persons*. It was possible to speak only of homosexual *acts* as incidental manifestations of inversion. The emergence of the labels signified a critical turning point in the consciousness of the English-speaking world, with the corollary implication that *as a person*, one is either essentially homosexual or heterosexual.

One problem with the emergence of the labels, however, is that it is all-too-convenient to subsume various identities and behaviors under the broad

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<sup>197</sup> CHRISTINE DOWNING, MYTHS AND MYSTERIES OF SAME-SEX LOVE 1 (1991).

<sup>198</sup> *Id.*, at 2.

<sup>199</sup> *Id.*

<sup>200</sup> Cheshire Calhoun, *Family's Outlaws: Rethinking the Connections between Feminism, Lesbianism and the Family*, in FEMINISM AND FAMILIES 139 (Hilde Lindemann Nelson ed., 1997).

<sup>201</sup> DOWNING, *supra* note 197, at 2.

penumbra offered by the words themselves. It would be possible for the uncritical person, without entirely understanding the implications of the word, to attach that label to a broad range of behavior, as a pedagogical tool for understanding such behavior, not comprehending the full effects of such uncritical application (as, indeed, our Supreme Court has done). As pointed out by one author, the use of this label is erroneous because it masks the reality that there is no *single* homosexual identity, but rather a *plurality of identities*:

The present dominant myth implies that "homosexuality" is a uniform category, that the history, the experience, the self-understanding of those whose love is directed to the same gender can be subsumed within the same definition, the same explanatory paradigm. Whereas in actuality, as many recent studies have acknowledged, even as they still use the word, we would do better to speak in the plural, to speak of "homosexualities."<sup>202</sup>

This plurality of identities has been widely discussed and analyzed elsewhere,<sup>203</sup> and a thorough presentation thereof is fodder for another dissertation. We present here a brief sampling of phenomena that have been examined, merely in order to demonstrate this multiplicity of identities.

Apart from the traditional notion that "homosexuality" connotes sexual attraction for the same biological sex, other behaviors have been loosely grouped under the penumbra of this word. For instance, one phenomenon is that of *transvestism*, which more accurately mimics the phenomenon of *inversion* earlier alluded to. Transvestites, in brief, are biological males or biological females, who challenge the traditional gender roles by "cross-dressing," that is, clothing themselves in the apparel traditionally worn by the other sex. This cross-dressing, however, is not necessarily accompanied by sexual attraction to those of the same biological sex. It has been suggested though that such transvestism is sufficient to transform a person into a homosexual. Joan of Arc, for instance, who disguised her sex and dressed as a man, has been called a "lesbian"<sup>204</sup> despite the absence of evidence regarding any sort of sexual attraction to women.

Another phenomenon that has been subsumed under "homosexuality" is that of *transsexuality*, i.e. the not infrequent occurrence of "sexually-altered" human beings who, by virtue of technological advancement, have been able to

<sup>202</sup> DOWNING, *supra* note 197, at 6-7.

<sup>203</sup> See, e.g., DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE (1990); TERESA DE LAURETIS, TECHNOLOGIES OF GENDER: ESSAYS ON THEORY, FILM AND FICTION (1987); THE CULTURAL CONSTRUCTION OF SEXUALITY (Pat Capla ed., 1987).

<sup>204</sup> ADRIA SCHWARTZ, SEXUAL SUBJECTS: LESBIANS, GENDER, AND PSYCHOANALYSIS 5-6 (1998).

transform themselves into the biological opposite of their original sex. Transsexuals have also been called "homosexuals" even after they have fully undergone surgical transformation. It is thus possible for a biological female, who is attracted only to biological males, to still be labeled a "homosexual." In the same vein, certain individuals have been referred to as "male lesbians." Biologically male and attracted to women, they consider themselves *women* trapped in men's bodies.

