

The Transplantation of the Trans “Panic” Defense in the Philippines as a Consequence of *People v. Pemberton*

Christine Faith M. Tango*

Juan Paolo M. Artiaga**

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* '19 J.D., University of the Philippines College of Law. The Author was a recipient of the Dean’s Medal for Academic Excellence and is an Associate at Castillo Laman Tan Pantaleon & San Jose Law Firm.

** '20 J.D., University of the Philippines College of Law. The Author is a Political Affairs Officer at the Philippine House of Representatives and a part-time Lecturer on Public Administration at the College of Liberal Arts in Bicol College.

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I. INTRODUCTION

On 11 October 2014, 26-year-old Filipino transwoman Jennifer Laude met United States (U.S.) Marine Corps Lance Corporal Joseph Scott Pemberton while out for a drink with her friend, Barbie Gelviro, at Ambyanz Disco in Magsaysay Drive, Olongapo City.¹ Pemberton was among the 3,500 U.S. sailors and Marines visiting the Philippines to participate in a military exercise as part of the Visiting Forces Agreement² between the Philippines and the U.S.³

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1. *People of the Philippines v. L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 4-5 (RTC 2015) (unreported).
 2. *Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines*, Phil.-U.S., Feb. 10, 1998.
 3. *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 4 (unreported) & Criag Whitlock, *U.S. Marine accused in slaying in the Philippines, raising old tensions*, Oct. 15, 2014, WASH. POST., available at https://www.washingtonpost.com/world/national-security/us-marine-accused-in-slaying-in-the-philippines-raising-old-tensions/2014/10/15/c3bfd588-5475-11e4-892e-602188e70e9c_story.html (last accessed Nov. 30, 2020).

Jennifer and Pemberton found themselves entering a motel with Barbie, who would later stay in another room with a different companion.⁴ Jennifer and Pemberton were assigned to room number one by cashier Elias Gallamos.⁵

Approximately 30 minutes later, Pemberton exited the motel room, leaving the door of room number one slightly ajar.⁶ Fifteen minutes after Pemberton left, Elias entered the room only to discover the dead body of Jennifer — naked, with her body wrapped in a bedsheet, and head submerged in the motel room’s toilet bowl.⁷

On 15 October 2014, a few days after her sister’s death, Marilou Laude filed a murder complaint against Pemberton who was still in Subic.⁸ The Philippine National Police and Regional Crime Laboratory Office released an official report on 17 October 2014 confirming that Jennifer died due to asphyxia.⁹

The Olongapo City Prosecutor’s Office later filed murder charges against Pemberton with the alleged qualifying circumstances of “treachery, abuse of superior strength[,] and cruelty.”¹⁰ On 16 December 2014, Branch 74 of the Regional Trial Court of Olongapo issued a warrant of arrest against Pemberton.¹¹

During the trial on 24 August 2015, Pemberton admitted in court that he choked and attacked Jennifer in “blind rage” after finding out she was a “dude.”¹² Later on, Pemberton would also claim that the oral sex she had performed on him was an act of rape.¹³ This marked the first time that the

4. *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 5-6 (unreported).

5. *Id.* at 8-9.

6. *Id.* at 9.

7. *Id.*

8. *Laude v. Ginez-Jabalde*, G.R. No. 217456, 775 SCRA 408, 412 (2015).

9. CNN Philippines Staff, *Revisiting the Jennifer Laude Murder Case*, CNN PHIL., Feb. 24, 2015, available at <https://cnnphilippines.com/news/2015/02/23/Transgender-Jennifer-Laude-murder-case-accused-US-Marine-Joseph-Scott-Pemberton-timeline-verdict.html> (last accessed Nov. 30, 2020).

10. *People of the Philippines v. L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 2-3 (CA 2017) (unreported).

11. *Id.*

12. *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 18 & 50 (unreported).

13. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 14 (unreported).

LGBTQIA+¹⁴ “panic” defense was reportedly used inside a Philippine court room.¹⁵

In essence, the LGBTQIA+ “panic” defense strategy is a legal strategy that asks a jury to find that a victim’s sexual orientation, gender identity or expression is to blame for a defendant’s violent reaction, including the act of murder.¹⁶ In this strategy, “[d]efendants assert the [LGBTQIA+] panic defense to persuade the jurors that their [murder] charges should be reduced to a less culpable form of homicide.”¹⁷

The LGBTQIA+ “panic” defense has been used in the U.S. in three ways to mitigate a case of murder to manslaughter or justified homicide.¹⁸ These include: *first*, as a defense of insanity or diminished capacity; *second*, as a defense of provocation; and *third*, as self-defense.¹⁹ Interestingly, the common law defenses of provocation and self-defense find similar application in our jurisdiction despite there being no common law crimes in the Philippines.²⁰ In the Philippines, insanity may be used to show the lack of capacity to form

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14. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008) [hereinafter Lee, *Gay Panic Defense*]. “There is no officially recognized ‘gay panic’ defense, but many use the term to refer to defense strategies that rely on the notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance.” *Id.* The defense is more popularly called as the “gay panic defense” or the “non-violent homosexual advance (NHA) defense.” However, for purposes of being more inclusive, and in recognition of the impact of the defense on the LGBTQIA+ community as a whole, the Authors will refer to LGBTQIA+ throughout this Article.
 15. United Nations Development Programme & Commission on Human Rights, *Legal Gender Recognition in the Philippines: A Legal and Policy Review*, at 12, available at <https://www.undp.org/content/dam/philippines/docs/Others/rbap-hhd-2018-legal-gender-recognition-in-the-philippines.pdf> (last accessed Nov. 30, 2020) [hereinafter UNDP & CHR, *Legal Gender Recognition in the Philippines*].
 16. The LGBT Bar, *LGBTQ+ “Panic” Defense*, available at <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense> (last accessed Nov. 30, 2020).
 17. David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Laurence King Case*, 60 UCLA L. REV. 778, 780 (2013).
 18. The LGBT Bar, *supra* note 16.
 19. *Id.*
 20. LUIS B. REYES, *THE REVISED PENAL CODE CRIMINAL LAW BOOK ONE I* (2017).

intent, resulting in exemptions from penalties arising from criminal acts.²¹ Provocation,²² as well as passion or obfuscation,²³ may be a mitigating circumstance to reduce the length of service, while self-defense may be a justifying circumstance which absolves the offender from penalty.²⁴

21. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, art. 12 (1) (1932). The Revised Penal Code provides —

Circumstances Which Exempt from Criminal Liability — The following are exempt from criminal liability:

- (1) An imbecile or an insane person, unless the latter has acted during a lucid interval.

When the imbecile or an insane person has committed an act which the law defines as a felony (*delito*), the court shall order his confinement in one of the hospitals or asylums established for persons thus afflicted, which he shall not be permitted to leave without first obtaining the permission of the same court.

Id.

22. *Id.* art. 13 (4). “*Mitigating circumstances.* — The following are mitigating circumstances ... (4) That sufficient provocation or threat on the part of the offended party immediately preceded the act.” *Id.*

23. *Id.* art. 13 (6). “*Mitigating circumstances.* — The following are mitigating circumstances ... (6) That of having acted upon an impulse so powerful as naturally to have produced passion or obfuscation.” *Id.*

24. REV. PENAL CODE, art. 11 (1). The Revised Penal Code provides —

Justifying circumstances. — The following do not incur any criminal liability:

- (1) Anyone who acts in defense of his person or rights, provided that the following circumstances concur:

First. Unlawful aggression;

Second. Reasonable necessity of the means employed to prevent or repel it;

Third. Lack of sufficient provocation on the part of the person defending himself.

Id.

While there has been an ample amount of scholarly work surrounding the LGBTQIA+ “panic” defense in the U.S.,²⁵ where various states have enacted legislation to put an end to the LGBTQIA+ “panic” defense,²⁶ the Philippines is only beginning to entertain the idea.²⁷ This would make the country an

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25. See, e.g., Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992); Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81 (1992); Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Christina Pei-Len Chen, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195 (2000); Bradford Bigler, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. REV. 783 (2006); Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279 (2001); Lee, *Gay Panic Defense*, *supra* note 14; Morgan Tilleman, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659 (2010); Perkiss, *supra* note 17; Cynthia Lee, *Masculinity on Trial: Gay Panic in the Criminal Courtroom*, 42 SW. L. REV. 817 (2013) [hereinafter Lee, *Masculinity on Trial*]; Cynthia Lee & Peter Kar Yu Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014); Aimee Wodda & Vanessa R. Panfil, *Don’t Talk to Me About Deception: The Necessary Erosion of the Trans Panic Defense*, 78 ALB. L. REV. 927 (2014); Omar Russo, *How to Get Away with Murder: The “Gay Panic” Defense*, 35 TOURO L. REV. 811 (2019); Devan N. Patel, *The Indefensible “Gay Panic Defense”*, 46 J. LEGIS 114 (2019); Jordan Blair Woods, *Framing Legislation Banning the “Gay and Trans Panic” Defenses*, 54 U. RICH. L. REV. 833 (2020); & Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411 (2020) [hereinafter Lee, *Trans Panic Defense Revisited*].
26. The LGBT Bar, *supra* note 16. The United States LGBT Bar Association lists 19 states that have enacted or introduced LGBTQIA+ “panic” defense legislation. These include the States of Washington, California, Nevada, Colorado, New Mexico, Hawaii, Texas, Illinois, Iowa, Minnesota, Wisconsin, Pennsylvania, Maryland, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and Maine. *Id.* See also Russo, *supra* note 25, at 831-35 (enumerating the states that have banned the use of gay-panic defense) & Woods, *supra* note 25, at 875 (enumerating states that have banned the gay and trans panic defenses).
27. See Allan Macatuno, *Pemberton admits he choked Laude*, PHIL. DAILY INQ., Aug. 25, 2015, available at <https://globalnation.inquirer.net/127650/pemberton-admits-he-choked-laude> (last accessed Nov. 30, 2020) & Dharel Placido, *‘Pemberton verdict could lead to more abuse vs LGBTs’*, ABS-CBN NEWS, Dec. 2,

appropriate location for the cultivation of the defense and the continuation of its legacy, having literally been brought upon Philippine soil by an American.²⁸

For the last several years, there have been numerous documented cases of violence and harassment against people who have self-identified as LGBTQIA+,²⁹ especially among transgender members. Despite this, the Philippine Congress is yet to enact an anti-discrimination statute that addresses this growing concern.³⁰ The transplantation of the LGBTQIA+ “panic” defense strategy in the Philippines would not only exacerbate the discrimination too often committed against members of the LGBTQIA+ community, but would also constitute a judicial institutionalization of homophobia, transphobia, and prejudice.

Notwithstanding the potential impact of such transplantation, there is generally a lack of legal commentary in the Philippines regarding the LGBTQIA+ “panic” defense or its potential use in trial, as in the case of

2015, available at <https://news.abs-cbn.com/nation/12/02/15/pemberton-verdict-could-lead-to-more-abuse-vs-lgbts> (last accessed Nov. 30, 2020). It was reported that the Laude family’s counsel Harry Roque claimed that “the homosexual panic defense is not present in Philippine criminal law[.]” Bemz Benedicto of Ladlad, a pro-LGBT group, also stated that —

I warned my fellow transgender sisters and brothers that this decision of the court also sets a dangerous implication and precedent to have mitigating circumstance due to the discovery of one’s sexual partner’s gender identity and expression. This makes us all more vulnerable and easy targets of hate crimes and bigotry related violence.