One group has even gone so far as to assert that *all* women, in some manner, are lesbians, by offering the following definition:

A lesbian is the rage of all women condensed to the point of explosion. She is the woman who, often beginning at an extremely early age, acts in accordance with her inner compulsion to be a more complete and freer human being than her society – perhaps then but certainly later – cares to allow her.... She may not be fully conscious of the political implications of what for her began as personal necessity, but on some level she has not been able to accept the limitations and oppression laid on her by the most basic role of her society – the female role.<sup>205</sup>

This assertion is particularly frightening in the Philippine context. If *any* homosexual family is subject to fragmentization, and *any* person may be called a homosexual, then *every* Filipino family is inherently unstable. Surely, this conclusion is untenable. Yet, given the current state of our laws, this conclusion is entirely possible. The confusing plurality of identities thus underscores the need for a *legal definition* of homosexuality, one that is grounded in our cultural realities and that would enhance rather than detract from the laudable state objectives. For this definition, we must turn to a historical survey, adopting the framework offered by the social constructionists.

### B. The "Homosexual" in the Philippines

In the Philippines, the debate between the essentialists and the social constructionists has been largely absent. J. Neil Garcia's *Philippine Gay Culture: The Last 30 Years* is the first work that addresses the history of "gayness" in the

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<sup>205</sup> SCHWARTZ, *supra* note 204 at 4, citing RADICALESBIANS, WOMAN-IDENTIFIED WOMAN 240 (1973).

Philippines. Garcia suggests that there has not been much essentialist Philippine gay historiography against which the social constructionist can react.<sup>206</sup>

The paradigm mentioned above is muddled in the Filipino context because there is a schism between Western and local sexual frameworks, a confusion that occurs each time Western sexual categories are indiscriminately transplanted into cultures that do not share the same perspective. This chasm has been discussed in the framework of the nativist/universalist debate. The *universalist* perspective assumes that there is a certain kind of equivalence between Western and local sexual frameworks: Homosexuality and heterosexuality remain invariable and essentially the same across *all* human populations. From the *nativist* perspective, on the other hand, we see that even though *labels* of sexuality and the discourse producing them actually occur in the Philippines, they do not accurately depict or capture the native subject's comprehension.

Even a perfunctory glance at the Philippine experience demonstrates that the essentialist and universalist perspectives are fundamentally unsound. It is erroneous to unqualifiedly transplant a Western construct into the Filipino context, which does not necessarily reflect that reality. This would be a fundamental distortion of the expressive function that attaches to family laws.<sup>207</sup>

A simple linguistic analysis demonstrates that the "homosexual" lacks a native counterpart: There simply is no Filipino term for the word "homosexual" and everything that the latter word connotes. The closest approximation appears to be the *Tagalog* word "*bakla*," but whether or not the two are rough equivalents remains to be seen. It would be naïve, and historically inaccurate, to automatically claim equivalence between the two terms: *Bakla* predates "homosexual" and was already in existence in pre-colonial Philippines. A contraction of the words *babae* and *lalake*, *bakla* was used to allude primarily (although not exclusively) to the cross-dressing high priests of the native religion. Certainly present in these high priests were various signs of gender "inversion": The *babaylan*, who held exalted positions of power,<sup>208</sup> were recognized by several early historians as being transvestites.<sup>209</sup> But were they *homosexuals*? Perhaps, but only if mere transvestism is sufficient to create a homosexual. The etymology of

<sup>206</sup> GARCIA, *supra* note 195, at 201.

<sup>207</sup> For a discussion, see Chapter I, *supra*.

<sup>208</sup> See, generally, Zeus Salazar, *Ang Babaylan sa Kasaysayan ng Pilipinas*, Women's Role In Philippine History: Papers And Proceedings Of The Conference Held 8-9 March 1989 (University of the Philippines, Center for Women's Studies), at 35-41.

<sup>209</sup> EVELYN TAN CULLAMAR, *BABAYLANISM IN NEGROS: 1896-1907* 18 (1986).



the word *bakla*, nothing more than a shortened form of the words for woman and man, suggests that the term was used to refer simply to *effeminate men*, and not necessarily to refer to sexual orientation.

Therefore, whereas it may be possible to show that, in the Philippines, there have *always* been practices that seem to display homosexual behavior, these practices can be called *gay* only if one analyzes them in terms of modern-day categories. But how could there have been *homosexuality* if *homosexuality* as a concept did not exist? There was some form of condemnation of behavior perceived as deviant, true; however, in the Philippines at least, mere *homosexual behavior* did not a homosexual make.

The advent of the Spanish conquerors did little to transform the usage of *bakla* from its earliest roots. *Bakla* here, as in the pre-Spanish period, referred simply to effeminate men; and again this term was used in a purely descriptive, and hence not necessarily judgmental, manner. The entry of European man, however, marked a turning point in that the *babaylanes*, formerly revered, came to be persecuted. It must be stressed, however, that European man had not defined what was meant by *homosexuality*, and so the persecution of the *babaylanes* was perhaps more on *religious intolerance* for native practices than as a result of moral outrage at sins against nature. Further, the rigid hierarchies introduced by the Spanish assigned non-flexible gender roles to men and women, and persecution of the *babaylanes* may have been because they did not fit into these preordained roles.

However, although there *was* a Catholic morality that frowned upon the “gender inversion” then in existence, the hidden history of the Spanish period speaks of a certain amount of hypocrisy. Whereas male transvestism was frowned upon, and the gender inversion practiced by the *babaylanes* was equally condemned, it is possible to interpret other – widely tolerated – actions as being those properly pertaining to homosexuals. There is an absence of discourse as regards *women* exhibiting signs of “lesbian” behavior, but there are several sources that allude to “homosexual” behavior between and among men. Not an uncommon phenomenon was the existence of intense, passionate (albeit chaste) relationships between men. These relationships were not only tolerated; they were encouraged, even in all-male schools run by devout members of the clergy. Nor were such friendships considered manifestations of *kabaklaan*. The homosexual as such simply did not exist.

A radical paradigm shift came with the entry of the Americans, who introduced the term and the concept of the *homosexual*; and *homophobia*, as well, came into Philippine consciousness. Today's apparent intolerance has its roots in the ideas introduced by the new colonial power. *Bakla*, therefore, took on a new meaning with the turn of the century: no longer seen simply as an effeminate man, *bakla* and *homosexual* became rough linguistic equivalents. And the negative connotations associated with homosexuality came to be associated with *kabaklaan* as well. Hence, to call someone *bakla* was no longer merely to describe his behavior: It was a condemnation of his entire person, his entire identity. Today, *bakla* identity is popularly and even academically construed as a product of psychosexual inversion, that is, a psychological reversal of one's anatomic sex. Only recently – within the last four decades – did the *bakla* begin to be perceived and constructed into an invert.<sup>210</sup>

This broadly drawn survey, distilled from a variety of sources, does not serve to edify us in the search for a simple definition of the word *homosexual* as used in our laws. Philippine gay culture in the last forty years has been characterized not by a *single* identity, but by several expressions of the homosexual identity.<sup>211</sup> Confusion is heightened by a study of the various labels currently used to refer to homosexuals, to “effeminate men,” and to “straight men,” which reveal that implicit in the Filipino experience of homosexuality is the idea that we cannot speak of “gay” persons unequivocally. The different terms in use today make possible fine distinctions between observable behavior and sexual orientation. There are terms used to refer to straight males (*lalake*; *mhin*), and terms used for straight females (*babae*; *mujer*); there are terms that refer to effeminate men attracted to women (*bading*; *binabae*; *dingler verdigris*); there are words that pertain to “masculine” men attracted to men (*pamhinta*); terms attached to “masculine” women (*tomboy*; *tibo*), to “feminine” women attracted to other women (*badjao*); others that connote indeterminate sexuality (*closet queens*; *closeta*), others that connote bisexuality (AC/DC). That these labels all exist, and that many identify themselves as a result of these labels, gives credence to the original assertion made above: that there is a need to historicize sexual orientation, not only sexual attitude and conventions. To reiterate the passage quoted above: In the Philippines, we cannot and should not speak of homosexuality *as such*. We can only speak of *homosexualities*.

<sup>210</sup> GARCIA, *supra* note 195, at 125-126.

<sup>211</sup> GARCIA, *supra* note 195, at 34.

### C. A Viable Legal Definition?

The foregoing phenomenological analysis has demonstrated, first, the current impossibility of a clear-cut definition of *homosexuality*; second, the existence of a wide range of phenomena that can be subsumed under that word; and third, precisely because of the vast spectrum of human behavior, the possibility that *anyone and everyone* might actually, in some shape, manner or form, be a "homosexual." These conclusions do not bode well for Philippine family law.