Macatuno, *supra* note 27 & Placido, *supra* note 27.

28. See *Laude*, 775 SCRA at 412.
29. See, e.g., Raoul Angelo de Fiesta Atadero, *A Mandate Against Hate: Finding and Founding Philippine Law on LGBT Hate Crimes*, 88 PHIL. L.J. 699, 775-790 (2014) (arguing for a Philippine law on LGBT hate crimes, citing various documented instances of violence against members of the LGBTQIA+ community).
30. Chad de Guzman, *Anti-Discrimination Bill Fails to Hurdle Congress*, CNN PHIL., June 4, 2019, available at <https://cnnphilippines.com/news/2019/6/4/Anti-discrimination-bill-SOGIE-equality-bill-Senate.html> (last accessed Nov. 30, 2020). The SOGIE bill (also known as the Anti-Discrimination Bill), which was first filed in 1999, was passed in the House of Representatives for the first time in 2017 with no abstentions or dissent. The bill, however, was not approved by the Senate during the 17th Congress. *Id.*

Pemberton in 2014.³¹ Thus, this Article aims to start the discussion by looking into the potential application of the LGBTQIA+ “panic” defense in the Philippine criminal justice system.

Part I of this Article will clarify the meaning of SOGIE. This is based on the Authors’ belief that a prior understanding of the concept is critical to a proper understanding of the meaning of “transgender” in relation to the LGBTQIA+ “panic” and trans “panic” defenses.

Part II will discuss the concept of the LGBTQIA+ “panic” defense and its development from being considered a mental disorder during the mid-1900s in the U.S., into a criminal defense used in the courtroom, first, in the form of an insanity defense, and later, as a provocation defense.

Part III will introduce the concept of trans “panic” defense and differentiate it from the LGBTQIA+ “panic” defense. This Section will also elaborate on violence against transgenders in the Philippines, as well as possible motivations behind such violence.

Part IV will look into the Philippine criminal law system, particularly the different circumstances affecting criminal liability, as it is through these circumstances that the LGBTQIA+ “panic” defense will manifest in court. The Authors will then discuss each relevant circumstances and theorize how these can be used inside the courtroom and define Philippine LGBTQIA+ “panic” defense.

Part V will dissect the factual circumstances in *People v. Pemberton* to explain how the LGBTQIA+ “panic” defense was raised, and how the defense was ultimately transplanted in Philippine jurisdiction by the decisions of the trial and appellate courts.

31. Prominent Philippine-based law journals are bereft of any discussion of the LGBTQIA+ defense “panic” or the merits of the Jennifer Laude case. There are, however, online articles discussing the use of the trans “panic” defense in the latter case. See, e.g., Meredith Talusan, *The Failed Logic of “Trans Panic” Criminal Defenses*, available at <https://www.buzzfeed.com/meredithtalusan/trans-panic-criminal-defense> (last accessed Nov. 30, 2020); Rodrigo Bacus, *Inadequate Justice: The Case of Jennifer Laude and the Call to End Unequal Military Agreements*, available at <https://rightswireblog.org/2016/01/07/inadequate-justice-the-case-of-jennifer-laude-and-the-call-to-end-unequal-military-agreements> (last accessed Nov. 30, 2020); & Ara Eugenio, *Why He, She or They Matters: A Postscript to Jennifer, Not Jeffrey*, available at <https://www.reportr.world/news/she-was-jennifer-not-jeffrey-here-s-why-it-matters-a4713-20200925> (last accessed Nov. 30, 2020).

To conclude, Part VI will reject the legality of the transplantation of the defense on the grounds of international law, criminal law principles, and a rights-based approach to gender equality.

In Part VII, the Authors will propose the enactment of a legislative ban against the use of the LGBTQIA+ “panic” defense.

II. UNDERSTANDING SOGIE

Understanding of the concept of “SOGIE” is necessary before any discussion can be made on the LGBTQIA+ “panic” defense. A lack of understanding with respect to the differences between sexual orientation, gender identity, and gender expression is evident in present Philippine society³² despite a non-conforming pre-colonial history.³³ This is understandable, as such concepts are largely western-influenced, and because some members of the LGBTQIA+ community themselves remain unaware of such distinctions, while others question some categories.³⁴ In fact, there remains to be no widely used local

32. UNDP & CHR, Legal Gender Recognition in the Philippines, *supra* note 15, at 14–15.

33. See *Falcis v. Civil Registrar General*, G.R. No. 217910, Sept. 3, 2019, at 42, available at <https://sc.judiciary.gov.ph/8227> (last accessed Nov. 30, 2020) (citing Jay Jomar Quintos, *A Glimpse Into the Asog Experience: A Historical Study on the Homosexual Experience in the Philippines*, PLARIDEL, Volume No. 9; Issue No. 2, at 156–57) (narrating early documentations of “men who dress in women’s clothes and keep relations with fellow men”); United Nations Development Programme & United States Agency for International Development, Being LGBT in Asia: The Philippines Country Report, at 15–16, available at https://www.undp.org/content/dam/undp/library/HIV-AIDS/Governance%20of%20HIV%20Responses/Philippines%20Report_Final.pdf (last accessed Nov. 30, 2020) [hereinafter UNDP & USAID, Being LGBT in Asia] (narrating instances of gender non-conformity that pre-date the arrival of Spaniards in 1521); & UNDP & CHR, Legal Gender Recognition in the Philippines, *supra* note 15, at 14 (citing UNDP & USAID, Being LGBT in Asia, *supra* note 33, at 15) (narrating early documentations of male babaylans “who not only put on women’s cloth[es] but also pretended to be women so that the spirits listened to their prayers”).

34. UNDP & USAID, Being LGBT in Asia, *supra* note 33, at 19 (citing a report of the Health Information Action Network about a study that touched on the identities of Filipino Men who have Sex with Men or MSM).

word that directly translates to the word “transgender.”³⁵ Instead, transgender women are commonly referred to as *bakla* or *bayot*, while transgender men are referred to as “tomboy” or “lesbian.”³⁶ Ironically, even an Anti-Discrimination Bill filed in the 13th Congress entitled “An Act Prohibiting Discrimination on the Basis of Sexual Orientation and Gender Identity and Providing Penalties Therefore” used only the terms “gay” and “lesbian” in describing the situation of the entire LGBTQIA+ community³⁷ —

Unfortunately, reality has still to catch up with the noble intentions of ... numerous laws and international agreements. Lesbians and gays continue to be oppressed by the iniquitous treatment of society at large, primarily because of misconception and ignorance. Sadly for our democracy, gays and lesbians are considered second class citizens when they try to exercise the rights to which they are rightfully entitled.³⁸

Despite this legislative oversight, the statement still forwards the idea that the lack of understanding on SOGIE is a contributing factor to continuing discrimination in the country,³⁹ and may perhaps be the reason why the

35. Sass Rogando-Sasot, Country report: The Philippines, *available at* http://www.transgenderasia.org/country_report_philippines.htm (last accessed Nov. 30, 2020) (arguing that in the Philippines, “[the] desire [of someone with] the same sex [or] gender *may* also mean the desire to be the opposite sex/gender and vice versa. [Thus,] transgenders and transsexuals are clustered together as either gay or lesbian by Philippine society[.]”)

36. *Id.* (narrating that the term “*bakla*” is contemporarily used “to label men who show manifestations of femininity[,] ... desire [erotically-romantically a person of the] same sex[, and even used to] label [] men who [act in an] ‘unmanly/not-macho’ manner[; while] ‘tomboy’ ... is generally used to label women who show manifestations of masculinity ... and/or who erotically-romantically desire [the] same sex”). *See also* UNDP & CHR, Legal Gender Recognition in the Philippines, *supra* note 15, at 14 (“Transgender women are commonly referred to as *bakla* (in Tagalog) or *bayot* (in Visayan)”).

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

38. *Id.*

39. *See also* An Act Defining Discrimination on the Basis of Sexual Orientation and Gender Identity and Providing Penalties Therefor, H.B. No. 258, explan. n., 18th Cong., 1st Reg. Sess. (2019) (explaining that discrimination is primarily due to misconceptions and systemic state ignorance); Ging Cristobal, OutRight Action International, To Serve & Protect Without Exception: Addressing Police Abuse

LGBTQIA+ “panic” defense would thrive here in the Philippines in the absence of legislation protecting the LGBTQIA+ community.

A. What is SOGIE?

Before defining SOGIE, it is important to understand the difference between “sex” and “gender.” In its simplest analysis, “[‘sex[’]” refers to the classification of being either male or female and is usually determined by the external genitalia⁴⁰ while “[‘gender[’]” refers to the culturally determined behavioral, social, and psychological traits that are typically associated with being male or female.”⁴¹

Thus, between the two, “sex” is understandably easier to understand even in a heteronormative society such as the Philippines. A person with a penis and testicles is considered “male,” a person with a vagina and an ovary is considered “female,” and a person in possession of both is considered as

Toward Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in the Philippines (A Report by OutRight Action International), at 40, *available at* <https://outrightinternational.org/sites/default/files/serveProtectFull.pdf> (last accessed Nov. 30, 2020) (defining discrimination as a product of ignorance); & United Nations Educational, Scientific and Cultural Organization Bangkok, LGBTI Training in the Philippines Promotes Inclusion and Counters Ignorance, *available at* <https://bangkok.unesco.org/content/lgbti-training-philippines-promotes-inclusion-and-counters-ignorance> (last accessed Nov. 30, 2020) (citing Shamah Silvos Bulangis, president of ISPEC, an LGBTQIA+ organization in Silliman University, who claims that institutionalized homophobia and transphobia comes from ignorance).

40. Tilleman, *supra* note 25, at 1663 (2010) (citing MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, *TRUE SELVES* 19 (1996)) (emphasis omitted). *See also* Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265, 271 (1999).
41. Tilleman, *supra* note 25, at 1663 (2010) (citing BROWN & ROUNSLEY, *supra* note 25, at 19). *See generally* Rose McDermott & Peter K. Hatemi, *Distinguishing Sex and Gender*, 44 *PS: POL. SCI. & POL.* 89, 90 (2011); Jennifer Johnson, *Transgender Youth in Public Schools: Why Identity Matters in the Restroom*, 40 *WM. MITCHELL L. REV.* 63, 68 (2014) (citing Gender Spectrum, *Understanding Gender*, *available at* <https://www.genderspectrum.org/understanding-gender> (last accessed Nov. 30, 2020) & Greenberg, *supra* note 40, at 274) (defining “sex” and “gender”); & Lee & Kwan, *supra* note 25, at 87 (citing Kim D. Felsenthal, *Socio-Spatial Experiences of Transgender Individuals*, in 3 *THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION: BIAS BASED ON GENDER AND SEXUAL ORIENTATION 201-02* (Jean Lau Chin ed., 2004)) (defining “sex” and “gender”).

“intersex.”⁴² On the other hand, “gender” is more complex. The term “SOGIE” is actually an abbreviation for “sexual orientation[,] gender identity and expression,” all of which pertain to the different categories of gender.⁴³ These terms are interrelated, but completely independent of each other such that a person’s sexual orientation does not determine his or her gender identity.⁴⁴ Understanding the term “transgender” in relation to the LGBTQIA+ “panic” defense or the trans “panic” defense requires the purging of heteronormative biases, a proper understanding of SOGIE, and an acknowledgment of the compulsory link between sex and gender.⁴⁵

To start with the distinction, “sexual orientation” pertains to the emotional, physical, and sexual attraction to others.⁴⁶ Perhaps the easiest to understand among the three categories, sexual orientation answers the question of whom one is attracted to.⁴⁷ A person may, among others, be *asexual*, meaning the person does not experience sexual attraction, or may not

42. Republic v. Cagandahan, G.R. No. 166676, 565 SCRA 72, 85 (2008) (recognizing and defining intersex as an individual having biological characteristics of both male and female).