The authors are not at this stage suggesting an amendment of the Family Code to extricate the grounds that pose threats to the stability of marriage, as discussed in Chapter Two. A passive acceptance of our laws' allusion to "homosexuality and lesbianism," however, is rather dangerous. If the purpose for excluding homosexuals and lesbians from participating in family life is to *enhance* the stability of marriage and the family, then at the very least, these terms *must be defined*; and these definitions must be as *specific as possible*, in order to protect the family institution from incidental dangers.

#### 1. Marriage and the Homosexual

The first of these dangers is with regard to the stability of the marital institution, which apparently can be torn asunder for the flimsiest of reasons. To prevent this, and drawing parallels from the other grounds enumerated in the Family Code, homosexuality and lesbianism must take on a particular legal character, depending on the remedy relied upon by the so-called "innocent" spouse. If concealment of homosexuality and lesbianism are to be relied upon as grounds for the *annulment* of marriage, the fraud perpetuated must be at least as grave as that of the other grounds. Mere gender inversion or cross-dressing cannot be sufficient: Quite apart from the inability of concealment,<sup>212</sup> transvestism does not connote any lessening of sexual attraction to a different-sex spouse and does not therefore pose any dangers to the union. Concededly, the spouse and family of a transvestite might suffer some form of *embarrassment*. This fact alone, however, has never been a sufficient ground for rendering the marital tie void.

Concealment of *some* relationships, even sexual ones, with other persons of the same sex would not suffice either. Concealment of prior sexual relations

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<sup>212</sup> See discussion on concealment of pregnancy as a ground for annulment, discussed in Chapter II, *supra*.

does not constitute fraud; the law does not require divulgement of loss of virginity. Further, the mere fact that a spouse may have had sexual relations with a person or persons of the same sex does not *ipso facto* mean that he or she is *exclusively* attracted to members of the same sex, and completely incapable of forming such close attachments to members of the opposite sex. The phenomenon of *bisexuality*, in which persons can have sexual feelings for both males and females, does not in and of itself render the person incapable of forming the marital bond, even as the state has defined marriage.

In order to make logical sense, concealment of "homosexuality or lesbianism" must refer, first, to overt behavior; and second, to some form of self-identification by the "erring" spouse, i.e. that he positively identifies himself as a homosexual or that she identifies herself as a lesbian, prior to the celebration of the marriage. *Sans* overt behavior, *sans* positive acts that would undeniably demonstrate homosexuality or lesbianism, the ground relied upon would be purely speculative, and would amount to punitive measures inflicted for purely mental imaginings. *Sans* self-identification, there would be no fraud perpetuated and thus nothing to conceal; concealment of mere questions about one's sexuality, like mere questions about the love one has for a prospective life's partner, is not grave enough to warrant a judgment of fraud. The overt behavior referred to must be of so overwhelming a character as to remove any doubt that the person may be merely a "bisexual." As a viable ground for annulment, therefore, "homosexuality" or "lesbianism" must contain two essential requisites. First, *all* of the purportedly fraudulent spouse's prior romantic relationships, regardless of the number thereof, must have been *exclusively with members of the same biological sex*. Second, that person must have been aware of his absence of sexual attraction for members of the opposite sex, and must have *positively identified him- or herself as a homosexual or lesbian*, beyond the shadow of a doubt. It need not bear emphasizing that these requisites must have occurred before the marital union is actually solemnized. Concededly, the second ground may be rather difficult to prove. But this difficulty of proof should be embraced rather than condemned, in that it would tend to enhance the stability of marriage.

If homosexuality and lesbianism number among the indicia of psychological incapacity, the requisites above change somewhat. The requirement of self-identification may be dispensed with since fraud is not a component of psychological incapacity. However, the requirement that *all* of the purportedly fraudulent spouse's prior romantic relationships must have been *exclusively with members of the same biological sex*, must still be in place. This must be coupled with an additional requirement, that of *actual inability to comply with the essential marital*

*obligations*. Since “homosexuality” and “lesbianism” pertain to *sexual* orientation, the marital obligation in question must be sexual in nature: The homosexual or lesbian spouse must be *actually unable to cohabit* with his or her spouse. If the marriage has actually been consummated, this ground should be unavailing.