43. Perci Cendaña, SOGIE and LGBT, *available at* <https://humanrightsinasean.info/news/sogie-and-lgbt> (last accessed Nov. 30, 2020). See An Act Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity or Expression (SOGIE) and Providing Penalties Therefor, H.B. No. 4982, § 3 (c), (d), & (i), 17th Cong. 1st Sess. (2017).

44. Lee & Kwan, *supra* note 25, at 88 & Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1417 (citing Lee & Kwan, *supra* note 25, at 88).

45. See Johnson, *supra* note 41, at 69.

46. American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 862 (2015).

Sexual orientation [is] a component of identity that includes a person’s sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.

Id.

47. *Id.*

have interest in, or desire for sex;⁴⁸ *bisexual*, meaning the person is attracted to both men and women romantically and sexually;⁴⁹ *heterosexual*, meaning the person “feels physically and emotionally attracted” to individuals of the opposite sex;⁵⁰ *homosexual*, meaning the person “feels physically and emotionally attracted to [individuals] of the same gender;”⁵¹ or *pansexual*, meaning the person is attracted to another regardless of sex, gender identity, gender expression or sexual orientation.⁵²

“Gender identity,” on the other hand, refers to how one thinks of himself or herself.⁵³ According to social justice activist Samm Killermann, gender identity is formed at the age of three and is affected by hormones and environment just as much as it is by biological sex.⁵⁴ The pivotal question to

48. UC Davis LGBTQIA Resource Center Glossary, *available at* <https://lgbtqia.ucdavis.edu/educated/glossary> (last accessed Nov. 30, 2020).

49. *See id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, at 6 nn. 1–2, *available at* http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (last accessed Nov. 30, 2020). *See also* American Psychological Association, *supra* note 46, at 862.

Gender identity [is] a person’s deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics. Because gender identity is internal, a person’s gender identity is not necessarily visible to others. ‘Affirmed gender identity’ refers to a person’s gender identity after coming out as [transgender and gender non-conforming] or undergoing a social and/or medical transition process.

Id.

54. Samm Killermann, Breaking Through the Binary: Gender Explained Using Continuums, *available at* <https://www.itspronouncedmetrosexual.com/2011/11/breaking-through-the-binary-gender-explained-using-continuums> (last accessed Nov. 30, 2020). *See also* Lee & Kwan, *supra* note 25, at 91 (2014) (citing Petula Dvorak, *Transgender at Five*, WASH. POST, May 20, 2012, at A1) (“According to Patrick Kelly, a psychiatrist with the Division of Child and Adolescent Psychiatry at John Hopkins Children’s Center, gender solidifies between the ages three and six.”).

be asked is, “do you think you fit better into the societal role of “woman” or “man,” or does not neither particularly ring true for you?” The answer to such question is one’s gender identity. A person whose gender identity conforms with his or her biological sex is referred to as “cisgender,” while a person whose biological sex does not align with his or her gender identity is sometimes⁵⁵ referred to as a transgender.⁵⁶

Lastly, “gender expression” pertains to how one demonstrates his or her gender through the way he or she acts, dresses, behaves, and interacts — whether intentional or unintentional.⁵⁷ According to Killermann, “gender expression” is usually interpreted based on traditional gender norms (e.g., men wear pants; women wear dresses).⁵⁸ Thus, in the Philippines, a person who sports long hair and wears dresses and high heels, may be considered as having a gender expression that is on the feminine side, while a person who sports short hair, and frequently wears a basketball jersey or shirt, may be considered as having a gender expression on the masculine side.

55. As will be discussed later, the term transgender is often used as an umbrella term to embrace a wide range of individuals whose biological sex does not conform with their gender identity and expression, and other non-conforming individuals. American Psychological Association, *supra* note 46, at 863.

56. *Id.* at 862. “For most people, gender identity is congruent with sex assigned at birth ([known as] cisgender); for [transgender and gender non-conforming] individuals, gender identity differs in varying degrees from sex assigned at birth.” *Id.* at 862.

57. Human Rights Campaign, Sexual Orientation and Gender Identity Definitions, available at <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last accessed Nov. 30, 2020). See ARC International et al., Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review, at 14, available at https://ilga.org/downloads/SOGIESC_at_UPR_report.pdf (last accessed Nov. 30, 2020). Gender expression is defined as

[e]xternal manifestations of gender, expressed through one’s name, pronouns, clothing, haircut, behavior, voice, or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine and feminine changes over time and varies by culture. Typically, transgender people seek to make their gender expression align with their gender identity, rather than the sex they were assigned at birth.

Id.

58. Killermann, *supra* note 54.

Considering the nuances and variations in SOGIE, such categories must be understood as interrelated but completely independent of each other. “Interrelated” means that the combination of the three categories would help the person describe his or her gender. For instance, a person whose biological sex is male (biological sex) and identifies himself as a male (gender identity), is attracted to another male (sexual orientation), and expresses himself in a masculine manner (gender expression) may refer to himself as a “masc” or a cisgender masculine gay.⁵⁹ In contrast, a person whose biological sex is male (biological sex), who likewise identifies himself as a male (gender identity) and attracted to another male (sexual orientation), but expresses himself in a feminine manner (gender expression) may refer to himself as an “effem/femme” or an effeminate cisgender gay.⁶⁰ Both persons in the previous examples are “gay” and neither can be considered as “more gay” than the other because being “gay” is not based on gender expression but on sexual orientation.

As an alternative example, a person whose biological sex is male (biological sex), identifies as a male (gender identity), is attracted to females (sexual orientation), and expresses himself in an effeminate manner (gender expression) may be considered a heterosexual effeminate cisgender male. On the other hand, a person whose biological sex is male (biological sex), identifies as a male (gender identity), is attracted to females (sexual orientation), and expresses himself in a masculine manner (gender expression) is a heterosexual masculine cisgender male. The former, under a heteronormative society where views on sex and gender are two-dimensional (being either straight or gay), may be already labelled as “gay” for being effeminate.

An informed individual, however, would know that such is not the case because “gender expression” is different from “sexual orientation.” Given the fluidity of gender,⁶¹ it would be cumbersome to enumerate all the possible combinations if such limitation even exists.

59. See Brooke Villanueva, In Focus: BJ Pascual Shares Stand on Femme and Masc Shaming, *available at* <https://lifestyle.abs-cbn.com/photos/2504/bj-pascual-pride-month> (last accessed Nov. 30, 2020) (discussing the culture of “masc” and “femme” shaming in the Philippines).

60. *Id.*

61. See *Falcis*, G.R. No. 217910, at 2 (recognizing that gender is not limited to the dominant and expected cultural binary).

B. Defining Transgender

Transgender, in its simplest definition, refers to an individual whose gender identity does not conform to his or her biological sex.⁶² For instance, a person who is anatomically male but identifies as a female is a transgender female.⁶³ A person who is anatomically female but identifies as a male, on the other hand, is a transgender male.⁶⁴ In the Philippines, however, where there is a lack of commonly used terminology, “transgender” has been used as an umbrella term to describe not only people whose gender identity does not match the sex they were assigned at birth, but also gender non-conforming people.⁶⁵

62. Tilleman, *supra* note 25, at 1664. See also Lee & Kwan, *supra* note 25, at 86 (citing Transgender Law Center, 10 Tips for Working with Transgender Patients, at *1, available at <https://transgenderlawcenter.org/resources/health/10tips> (last accessed Nov. 30, 2020); Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma*, 17 DUKE J. GENDER L & POL’Y, 219, 221 (2010)) & Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1416 (citing National Center for Transgender Equality, Frequently Asked Questions About Transgender People, at *1, available at https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf (last accessed Nov. 30, 2020) & National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey, at 40, available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (last accessed Nov. 30, 2020)). See generally Johnson, *supra* note 41, at 68–73.

63. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1416–17.

64. *Id.*

65. UNDP & CHR, Legal Gender Recognition in the Philippines, *supra* note 15, at 14 (citing Gloria Esguerra Melencio, The babaylan lives in her story, available at <https://web.archive.org/web/20130702044515/http://philippinehistory.ph/the-babaylan-lives-in-her-story> (last accessed Nov. 30, 2020) & UNDP & USAID, Being LGBT in Asia, *supra* note 33, at 19) (discussing the use of the word “transgender” as an umbrella term to describe anyone whose gender identity and gender expression does not conform to their sex assigned at birth). See also Johnson, *supra* note 41, at 72 (citing Jamison Green, Transgender Equality: A Handbook for Activists and Policymakers (Introduction to the Handbook by Paisley Currah and Shannon Minter), at 2, available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf> (last accessed Nov. 30, 2020)) (discussing transgender as an umbrella term used to describe a wide range of individuals who do not fit into traditional social norms about gender).

It is important not to confuse gender identity with sexual orientation. Using the foregoing discussion on SOGIE as guide, a person whose biological sex is female, identifies as a male (gender identity), and is attracted to males (sexual orientation) may be called a homosexual transgender male. On the other hand, a person whose biological sex is female, identifies as a male (gender identity), and is attracted to females (sexual orientation) may be called a heterosexual transgender male.

For purposes of this Article and in recognition of the use of “transgender” as an umbrella term, the Authors will adopt a definition that refers to people whose gender identity and/or expression does not conform with their biological sex. Based on the testimonies of Jennifer Laude’s family, close friends, and lover, Jennifer identified as a female and had always lived her life as one.⁶⁶ Thus, Jennifer Laude was a woman and shall be addressed as one throughout this Article.

C. Violence Against the LGBTQIA+ Community and Transgender Women

In 2019, a Pew Research Report revealed that around 73% of Filipinos think that homosexuality should be accepted by society.⁶⁷ The same figure was produced by similar research in 2013 which also identified the Philippines as being among the most “gay-friendly” countries in the world.⁶⁸ Various

66. See Katerina Francisco, *Remembering ‘Ganda’: The tragedy of Jennifer Laude*, RAPPLER, Oct. 15, 2014, available at <https://www.rappler.com/nation/jennifer-laude-transgender-death> (last accessed Nov. 30, 2020).

67. Michelle Abad, *73% of Filipinos think ‘homosexuality should be accepted by society’ — report*, RAPPLER, June 25, 2020, available at <https://rappler.com/nation/filipinos-acceptance-homosexuality-2019-pew-research-report> (last accessed Nov. 30, 2020).

68. Philip C. Tubeza, *PH ranks among most gay-friendly in the world*, PHIL. DAILY INQ., June 8, 2013, available at <https://globalnation.inquirer.net/76977/ph-ranks-among-most-gay-friendly-in-the-world> (last accessed Nov. 30, 2020).

scholars,⁶⁹ authors,⁷⁰ and even legislators, however, dispute this claim, arguing that at most, there is nuanced “tolerance” but not “acceptance.”⁷¹

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69. See, e.g., USAID, *Being LGBT in Asia*, *supra* note 33, at 25 (citing Michael L. Tan, *Survival Through Pluralism: Emerging Gay Communities in the Philippines*, in *GAY AND LESBIAN ASIA: CULTURE, IDENTITY, COMMUNITY* 123 (Gerard Sullivan & Peter A. Jackson eds., 2001 & J. Neil C. Garcia, *Male Homosexuality in the Philippines: a short history (from IIAS Newsletter No. 35, Nov. 2004)*, at 13, available at https://www.iias.asia/sites/default/files/2020-11/IIAS_NL35_13.pdf (last accessed Nov. 30, 2020)) (citing Tan as saying that the “acceptance” is conditional to the confinement of LGBTs to “certain occupational niches and [their] fulfill[ment of] certain stereotypes” and Garcia as saying that “when visitors of the Philippines remark that [the country] ... accept[s] homosexuality, they [] have in mind effeminate, cross-dressing men [] swishing down streets and squealing on television [program] with flaming impunity”); Sass Rogando-Sasot, *supra* note 35 (arguing that “tolerance is eclipsed by prejudice, discrimination, and marginalization” in the Philippines); & Dr. W. Adihartono & Ellisiah Uy Jocson, *A Comparative Analysis of the Status of Homosexual Men in Indonesia and the Philippines*, 4 J. SOUTHEAST ASIAN HUM. RTS. 271, 282 (2020) (describing treatment on members of the LGBTQI+ community as “a far cry from social acceptance”).
70. See, e.g., Magda Mis, *Is the Philippines really Asia’s most gay-friendly country?*, available at <https://news.trust.org/item/20140516162146-jipm9> (last accessed Nov. 30, 2020) (citing a study that found that two-thirds of Filipinos view homosexuality as immoral, rampant LGBT-related killings in 2011, and lack of anti-discrimination law); Buena Bernal, *Is the Philippines really gay friendly?*, RAPPLER, June 14, 2013, available at <https://www.rappler.com/moveph/philippines-gay-friendly> (last accessed Nov. 30, 2020) (arguing that the term “gay-friendly” is a misnomer because the survey asked the respondents about their subjective view of what the ideal condition must be instead of their subject assessment of current conditions); Natashya Gutierrez, *LGBTQ Activists: We are tolerated but not accepted in the Philippines*, RAPPLER, May 17, 2017, available at <https://www.rappler.com/nation/lgbtq-rights-philippines-tolerated-not-accepted> (last accessed Nov. 30, 2020) (narrating the realities the LGBTQI+ community in the country and describing “tolerance” as enduring but only to a certain point); & Patricia Denise Chiu, *Pinoys are gay friendly? Only on paper, says LGBT activist*, GMA NEWS ONLINE, available at <https://www.gmanetwork.com/news/news/nation/312328/pinoys-are-gay-friendly-only-on-paper-says-lgbt-activist/story> (last accessed Nov. 30, 2020) (citing Jonas Bagas saying that “the acceptance of LGBTs in the country is centered around stereotypes.”).
71. Dominique Mosbergen, *The Dangers of Being LGBT In ‘Tolerant’ Philippines*, available at https://www.huffpost.com/entry/lgbt-philippines_n_5614f92fe4b021e856d2d870 (last accessed Nov. 30, 2020).

At present, members of the LGBTQIA+ community face discrimination not only in different institutions such as schools,⁷² workplaces,⁷³ and in public

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72. See United Nations Educational, Scientific and Cultural Organization Bangkok, School-related violence and bullying on the basis of Sexual Orientation and Gender Identity and Expression (SOGIE): Synthesis Report on China, the Philippines, Thailand and Viet Nam, at 30, available at <https://unesdoc.unesco.org/ark:/48223/pf0000366434> (last accessed Nov. 30, 2020) (“Schools reinforce and maintain gender stereotypes through teaching materials and the treatment of students based on their sex at birth (rather than their gender identity or expression)[,] including strict enforcement of gendered uniform policies”); Human Rights Watch, Just Let Us Be: Discrimination Against LGBT Students in the Philippines, at 17–25, available at <https://www.hrw.org/report/2017/06/21/just-let-us-be/discrimination-against-lgbt-students-philippines> (last accessed Nov. 30, 2020) (enumerating the different forms of harassment encountered by a Philippine LGBT student including physical bullying, sexual assault and harassment, verbal harassment, and cyberbullying); Rainbow Rights Project, Kwentong Bebot: Lived Experiences of Lesbians, Bisexual and Transgendered Women in the Philippines, at 8 & 19, available at <https://outrightinternational.org/sites/default/files/PhilippinesCC.pdf> (last accessed Nov. 30, 2020) (presenting research that included 59 interviews with lesbian, bisexual and transgender women, which found that “[s]ome teachers [in school] appear[] to impose their own personal values and [wielded] institutional rules to suppress people’s gender expression”); Xijia Tang & Ak Narayan Poudel, *Exploring Challenges and Problems Faced by LGBT Students in Philippines: A Qualitative Study*, 2 J. PUB. HEALTH POL’Y PLANNING 9, 9 & 13 (2018) (identifying “lack of legal protection, mental health issues[,] and discrimination ... as big challenges to Filipino LGBT students”); & Paterno Esmaguél II, *Transsexual coed tells UP prof: I am not a ‘he’*, GMA NEWS ONLINE, Feb. 28, 2011, available at <https://www.gmanetwork.com/news/news/nation/214104/transsexual-coed-tells-up-prof-i-am-not-a-he/story> (last accessed Nov. 30, 2020) (reporting that a complaint was filed against a professor by a transgender whom the professor refused to address according to her gender identity).
73. See Michael B. Ocampo, “Sex” in the Workplace: Approaches to Sexual Orientation and Gender Identity Discrimination in the Workplace Absent an Anti-Discrimination Law, 86 PHIL. L.J. 186 (2011) (Narrating discrimination in the workplace in the Philippines and arguing that “sex” as defined in the Labor Code of the Philippines should include members of the LBTQI+ community). See also Bonz Magsambol, *U.P. transwoman professor talks about workplace discrimination*, RAPPLER, June 19, 2019, available at <https://r3.rappler.com/move-ph/233454-transwoman-professor-up-talks-about-discrimination-workplace> (last accessed Nov. 30, 2020).

places,⁷⁴ but more importantly, even from Philippine laws and government policies.⁷⁵ In an article advocating the creation of “Philippine LGBT hate crime laws” written in 2014, Raoul Atadero cited 23 violent incidents involving LGBTQIA+ persons from 1996 to 2010, and 45 violent incidents from 2011 to 2012.⁷⁶ Atadero warned that the increasing reported cases could only be the “tip of the iceberg,” citing difficulties in classifying hate crimes.⁷⁷

The Philippine Supreme Court has already recognized this problem.⁷⁸ In the concurring opinion of former Chief Justice Puno in *Ang Ladlad LGBT Party v. COMELEC*,⁷⁹ he cited *Ang Ladlad LGBT Party’s* Petition for

74. See Robert Vergara, *Discrimination vs. trans woman in QC mall raises calls for SOGIE bill passage*, CNN PHIL., Aug. 14, 2019, available at <https://cnnphilippines.com/news/2019/8/14/gretchen-diez-arrest-sogie-bill.html> (last accessed Nov. 30, 2020) & *Discrimination vs ‘KaladKaren’ a Wake-up Call to Pass LGBT Rights Bill* — Hontiveros, available at <https://news.abs-cbn.com/news/08/29/18/discrimination-vs-kaladkaren-a-wake-up-call-to-pass-lgbt-rights-bill-hontiveros> (last accessed Nov. 30, 2020).

75. While there are several laws that mention sexual orientation (e.g., Magna Carta of Women, Magna Carta for Public Social Workers) and address same-sex relations (e.g., Anti-Rape Law of 1997, Article 46 of the Family Code, and Republic Act No. 9262), Philippine laws continue to deny the union of same-sex couples and allow establishment of property relations between LGBTQI+ couples, among other rights. See *Falcis*, G.R. No. 217910, at 38-39 (citing Ma. Theresa Casal De Vela, *The Emergence of LGBT Human Rights and the Use of Discourse Analysis in Understanding LGBT State Inclusion*, 60 PHIL. J. PUB. ADMIN. 72, 75-79 (2016)); & Jocel Isidro S. Dilag, *#LoveWins: Stimulating The Institution of Property Relations for Same-Sex Partners*, 90 PHIL. L.J. 681 (2016). But see UNDP & USAID, *Being LGBT in Asia*, *supra* note 33, at 22. The inclusion of sexual orientation in the above-specified legislations may be detrimental as sexual orientation is associated as socially bad or psychologically detrimental (i.e., that members of the LGBTQIs community are capable of rape and violence in the cases of the Anti-Rape Law and Republic Act No. 9262, and “deviant” in the case of Article 46 of the Family Code).

76. Atadero, *supra* note 29, at 787-88 (2014) (citing Interview by Raoul Atadero with Marlon Lacsamana, Elder of IFTAS (June 3, 2010)).

77. *Id.* at 789.

78. *Silverio v. Republic*, G.R. No. 174689, 537 SCRA 373, 395 (2007) (“The Court recognizes that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal.”).

79. *Ang Ladlad LGBT Party v. COMELEC*, G.R. No. 190582, 618 SCRA 32 (2010).

Registration, which enumerated the various cases of discrimination and violence perpetrated against the LGBTQIA+ community.⁸⁰ Chief Justice Puno said that “[o]ne cannot, in good faith, dispute that gay and lesbian persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.”⁸¹ More

80. *Id.* at 99–100 (C.J. Puno, separate concurring opinion). Citing Ang Ladlad’s Petition for Registration for party-list accreditation, Chief Justice Puno enumerates the following:

- (a) Effeminate or gay youths being beaten up by their parents and/or guardians to make them conform to standard gender norms of behavior;
- (b) Fathers and/or guardians who allow their daughters who are butch lesbians to be raped[, so as] to ‘cure’ them into becoming straight women;
- (c) Effeminate gays and butch lesbians are kicked out of school, NGOs, and choirs because of their identity;
- (d) Effeminate youths and masculine young women are refused admission from (*sic*) certain schools, are suspended or are automatically put on probation;
- (e) Denial of jobs, promotions, trainings and other work benefits once one’s sexual orientation and gender identity is (*sic*) revealed;
- (f) Consensual partnerships or relationships by gays and lesbians who are already of age, are broken up by their parents or guardians using the [A]nti-kidnapping [L]aw;
- (g) Pray-overs, exorcisms, and other religious cures are performed on gays and lesbians to ‘reform’ them;
- (h) Young gays and lesbians are forcibly subjected to psychiatric counseling and therapy to cure them[,] despite the de-listing (*sic*) of homosexuality and lesbianism as a mental disorder by the American Psychiatric Association;
- (i) Transgenders, or individuals who were born male (*sic*) but who self-identity as women and dress as such, are denied entry or services in certain restaurants and establishments; and
- (j) Several murders from the years 2003–3006 were committed against gay men, but were not acknowledged by police as hate crimes or violent acts of bigotry.

Id.

81. *Id.* at 99 (citing *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 434 (Conn. Sup. Ct. 2008) (U.S.)).

recently, in the case of *Falcis v. Civil Register General*,⁸² the Court, speaking through Justice Leonen, said that

[t]hose with sexual orientations other than the heteronormative, gender identities that are transgender or fluid, or gender expressions that are not the usual manifestations of the dominant and expected cultural binaries — the lesbian, gay, bisexual, transgender, queer, intersex, and other gender and sexual minorities (LGBTQIA+) community — have suffered enough marginalization and discrimination within our society.⁸³

Despite LGBTQIA+ recognition from a significant number of Philippine legislators,⁸⁴ discrimination and violence against the community remain rampant in the absence of an anti-discrimination law. In this discussion, it is important to point out that the Anti-Discrimination Bill, as well as other bills protecting the LGBTQIA+ community, have been successfully blocked by the Catholic Church and its conservative allies from other religions for at least two decades.⁸⁵

82. *Falcis v. Civil Registrar General*, G.R. No. 217910, Sept. 3, 2019, *available at* <https://sc.judiciary.gov.ph/8227> (last accessed Nov. 30, 2020).