Finally, as grounds for legal separation, the homosexuality or lesbianism should be made manifest *subsequent* to the marriage, by *actual sexual relations* with members of the same gender; mere attraction is insufficient, since mere attraction to members of the *opposite* gender is unavailing as a ground. But then again, if the definition is such, then it is not actually necessary to include it as a separate ground, since this would already fall under “sexual infidelity.”

## 2. Parenting and the Homosexual

The second incidental danger to the stability of the family pertains to the deprivation of the right to be a parent merely on the ground of homosexuality or lesbianism. In the realm of parenting, the legal definitions offered above are inapplicable, since one's fitness to be a parent is not dependent on one's fitness to be a spouse. Thus, the legal tenor of homosexuality and lesbianism must change when what is considered is the fundamental right of an individual to exercise parental authority - a fundamental component of the right to participate in the formation of the family.

Deprivation of these fundamental rights should not be made dependent on hypothetical fears or potential conditions that result in the vicious intrusion of the state in the private sphere of family rights. Unfounded biases should not result in human rights deprivation.

In other jurisdictions, the need to preserve the privileged position of the heterosexual, patriarchal family and its underlying traditional gender distinctions fuels the opposition to homosexual behavior and allows the creation of restrictions in their exercise of parental rights. The purported aim of advancing the interests of the child has been employed to veil the biases and prejudices which controlled the formulation of such conditions and shroud them in the appearance of genuine concern for the child's welfare.<sup>213</sup>

A more reasonable test than the child's “best interests” is another emergent doctrine in the United States: The *nexus test*. The *nexus test* emerged

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<sup>213</sup> See discussion, Chapter III, *supra*.



due to a widespread recognition that Courts of Justice ought not to "take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship."<sup>214</sup> Under this test, the Court that seeks to deny custody to homosexual or lesbian parents, or to deny the grant of adoption thereto, must find a positive correlation or *nexus* between the sexual preference of the parent and the adverse effect on the child, if any. This test is a response to arguments that the psychosocial development of the child may be impaired by the rearing methods of gays and lesbians, because these methods are likely to engender confusion in the child's perception of gender identity and gender roles. These arguments imply that the teachings of the homosexual or lesbian parent go against the traditional values of the society and would therefore result in seriously injuring the child's ability to understand established social norms and institutions. The application of the *nexus* test results in dispelling these amorphous fears by requiring positive proof of adverse effects on the child, if any. The *nexus* test would thus avoid unwarranted judgments based on prejudice and bias, and would serve to stabilize the exercise of fundamental human rights.

An examination of some United States cases in which the *nexus* test has been applied could serve to aid our judiciary. In the landmark case of *Bezio v. Patenaude*,<sup>215</sup> the Massachusetts Supreme Judicial Court sustained a lesbian mother's custody because the father failed to prove a positive correlation between the mother's sexual preferences and any adverse effects on the child. The Court stated that a homosexual mother's sexual preference is *per se* irrelevant to her parenting skills, and, in order to prove her unfit, there had to be affirmative proof that her sexual preference was detrimental to the child. In granting custody to the lesbian mother, the Court further affirmatively pronounced that "[t]here is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, [or] maladjusted than children raised with a loving couple of mixed sex."<sup>216</sup>

One court, at least, has even gone so far as to claim that parenting by a homosexual would actually be in the child's best interests. In *M.P. v. S.P.*,<sup>217</sup> the New Jersey Superior Court refused to remove custody from a homosexual mother and award it to the father. After indirectly applying the *nexus* test, the Court acknowledged the possibility that the children would emerge from custody with

<sup>214</sup> *Conkel v. Conkel*, 31 Ohio App. 3d 169 at 173, 509 N.E. 2d 983, 987 (1987).

<sup>215</sup> 381 Mass. 563, 410 N.E. 2d 1207 (1980).

<sup>216</sup> *Bezio v. Patenaude*, 381 Mass. 563 at 574, 410 N.E. 2d 1207 at 1215-1216 (1980).