83. *Id.* at 2.

84. See H.B. No. 9094, 17th Cong., 3d Reg. Sess. (2019); H.B. No. 4982, 17th Cong., 1st Reg. Sess. (2017); H.B. No. 6294, 18th Cong., 1st Reg. Sess. (2020); H.B. No. 134, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 160, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 258, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 640, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 1041, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 1041, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 1359, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 2211, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 2167, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 2870, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 4474, 18th Cong., 1st Reg. Sess. (2019); H.B. No. 5818, 18th Cong., 1st Reg. Sess. (2019); & H.B. No. 95, 18th Cong., 1st Reg. Sess. (2019).

85. Jayceel Cornelio & Robbin Charles M. Dagle, *Weaponising Religious Freedom: Same-Sex Marriage and Gender Equality in the Philippines*, 14 RELIGION & HUM. RTS. 65, 76 (2019) (citing GALANG PHILIPPINES, POLICY AUDIT: SOCIAL PROTECTION POLICIES AND URBAN POOR LBTS IN THE PHILIPPINES, SEXUALITY, POVERTY AND LAW *2 (2013) & UNDP & USAID, *Being LGBT in Asia*, *supra* note 33, at 27). See also Agence France-Presse & Guillaume Lavallee, *CBCP urges followers to oppose same sex marriage*, RAPPLER, Aug. 31, 2015, *available at* <https://www.rappler.com/nation/cbcp-urges-followers-oppose-same-sex-marriage> (last accessed Nov. 30, 2020) (“The CBCP statement adds that Catholic

In a privilege speech on the SOGIE Bill, Senator Risa Hontiveros pointed out that during the past three years that the bill sat pending during the 17th Congress, there have been numerous cases of discrimination on the basis of SOGIE.⁸⁶ In the same speech, she asked,

lawmakers have ‘a moral duty’ to express their ‘opposition clearly and publicly’ and to vote against a law”); Eleanor R. Dionisio, *Catholic Partisanship in the 2013 Elections: ‘Churchifying’ Democracy or Democratizing the Church?*, 62 PHIL. SOCIOLOGICAL REV. 11, 13 (2014) (discussing how the Catholic Church attempted to “mobilize a ‘Catholic vote’” during the 2013 elections and in relation to the Reproductive Health Law); & Jose Mario C. Francisco, *People of God, People of the Nation Official Catholic Discourse and Nationalism*, 62 PHIL. STUDIES: HISTORICAL & ETHNOGRAPHIC VIEWPOINTS 341, 356 (2014) (discussing how the official collective statements of Catholic Bishops tried to promote the imaginary of the Philippines as a “Catholic nation”).

86. Risa Hontiveros, Senator, *Privilege Speech on SOGIE Bill #ResistTogether*, Privilege Speech at 18th Congress (June 4, 2019) (transcript available at http://legacy.senate.gov.ph/press_release/2019/0604_hontiveros3.asp (last accessed Nov. 30, 2020)).

A photograph of a gay teacher dressed up as a bride in a non-school and personal event was used by officials of a private school to terminate his employment[.]

A transwoman employee was forced to cut her long hair to comply with a human resource policy concerning prescribed haircut for male employees.

A transwoman employee experienced harassment after being subjected to a pre-employment medical examination.

A lesbian was constrained to dress up in a stereotypical feminine way in order to be considered for the job.

A second-year high school student in the town of Batangas committed suicide due to depression, following incidents of bullying by his classmates accusing him of being gay.

A group of transwomen students from Jose Rizal Memorial State University sought redress from the CHR for being forced by their dean to cut their hair and comply with a ‘prescribed male haircut.’

PUP Senior High School [did not allow transgender individuals to graduate from the school if they do not conform to the prescribed haircut of the school corresponding to their biological sex.]

*Habang patuloy na dinedelay ang bill na ito ilan pa sa ating mga kapatid, anak, kaibigan ang mahaharang sa airport, ang hindi papasukin sa mga bars, ang mawawalan nang trabaho, ang hindi makakagraduate? Worse, ilan pa ang makakaranas ng hate crime? Ilang pang Richelle Bequilla, Jordan Borabien, Rolando Apolinario, Joice Florance, Alex Nodado? Ilan pang mga Jennifer Laude?*⁸⁷

Like Jennifer Laude, Richelle Labitad Bequilla, Jordan Borabien, Rolando Apolinario, Joice Florance, and Alex Nodado were transgenders who have been reported (mostly through social media only) to have been killed because of their gender within the last five years.⁸⁸ Indeed, transgender men and women, in particular, are harassed, assaulted and killed at alarming rates, not only in the U.S.,⁸⁹ but also in the Philippines. However, due to the lack of verification and collation of data on crimes related to gender identity bias by the government, it is hard to assess the exact number with utmost certainty.⁹⁰

In 2012, the Philippine LGBT Hate Crime Watch and other transgender organizations started reporting and documenting violence against transgender

LGBT PLHIVs experience disqualification from claiming health benefits upon subsequent contraction of HIV.

A lesbian couple was not entitled to a home in a relocation site because they are not considered as a family.

LGBT couples cannot claim benefits from SSS, GSIS, Health or Life Insurance.

Id.

87. *Id.* The Authors provide the following translation:

While the bill continues to be delayed in Congress, how many more of our sibling and children would be prevented to enter an airport or bar, or lose their jobs, or not be able to graduate? Worse, how many more would have to suffer from a hate crime? How many more Richelle Benquilla, Jordan Borabien, Rolando Apolinario, Joice Florence, Alex Nodado? How many more Jennifer Laude?

88. ASEAN Sexual Orientation, Gender Identity and Expression (SOGIE) Caucus, Joint Submission of the Civil Society Organizations (CSOs) on the Situation of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Persons in the Philippines, at 6, available at <https://aseansogiecawcus.org/images/resources/upr-reports/Philippines/Philippines-UPR-JointReport-3rdCycle.pdf> (last accessed Nov. 30, 2020).

89. See generally Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1416-24 (2020) & Lee & Kwan, *supra* note 25, at 94-97.

90. UNDP & CHR, *Legal Gender Recognition in the Philippines*, *supra* note 15, at 15.

people.⁹¹ A report in March 2016 by the Trans Murder Monitoring Project listed 41 reported cases of transgender people murdered in the country since 2008.⁹² This translated to almost eight transgender people killed every year or two transgender persons every three months.⁹³ This is more than enough to sound the alarm considering that in the U.S., where the population is bigger, there have been 330 transgender people murdered from 1970 to 2011 or roughly seven murders each year.⁹⁴

III. THE LGBTQIA+ “PANIC” DEFENSE

The U.S. National LGBT Bar Association defines the LGBTQIA+ “panic” defense strategy as a legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity or expression is to blame for a defendant’s violent reaction, including the act of murder.⁹⁵ Thus, when a defendant uses the LGBTQIA+ “panic” defense, he is essentially claiming that his violent actions are justified because the victim deserved to be physically hurt or killed merely because the latter was a member of the LGBTQIA+ community, implying that the lives of the latter are worth less than their heterosexual cisgender counterparts. The same concept can also be applied in Philippine

91. *Id.*

92. *Id.* (citing Transgender Europe, 31st March 2016: Trans Day of Visibility Press Release Over 2,000 trans people killed in the last 8 years, *available at* <https://tgeu.org/transgender-day-of-visibility-2016-trans-murder-monitoring-update> (last accessed Nov. 30, 2020)).

93. *Id.*

94. Lee & Kwan, *supra* note 25, at 95 (citing Transgender Day of Remembrance, All Years 2011, *available at* https://tdor.info/?attachment_ (last accessed Nov. 30, 2020)). *See also* Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1418 (citing Human Rights Campaign Foundation, A National Epidemic: Fatal Anti-Transgender Violence in America in 2018, at 61, *available at* <https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf> (last accessed Nov. 30, 2020)) (citing the Human Rights Campaign report stating that “between January 2013 and November 2018, at least 128 transgender individuals were the victims of fatal violence”).

95. The LGBT Bar, *supra* note 16.

jurisdiction by simply changing the word “jury” to “judge,” as the Philippines employs a bench system rather than a jury.⁹⁶

In this part of the Article, the Authors will discuss the concept of the LGBTQIA+ “panic” defense and how it developed from being a mental disorder during the mid-1900s in the United States, to becoming a criminal defense used in the courtroom — first, as a form of insanity defense, and later, as a provocation defense. Through this, one may be able to have a better grasp of its potential application in Philippine jurisdiction.

A. Origins

The use of the LGBTQIA+ “panic” defense is rooted “in theories [that depicted] latent homosexuality as a mental disorder.”⁹⁷ The term “homosexual panic” was coined in 1920 by a clinical psychiatrist named Dr. Edward Kempf “to describe a ‘panic due to the pressure of uncontrollable perverse sexual cravings’ that threatened and at times overcame the afflicted individual’s ego and feeling of self-control.”⁹⁸ Dr. Kempf claimed that “an afflicted individual’s fear of being socially identified as ‘homosexual’ [leads to the] repress[ion of his] uncontrollable homosexual desires, [which then] caus[es] erotic hallucinations and severe delusions to gratify those sexual cravings.”⁹⁹ Afflicted individuals experienced a heightened sense of anxiety or “panic” in same-sex environments, caused by the tension between their “true” sexual orientation, which is homosexual, and what they perceived to be the socially acceptable sexual orientation, which is heterosexual.¹⁰⁰ The symptoms were described as “erotic visions and voices, ‘drugged’ feelings, seductive and hypnotic influences, irresistible trance states, [among others].”¹⁰¹ At its worst, an afflicted individual going through “an acute aggression panic episode would ... likely [] react with dangerous hatred towards others because homosexual

96. Jose Manuel I. Diokno, *Now or Never: Judicial and Legal Reforms in the Philippines*, 63 ATENEO L.J. 1, 4 (2018) (citing WILLARD B. RIANO, CRIMINAL PROCEDURE (THE BAR LECTURE SERIES) 23 (2016)) (discussing the incongruence of using procedural rules meant for juries when Philippine cases are decided by the judge).

97. Lee, *Gay Panic Defense*, *supra* note 14, at 482.

98. Chen, *supra* note 25, at 199–200 (citing 2 ENCYCLOPEDIA OF HOMOSEXUALITY 941–43 (Wayne R. Dynes, et al. eds., 1990)); & Perkiss, *supra* note 17, at 795 (citing 2 ENCYCLOPEDIA OF HOMOSEXUALITY, *supra* note 98, at 941–43).

99. Chen, *supra* note 25, at 200.

100. Lee, *Gay Panic Defense*, *supra* note 14, at 483.

101. Chen, *supra* note 25, at 200.

panic induce[s automatic] reactions, where[] the afflicted [feels] threatened by undue malignant influence, physical violence, or impending death.”¹⁰²

B. Ways of Manifesting

1. Insanity

It is within this context that the legal defense of “homosexual panic”¹⁰³ first emerged as an insanity defense against homicide prosecutions in 1967.¹⁰⁴ Under this defense, “the defendant’s acute psychotic reaction of homicidal violence ... was directly premised upon the latent homosexual’s mental disorder[.]”¹⁰⁵ Thus, while an “external stimuli such as a homosexual advance”¹⁰⁶ by the victim triggered the reactive panic of the defendant, such panic originated not from the external stimuli that is the homosexual advance, but “from the defendant’s larger psychiatric illness of homosexuality.”¹⁰⁷

The first case which utilized the term “homosexual panic” was *People v. Rodriguez*.¹⁰⁸ In this case, the defendant claimed that he was urinating between a bushy area and a garage when someone “grabbed him from behind.”¹⁰⁹ He claimed to have feared that the man was “trying to engage [him] in a homosexual act.”¹¹⁰ This drove the defendant to pick up a club and hit the victim in the head, resulting in the latter’s death.¹¹¹ During trial, the expert witness for the defense testified that, “in his opinion[, the] defendant did not know the nature and quality of his act at the time of the attack and [that his reaction was] a result of [what was called] ‘acute homosexual panic[.]’” by his

102. *Id.*

103. In discussing the use of the defense as a form of insanity, the Authors will refer to the defense as “homosexual panic,” as opposed to “LGBTQIA+ panic defense.”

104. Chen, *supra* note 25, at 201 n. 31 (citing Robert G. Bagnall, et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 499 n. 4 (1984)).

105. Chen, *supra* note 25, at 202.

106. *Id.*

107. *Id.*

108. *People v. Rodriguez*, 256 Cal.App.2d 663 (Cal Ct. App. 1967) (U.S.) & Chen, *supra* note 25, at 201 n. 31 (citing Bagnall, *supra* note 104, 499 n. 4).

109. *Rodriguez*, 256 Cal.App.2d at 666.

110. *Id.*

111. *Id.* at 666-67.

fear of being sexually molested by the victim.¹¹² Despite this claim, the jury held him liable for second-degree murder.¹¹³

This idea of “homosexual panic” being an internal disturbance triggered by the external stimuli of a homosexual advance subsisted until the 1970s.¹¹⁴ In 1973, however, the American Psychiatric Association “formally de-medicalized homosexuality and deleted it from the [Diagnostic and Statistical Manual of Mental Disorders], thus stripping [‘]homosexual panic[’] of its medical-scientific legitimacy as a defense and as an illness[.]”¹¹⁵ Without recognition of the same as a mental disorder, defendants could no longer use the insanity defense.¹¹⁶

Of course, aside from the fact that it is no longer officially recognized as a mental disorder, the defense as used in the courtroom has always been problematic.¹¹⁷ “[N]one of Kempf’s patients were aggressive towards others because of a same-sex advance.”¹¹⁸ Even if they became violent, the violence was usually self-inflicted instead of being inflicted upon a third person.¹¹⁹ Also, while Kempf’s patients were both male and female, which signified its availability to both sexes, it appeared that the defense was mostly invoked by males.¹²⁰ Nevertheless, instead of losing credibility as criminal defense after the declassification of homosexual panic as a mental disorder, the LGBTQIA+ “panic” defense was able to adapt to the times and evolve into another type of defense — one of provocation.¹²¹

112. *Id.* at 667.

113. *Id.* at 665.

114. Chen, *supra* note 25, at 200-01 (citing Bagnall, *supra* note 104, at 500).

115. Chen, *supra* note 25, at 202 & Perkiss, *supra* note 17, at 796.

116. Lee, *Masculinity on Trial*, *supra* note 25, at 820 (citing Lee, *Gay Panic Defense*, *supra* note 14).

117. See Comstock, *supra* note 25, at 81.

118. Lee, *Masculinity on Trial*, *supra* note 25, at 818.

119. Comstock, *supra* note 25, at 85-86.

120. Lee, *Masculinity on Trial*, *supra* note 25, at 819 (citing EDWARD J. KEMPF, PSYCHOPATHOLOGY 506-11 (1920) & Comstock, *supra* note 25, at 89). See also Comstock, *supra* note 25, at 89-90.

121. Chen, *supra* note 25, at 203.

2. Defense of Provocation

Over the years, the defense shifted from the defendant to the victim, particularly with respect to the latter's conduct.¹²² Heterosexual cisgender male defendants charged with murdering homosexual persons have begun arguing that "they were provoked into the heat of passion by a non-violent [homosexual] advance."¹²³ Thus, under this new formulation, "the external stimulus [that is] the homosexual advance [becomes the very] trigger"¹²⁴ for the "defendant's homicidal reaction."¹²⁵

To be able to use the defense, however, the defendant must be able to show that the killing was motivated by legally adequate provocation and that it did, in fact, cause a heat of passion that had not receded by the time the victim was killed.¹²⁶ According to Lee, provocation is considered "legally adequate if [a] reasonable person in the defendant's shoes would have been provoked into a heat of passion."¹²⁷

The case of Matthew Shepard is perhaps one of the most famous cases where the defense was invoked. "Shepard was an openly gay student who was beaten to death, robbed, and then left tied to a wooden fence"¹²⁸ by Aaron McKinney and Russel Henderson.¹²⁹ During the trial, McKinney's attorney

122. See Lee, *Masculinity on Trial*, *supra* note 25, at 822.

123. *Id.* & Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1428 (citing Lee, *Gay Panic Defense*, *supra* note 14, at 500-04). See also Mison, *supra* note 25.

124. Chen, *supra* note 25, at 203 & Perkiss, *supra* note 17, at 797 (citing Chen, *supra* note 25, at 203).

125. *Id.*

126. Lee, *Gay Panic Defense*, *supra* note 14, at 499-500.

127. *Id.* at 500.

128. Lee, *Masculinity on Trial*, *supra* note 25, at 823 (citing BETH LOFFREDA, LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER I (2000)).

129. Lee, *Gay Panic Defense*, *supra* note 14, at 523. See also Lee, *Masculinity on Trial*, *supra* note 25, at 823 (citing LOFFREDA, *supra* note 128, at 1); & Patel, *supra* note 25, at 114 (citing Robert Zepeda & Emily Shapiro, *Matthew Shepard: The legacy of a gay college student 20 years after his brutal murder*, ABC NEWS, Oct. 26, 2018, available at <https://abcnews.go.com/US/matthew-shepard-legacy-gay-college-student-20-years/story?id=58242426> (last accessed Nov. 30, 2020) & ABC News, *New Details Emerge in Matthew Shepard Murder*, ABC NEWS, Nov. 26, 2004, available at <https://abcnews.go.com/2020/story?id=277685&page=1> (last accessed Nov. 30, 2020)).

argued that the savage beating of Shepard was triggered by the homosexual advance made by the latter upon McKinney in the truck.¹³⁰ The defense also tried to prove that Shepard was a sexually aggressive deviant who often made heterosexual men uncomfortable with sexual advances.¹³¹ Fortunately, the use of the LGBTQIA+ “panic” defense did not prosper because McKinney admitted to making the story up in 2014.¹³²

The defense of provocation remains an effective defense in a culture where heterosexuality is the norm and where heterosexual males are expected “to be the sexual aggressors, not the ones aggressed upon.”¹³³ The unfortunate result is the reinforcement of stereotypes that depict homosexual males as sexual deviants and aggressors.

3. Self-defense

The use of self-defense is perhaps the widest stretch from the first conception of “homosexual panic.” Thus, it is not hard to understand why it is a less common form of the defense.¹³⁴ As originally understood, in no way can “homosexual panic” be interpreted as a form of self-defense by the latent homosexual who is having an internal conflict from repressing his sexual orientation, and who, as clinically described, should be “self-punishing, withdrawing, and passive.”¹³⁵

There have been instances, however, where the LGBTQIA+ “panic” defense has been successfully used as self-defense outside the original medical concept. For instance, in *People v. Rowland*,¹³⁶ the defendant shot the victim following an alleged homosexual advance.¹³⁷ While the judge was able to

130. Patel, *supra* note 25, at 114-15 (citing Julie Cart, *Defense Says Homosexual Advance Triggered Slaying*, L.A. TIMES, Oct. 26, 1999, available at <https://www.latimes.com/archives/la-xpm-1999-oct-26-mn-26455-story.html> (last accessed Nov. 30, 2020)). See Lee & Kwan, *supra* note 25, at 102 (citing Lee, *Gay Panic Defense*, *supra* note 14, at 523-24).

131. Lee, *Gay Panic Defense*, *supra* note 14, at 525.

132. Lee & Kwan, *supra* note 25, at 102 (citing 20/20: *The Matthew Shepard Story: Secrets of a Murder* (ABC television broadcast Nov. 26, 2004)).

133. Lee, *Gay Panic Defense*, *supra* note 14, at 479.

134. *Id.* at 517.

135. Comstock, *supra* note 25, at 94-95 & Suffredini, *supra* note 25, at 289.

136. *People v. Rowland*, 262 Cal. App. 2d 790 (Cal. Ct. App. 1968) (U.S.).

137. *Id.* at 792.

block any attempt to inquire into the homosexual nature of the victim and his tendency to be sexually aggressive, the conviction was reversed on appeal because the victim was found to be a potentially sexually aggressive homosexual.¹³⁸

In any case, like the defense of provocation, the concept of self-defense relies heavily on “masculinity norms, heterosexuality norms, and stereotypes about homosexual men to bolster [the] claim of reasonableness.”¹³⁹ As aptly described by Gary Comstock, “[t]he justification for self-defense in [] incidents [reported in the U.S.] is not the physical threat posed by the ‘advance,’ but the sexual identity of the victim.”¹⁴⁰ Comstock adds that although in the U.S., the self-defense argument requires proof that the defendant honestly and reasonably believed that deadly force was necessary to protect against an imminent threat of death or serious bodily injury, it appeared that the need to prove the same was “often ... tempered by bias ... against [members of the LGBTQIA+ community].”¹⁴¹ Thus, even in cases where no evidence of physical attack was produced, juries were still “inclined to believe the defendant’s allegation[] that the victim attacked him violently.”¹⁴²

IV. THE TRANS “PANIC” DEFENSE

A. Defining Trans “Panic” Defense

The term trans “panic” defense emerged only in the 1970s, well after the formation of the LGBTQIA+ “panic” defense.¹⁴³ In essence, it is identical to the LGBTQIA+ “panic” defense, considering that both defenses “assert that the defendant had his heterosexuality or masculinity so existentially challenged by the victim that the defendant acted without reason.”¹⁴⁴ However, a closer inspection of the cases involving the use of the defense would show that there

138. *Id.* at 797-98.

139. Lee, *Gay Panic Defense*, *supra* note 14, at 518.

140. Comstock, *supra* note 25, at 97.

141. *Id.* at 98 (citing Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 501 (1984)).

142. Comstock, *supra* note 25, at 98.

143. Tilleman, *supra* note 25, at 1668 (citing Lee, *Gay Panic Defense*, *supra* note 14, at 482-83).

144. Tilleman, *supra* note 25, at 1668-69.

is a distinction in usage.¹⁴⁵ In cases of the LGBTQIA+ “panic” defense, the heterosexual cisgender male defendant would argue that he was harassed by the homosexual cisgender male victim through a non-violent sexual advance.¹⁴⁶ On the other hand, when the trans “panic” defense is invoked, the heterosexual cisgender male defendant would primarily argue that he was “deceived” into having sexual relations by the transgender woman whom he initially believed to be biologically female.¹⁴⁷ During the trial for both cases, the defendants would similarly argue that they should be acquitted of murder and instead convicted for a lesser offense because they were provoked, possessed mental defects such as temporary insanity or diminished capacity during the commission of the act, or were acting in self-defense.