<sup>217</sup> 169 N.J. Super. 425, 404 A. 2d 1256 (App. Div. 1979).



the homosexual mother as better equipped to deal with society. The Court went so far as to suggest that children could actually *benefit* from being raised by a homosexual parent, and recognized that "neither the prejudices of the small community in which they live nor the curiosity of their peers about [the mother's] sexual nature will be abated by a change of custody."<sup>218</sup> Apparently, being raised by a homosexual parent was perceived to enhance the children's tolerance for the differences of others, a value that is necessary if one wishes to live in the social realm.

The *nexus* test, if affirmatively applied with the *best interests* test, would have manifold positive results. First, it would transcend unfounded fears and biases against homosexuals and lesbians, and, corollarily, result in an enhancement of fundamental human rights. With this, fewer persons would be excluded from participation in the fundamental social institution that is the family. Second, it would serve to facilitate parent-child relations by recognizing that the application of cultural prejudices is not necessarily in the child's best interests. Without going so far as to assert that being raised by a homosexual parent would *always*, in *every* situation, be for the betterment of the child, the application of the *nexus* test attacks the odious converse: That being raised by a *heterosexual* parent would always be better. Thus, the *nexus* test would support the Filipino family, rather than destroy it.

The Filipino family has never been just *Malakas* and *Maganda*; it was always hospitable enough to include all those who want to be part of it. It is now time to revisit that benevolent and gracious tradition of our past; it is time to welcome back the *baybayan* into the Filipino family.

## V. THE FILIPINO FAMILY

We began this paper with a discussion regarding the Filipino family, a definition gathered from our Constitution and statutes in supplement thereof. Proceeding from this definition, this paper examined the question regarding the functional participation therein of a hidden breed of Filipinos: the homosexual and lesbian. This paper has suggested that the current trend in our legal history is an escalation of the prejudice against persons labeled as gay, with the result that a vast plurality of persons might actually be excluded from the foundation of the state. Since it would be absurd to premise that the state could have intended this exclusion, this paper suggests legal definitions for "homosexuality" and

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<sup>218</sup> M.P. v. S.P., 169 N.J. Super. 425 at 436, 404 A. 2d 1256 at 1262 (App. Div. 1979).

"lesbianism;" definitions that would allow a fuller communion in the basic state institution.

This paper has used the current legal framework and has drawn two sets of possible conclusions therefrom: The *likely* conclusion, which leads to the marginalization above discussed; and the *desirable* conclusion, presented in this chapter. This paper has not analyzed whether or not the laws *themselves* are desirable or valid. Thus, it offers suggestions not for the legislature, but for the all-too-crucial judicial branch of government. Questions with regard to the *wisdom* of existing laws remain unasked, and consequently remain unanswered.

Perhaps though, as a parting note, it may be wise to end with an examination as regards the central concept that serves as the springboard for debate: The Filipino family. The operational definition which has underscored this entire paper has been primarily a traditional definition - one that hovers around the nucleus of the nuclear family - widely understood to be composed of a parenting unit and the offspring that result therefrom. This definition is as good as any, and it is the logical definition that may be gathered from our family laws. Perhaps, however, it is time to reexamine this definition. Other authors have claimed that "traditional" families, "possess no more claims to 'naturalness' or historical universality than do 'alternative' families; it is also that what constitutes 'traditionality' itself keeps changing.... [T]he distinction between the 'traditional' and 'alternative' family functions not descriptively but normatively, legitimizing certain family types over others on the basis of dubious historical assumptions."<sup>219</sup> Perhaps, therefore, what need examination are not merely the concepts of "homosexuality" and "lesbianism" and how these persons may be excluded from participation in the family. What needs to be analyzed is the very *definition* of a family, one that is so critical in the eyes of the state. Other authors have suggested that "alternative" families, ones which are not composed of the basic unit presented above, require just as much legal recognition and safeguards than do "traditional" families; one "alternative" family could be, for example, a parenting *triad* instead of a parenting *couple*, in deference to the notion that it takes an entire "community of elders" to raise a child.

That, however, will entail another paper.

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<sup>219</sup> Linda Nicholson, *The Myth of the Traditional Family*, in *FEMINISM AND FAMILIES* 28 (Hilde Lindemann Nelson ed., 1997).