According to Aimee Wodda and Vanessa Panfil, majority of cases in the U.S. invoking the trans “panic” defense

follow a similar [] thread. [T]he victim and [defendant] meet and are attracted to one another, the perpetrator begins to inquire as to whether the person he is attracted to is ‘really a woman,’ and at which point there is generally some type of ‘examination’ or reveal’ of male genitalia.¹⁴⁸

From then on, the defendant “asserts his heterosexuality and perpetrates fatal violence.”¹⁴⁹ When brought before the court, the defendant and his attorneys, will “propose an [‘]explanation[’] of the crime that centers on [the ‘deceit’ by the] victim[.]”¹⁵⁰

Thus, the more apt description for trans “panic” defense, as distinguished from the broader LGBTQIA+ “panic” defense, would be that proposed by Lee — trans “panic” defense describes a criminal defense strategy in the U.S., wherein a male defendant charged with the murder of a transgender woman

145. Wodda & Panfil, *supra* note 25, at 933 (“The trans ‘panic’ defense parallels the gay panic defense but typically has additional layers”).

146. For instance, in the Matthew Shepard case, Aaron McKinney, one of the defendants, stated that Shepard grabbed his crotch and licked his ear while they were inside a truck. Lee, *Masculinity on Trial*, *supra* note 25, at 823 (citing Transcript of Records, at 16–17, *in* State v. McKinney, 279 Wyo. 297 (2010) (U.S.)).

147. Tilleman, *supra* note 25, at 1669. See Bigler, *supra* note 25, at 831 (arguing that misrepresentation of biological sex can be adequate provocation).

148. Wodda & Panfil, *supra* note 25, at 947.

149. *Id.*

150. *Id.*

will claim that the discovery that the victim was biologically male was so upsetting that he panicked and “los[t] his self-control.”¹⁵¹

B. Motivations for Violence Against Transgender Women

According to Lee and Kwan, there are three possible motivations¹⁵² for the violence of the defendant:

- (1) “[T]he defendant’s fear of being seen as gay if others found out that he had sex with a transgender individual[;]”¹⁵³
- (2) “[T]he defendant’s desire to enforce gender norms[;] and”¹⁵⁴
- (3) “[T]he defendant’s anger at the victim’s alleged deceit.”¹⁵⁵

In the Philippines, the motives behind the killing of transgender people generally cannot be ascertained because of inaccurate reporting of the victims’ sexual orientation and gender identity. Be that as it may, for this Subsection, the Authors will argue by analogy by pointing out similar instances where such motivations were demonstrated by Filipino heterosexual cisgender males.

The first motivation is based on studies of scholars in the field of masculinities showing that men are socialized to believe that being a man means “not being like women,”¹⁵⁶ which means that he should not desire other men or ensure that no one would mistake him for a homosexual.¹⁵⁷ Citing scholars, Lee argues that a central feature of masculinity is the need to denigrate and repudiate those who are not considered masculine, namely women, gays, and racial minorities.¹⁵⁸ Thus, a heterosexual man who discovers

151. Lee, *Masculinity on Trial*, *supra* note 25, at 817 (citing Victoria L. Steinberg, Book Note, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 501 (2005)).

152. Lee & Kwan, *supra* note 25, at 109.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Lee, *Gay Panic Defense*, *supra* note 14, at 508 (citing Roy Scrivner, *Gay Men and Nonrelational Sex*, in *MEN AND SEX: NEW PSYCHOLOGICAL PERSPECTIVES* 233 (Ronald L. Levant & Gary R. Brooks eds., 1997)).

158. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1438 (citing Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV 777, 786-87 (2000));

that he is attracted¹⁵⁹ to or is being intimate with a transgender woman may worry that those who find out will think of him as “gay.”¹⁶⁰ This fuels him to reaffirm his masculinity by killing the transgender woman, believing that his aggressive reaction and use of brute force are evidence of his repulsion of having sex with another “man.”¹⁶¹

The use of violence to repudiate association with the LGBTQIA+ community is a common occurrence in the Philippines. For example, in *People v. Racal*,¹⁶² the defendant stabbed the victim who had “provoked” the former by calling him gay several days before the incident.¹⁶³ In another reported incident, a man was killed because he called the accused *bakla*.¹⁶⁴ In both instances, the idea of being identified as a homosexual seemed too much for the offender’s threatened masculinity that he felt the need to defend it by hurting — to the point of death — the person who had labelled him as such.

In 2019, when an Instagram user commented, “*mag-amang bakla* haha,” (“gay father and son haha”) on a picture of Piolo Pascual and his son,¹⁶⁵ Pascual

Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DENV. U. L. REV. 644, 647-48 (2009); & Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 707 (2011).

159. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1438. For example, Jose Merel, killer of Gwen Araujo, was so upset when he started thinking that he might be sexually attracted to someone who had been born with male genitalia, that when he discovered that Gwen Araujo was a transgender, that he felt that he was robbed of his masculinity. *Id.* at 1439 (citing *People v. Merel*, No. A113056, 2009 WL 1314822, *2 & *6 (Cal. Ct. App. 2009) (Westlaw, U.S.) (unreported) & Lee & Kwan, *supra* note 25, at 111).

160. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1438 (citing Lee & Kwan, *supra* note 25, at 109-11).

161. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1438 (citing Lee & Kwan, *supra* note 25, at 110).

162. *People v. Racal*, G.R. No. 224886, 838 SCRA 476 (2017).

163. *Id.* at 484.

164. Kate Cunanan, *Lalaking tinawag na bakla, nanaksak ng kainuman*, ABS CBN NEWS, May 9, 2018, available at <https://news.abs-cbn.com/news/05/09/18/lalaking-tinawag-na-bakla-nanaksak-ng-kainuman> (last accessed Nov. 30, 2020).

165. Kate Matriano, ‘*Suntukan tayo*’: *Piolo Pascual challenges basher who called him, Inigo ‘bakla’*, PHIL. DAILY INQ., Jan. 21, 2019, available at <https://entertainment.inquirer.net/314681/suntukan-tayo-piolo-pascual-challenges-basher-who-called-him-inigo-bakla> (last accessed Nov. 30, 2020).

replied, “*suntukan tayo*”¹⁶⁶ (“let’s fight”) leading to a heated exchange in the comment section and showing toxic masculinity at play.

The second motivation is based on the defendant’s “discomfort with any manifestation of gender non-conformity.”¹⁶⁷ Citing studies, Lee and Kwan note that “[n]egative attitudes toward sexual and gender minorities appear to be closely bound to heteronormative attitudes about gender identity, patriarchal authoritarianism, and masculinity.”¹⁶⁸ For a defendant asserting the trans “panic” defense, “the transgender woman transgresses gender norms by assuming a female identity when she was born with a male anatomy.”¹⁶⁹ Thus, killing the transgender is a way for the defendant to “punish[] her act of transgression.”¹⁷⁰

Discomfort with any manifestation of gender non-conformity is the status quo in a heteronormative and predominantly Catholic Philippines.¹⁷¹ In fact, legislators do not even think twice before voicing out prejudicial statements and their overall ignorance with respect to SOGIE issues.¹⁷² Senator Joel Villanueva has consistently dismissed the concept of SOGIE as one being merely based on “feelings.”¹⁷³ Senator Manny Pacquiao once called members of the LGBTQIA+ community as “*mas masahol pa sa hayop*” (“worse than

166. *Id.*

167. Lee & Kwan, *supra* note 25, at 112.

168. *Id.* (citing Aaron T. Norton & Gregory M. Herek, *Heterosexuals’ Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 *SEX ROLES* 738, 740 (2012)).

169. Lee & Kwan, *supra* note 25, at 113.

170. *Id.*

171. See Associated Press, *Mixed Philippine reaction on pope nod on gay civil unions*, ASSOCIATED PRESS, Oct. 22, 2020, available at <https://apnews.com/article/civil-unions-philippines-asia-pope-francis-manila-cc9221cb6fd7ddea58e246bca72bfcb3> (last accessed Nov. 30, 2020).

172. Rambo Talabong, *‘Why not just homo sapiens?’: Senators confused by LGBTQ+, SOGIE*, RAPPLER, Aug. 14, 2019, available at <https://rappler.com/nation/senators-confused-by-lgbtq-sogie> (last accessed Nov. 30, 2020).

173. Cathrine Gonzales, *Villanueva assures SOGIE bill won’t pass Senate at expense of freedom of religion*, PHIL. DAILY INQ., Aug. 10, 2018, available at <https://newsinfo.inquirer.net/1019903/villanueva-assures-sogie-bill-wont-pass-senate-at-expense-of-religion-sogie-senate-villanueva-discrimination-religion-bill> (last accessed Nov. 30, 2020).

animals”) while arguing that homosexual conduct is contrary to nature,¹⁷⁴ which cannot be more incorrect.¹⁷⁵

Other incidents are equally telling. A transgender woman was punched by her brother for simply wearing a dress and a wig during a dance party,¹⁷⁶ while another transgender woman was beaten up, shaved, and berated by several strangers who were “offended” after seeing her wearing a dress.¹⁷⁷ Similarly, Pemberton referred to Jennifer as an “it” in his testimony, stating, “I choked it, wrapped my arms around it until it stopped moving, and dragged it towards the bathroom.”¹⁷⁸ Clearly, Pemberton’s discomfort towards gender non-conformity is highlighted by his treatment of Jennifer as non-human.

The third motivation is based on the defendant’s “belief that the transgender victim was deceitful and had misrepresented her true gender identity.”¹⁷⁹ Thus, the “discovery” that the victim was biologically male “upset him so much that he lost self-control. The defendant also argues that the average heterosexual cisgender man in his shoes would have been equally upset; and therefore he was reasonably provoked into a heat of passion.”¹⁸⁰ In the Philippine context, the stereotype pinned on transgender women is, according to transwoman activist and influencer Gigi Esguerra, “that [they]

174. Marc Jayson Cayabyab, *Pacquiao compares gays to animals, draws flak on social media*, PHIL. DAILY INQ., Feb. 16, 2016, available at <https://newsinfo.inquirer.net/765172/pacquiao-compares-gays-to-animals-draws-flak-on-social-media> (last accessed Nov. 30, 2020). This is not the first time that Pacquiao made proud of his anti-LGBTQ+ sentiments. See also Fox Sports, *Pacquiao Rips Obama’s Views on Gays*, available at <https://www.foxsports.com/stories/boxing/pacquiao-rips-obamas-views-on-gays> (last accessed Nov. 30, 2020).

175. *Falcis*, G.R. No. 217910, at 34 (citing University of Oslo Natural History Museum, *Homosexuality in the Animal kingdom*, available at <https://www.nhm.uio.no/besok-oss/utstillinger/skiftende/tidligere/againstnature/gayanimals.html> (last accessed Nov. 30, 2020)) (“same sex conduct is a natural phenomenon”).

176. ASEAN Sexual Orientation, Gender Identity and Expression (SOGIE) Caucus, *supra* note 88, at 8.

177. *Id.*

178. Franco Luna, *‘No empathy’: CHR slams Duterte’s full pardon grant for murderer Pemberton*, PHIL. STAR, Sept. 9, 2020, available at <https://www.philstar.com/headlines/2020/09/09/2041184/no-empathy-chr-slams-dutertes-full-pardon-grant-murderer-pemberton> (last accessed Nov. 30, 2020).

179. Lee & Kwan, *supra* note 25, at 113.

180. *Id.* at 114.

exist only to deceive people.”¹⁸¹ It is difficult to argue against this sentiment when some of the most popular contemporary songs by renowned artists in the country are unapologetically transphobic.¹⁸² This motivation, of course, is exactly the motivation described by Pemberton. As will be discussed later in-depth, Pemberton argued that he got so angry with the “discovery” that Jennifer was “male,” and by the idea that he was “raped” by her, that he decided to violently assault her.¹⁸³

V. TRANSPLANTATION

In the previous Sections, the Authors have discussed the history and development of the LGBTQIA+ “panic” defense and its transformation from a defense of insanity, to one of provocation, and then into a defense with specific application against transgender individuals. Indeed, the ability of the LGBTQIA+ “panic” defense to adjust to the times is undeniable, and it would be naïve to think that it could not materialize in the Philippines.

Recall that in the previous parts of this Article, it was discussed that there is only “tolerance” and not “acceptance” of members of the LGBTQIA+ community in the Philippines.¹⁸⁴ There remains rampant discrimination and violence against LGBTQIA+, most especially transgender people, as a result of a lack of institutional protections.¹⁸⁵ Recall further that the country still has

181. Rappler, *Rapper Young Vito, Viva Records Come Under Fire for Releasing ‘Transphobic’ Song*, RAPPLER, Jan. 17, 2020, available at <https://rappler.com/entertainment/music/young-vito-viva-records-under-fire-transphobic-song> (last accessed Nov. 30, 2020) (Esguerra stated “Remember the guy who made an entire song perpetuating stigma against trans women (that we exist only to deceive people)? Well, he has a record label now + his transphobic song is now being monetized and I’m just in disbelief.”). See also Wodda & Panfil, *supra* note 25, at 932 (“The persistent mischaracterization of trans* persons as deceptive and murderous aberrations contribute to a transphobic social climate ...”).

182. Roel Hoang Manipon, *Transphobic Song Slammed*, TRIB., Jan. 20, 2020, available at <https://tribune.net.ph/index.php/2020/01/20/transphobic-song-slammed> (last accessed Nov. 30, 2020).

183. See *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 50 (unreported) *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CA 38620, at 9, 14, & 17 (unreported).

184. Gutierrez, *supra* note 70.

185. Aurora Almendral, *A Transgender Paradox, and Platform, in the Philippines*, N.Y. TIMES, Apr. 29, 2018, available at <https://www.nytimes.com/2018/04/29/world/asia/transgender-philippines-discrimination.html> (last accessed Nov. 30, 2020).

no anti-discrimination law as its passage is still being blocked by the Catholic Church, other Christian religions, and their allies within the Legislature.¹⁸⁶

It is under this context that the Authors believe that the Philippines is conducive for the development of its own version of the LGBTQIA+ “panic” defense. As previously discussed, the motivations for killing transgenders manifest themselves in Filipino heterosexual cisgender male behavior when associated with members of the LGBTQIA+ community. At this point, the possibility of successful transplantation becomes more real than apparent.

Outside the case of Pemberton and the courtroom in general, the country has already witnessed invocations of LGBTQIA+ and trans “panic” defenses to justify the killings of members of the LGBTQIA+ community. For instance, in 2012, a 63-year-old gay doctor was stabbed to death and robbed by two assailants.¹⁸⁷ The assailants recorded the video which showed that one of them approached the victim from behind and hit him with a stone on the head.¹⁸⁸ When the victim fell, he was stabbed several times, brought to the bathroom, then repeatedly stabbed again.¹⁸⁹ During the investigation, one of the accused initially claimed that the victim, armed with a knife, tried to molest him while he was inside the bathroom, which prompted him to grab the knife to defend himself.¹⁹⁰ One of the assailants pleaded guilty and was sentenced to 10 to 17 years, while the other was found guilty and sentenced to serve 40 years.¹⁹¹ If it were not for the video obtained from the cellphone of the assailants, they could have easily used the LGBTQIA+ “panic” defense in court, and the Authors could only surmise how the case would have turned out.

Be that as it may, no other court usage of the LGBTQIA+ “panic” defense, particularly the trans “panic” defense, has been reported, except for

186. *Id.*

187. Danny B. Dangcalan, *Body of “gay” found with 21 stab wounds*, PHIL. STAR, May 18, 2012, available at <https://www.philstar.com/region/2012/05/18/807928/body-gay-found-21-stab-wounds> (last accessed Nov. 30, 2020).

188. Danny B. Dangcalan, *Killing of Bacolod doc videotaped by killers*, May 17, 2012, PHIL. STAR, available at <https://www.philstar.com/region/2012/05/17/807584/killing-bacolod-doc-videotaped-killers> (last accessed Nov. 30, 2020).

189. *Id.*

190. *Id.*

191. Marchel Espina, *Doctor’s Teen Killer Gets 40 Years*, SUNSTAR, July 12, 2016, available at <https://www.sunstar.com.ph/article/85444/Business/Doctors-teen-killer-gets-40-years> (last accessed Nov. 30, 2020).

Pemberton, which did not reach the Supreme Court.¹⁹² This necessitates an inquiry into possible outcomes if the defense is ever asserted again in a Philippine court.

A. Possible Basis for Transplantation in the Philippine Legal System

1. Exempting Circumstances

The presence of an exempting circumstance in the commission of a crime exempts the accused from criminal liability¹⁹³ because in such cases, the accused suffers from a “complete absence of intelligence and free will in [the] perform[ance of] the act.”¹⁹⁴ The exempting circumstances under Philippine law are minority, insanity, imbecility, accident, irresistible force, uncontrollable clear, and lawful and insuperable cause.¹⁹⁵ Similar to American jurisprudence, the LGBTQIA+ “panic” defense may manifest as insanity.

a. Insanity

For the defense of insanity to prosper, there are two requisites, namely: (1) that there is a complete deprivation of intelligence, reason, or discernment; and (2) that such insanity existed “at the time of[,] or immediately [preceding,] the commission of the [crime].”¹⁹⁶

Jurisprudence is consistent in emphasizing the requirement of deprivation of reason.¹⁹⁷ Hence, insanity is not available as a defense if there are acts, no matter how small, that show that the accused was aware of the legal or moral implications of the crime. The courts have rejected insanity when the accused

192. *Pemberton* could have been the first case, but he withdrew his appeal, with the permission of the Supreme Court, in line with his upcoming early release as a result of the Good Conduct Time Allowance (GCTA). See Lian Buan, *Pemberton withdraws appeal, accepts 10-year sentence from 2015*, RAPPLER, Aug. 24, 2020, available at <https://rappler.com/nation/pemberton-withdraws-appeal-accepts-10-year-sentence> (last accessed Nov. 30, 2020).

193. REVISED PENAL CODE, art. 12.

194. *People v. Pantoja*, G.R. No. 223114, 847 SCRA 300, 310 (2017) (citing REYES, *supra* note 20, at 223).

195. REVISED PENAL CODE, art. 12.

196. *Verdadero v. People*, G.R. No. 216021, 785 SCRA 490, 502 (2016).

197. *People v. Garchitorea*, G.R. No. 175605, 597 SCRA 420, 444-45 (2009). See generally Ruby Rosselle L. Tugade, *Understanding Insanity: Making Sense Out of Mental Illness in Philippine Law and Jurisprudence*, 90 PHIL. L.J. 859 (2017).

has threatened the victim,¹⁹⁸ escaped,¹⁹⁹ or alleged that he acted out of anger.²⁰⁰

Unlike American criminal law, the defense of insanity in the Philippines does not require any medical finding of a mental defect or disability.²⁰¹ The fact that Homosexual Panic Disorder and homosexuality are no longer recognized as mental disorders is not a hurdle to the invocation of the LGBTQIA+ “panic” defense in this jurisdiction. Thus, the accused must prove two things: *first*, the non-violent sexual advances or alleged “deception” of the victim caused the defendant to lose all reason; and *second*, that such deprivation of reason existed at the time of, or immediately before the commission of the crime.

2. Mitigating Circumstances

Under Philippine law, mitigating circumstances are those attendant circumstances that lower the imposable penalty of a crime.²⁰² The concept is “founded on leniency in favor of an accused who has shown less perversity in the commission of an offense.”²⁰³ Provocation under American law may fall under this category because while the crime is not extinguished, the accused will be convicted for a significantly lesser offense (i.e., voluntary manslaughter instead of homicide).²⁰⁴ The closest mitigating circumstances to the American law provocation are provocation, immediate vindication, and passion or obfuscation.²⁰⁵

198. *People v. Alipio*, G.R. No. 175605, 603 SCRA 40, 54 (2009).

199. *People v. Belonio*, G.R. No. 148695, 429 SCRA 579, 586-87 (2004).

200. *People v. Antonio*, G.R. No. 138937, 393 SCRA 169, 177 (2002).

201. *See Lee*, *Gay Panic Defense*, *supra* note 14, at 492.

202. REYES, *supra* note 20, at 261.

203. *Id.* & *People v. Belbes*, G.R. No. 124670, 334 SCRA 161, 169 (2000) (citing *People v. Santos*, G.R. Nos. 99259-60, 255 SCRA 309, 311 (1996)).

204. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1424 (citing Lee & Kwan, *supra* note 25, at 77).

205. REV. PENAL CODE, art. 13 (4)-(6).

Mitigating Circumstances. — The following are mitigating circumstances:

...

a. Provocation

Provocation will be considered as a mitigating circumstance upon proof of the following: *first*, that there was “provocation on the part of the offended party; [*second*, that] the provocation [was] sufficient; and [*third*, that the] provocation [] immediately precede[d] the criminal act committed by the offender.”²⁰⁶

The existence of sufficient provocation depends upon several factors such as the act of provocation, the time and place thereof, and the standing of the person provoked.²⁰⁷ The courts have held that acts of aggression, insult, threat,²⁰⁸ abuse, kicking, and cursing²⁰⁹ on the part of the victim are “sufficient provocation” for the commission homicide. Lastly, the Supreme Court has emphasized that provocation must be proportionate to the act committed and must be adequate to arouse the accused to commit the crime.²¹⁰

b. Immediate Vindication

To validly invoke immediate vindication, the following elements must be present: *first*, the “victim committed a grave offense; [*second*,] the grave offense was committed against the offender or his spouse, ascendants, descendants, legitimate, illegitimate, or adopted brothers or sisters, or his relatives by affinity within the same degrees; and [*third*,] the offender committed the crime in proximate vindication of such grave offense.”²¹¹

-
- (4) *That sufficient provocation or threat on the part of the offended party immediately preceded the act.*
 - (5) *That the act was committed in the immediate vindication of a grave offense to the one committing the felony (delito), his spouse, ascendants, descendants, legitimate, natural, or adopted brothers or sisters, or relatives by affinity within the same degrees.*
 - (6) *That of having acted upon an impulse so powerful as naturally to have produced passion or obfuscation.*

Id. (emphasis supplied).

206. MARLO CAMPANILLA, CRIMINAL LAW REVIEWER, VOLUME I 159 (2018).

207. REYES, *supra* note 20, at 283.

208. U.S. v. Carrero, 9 Phil. 544, 546 (1908).

209. U.S. v. Firmo, 37 Phil. 133, 134 (1917).

210. People v. Lopez, G.R. No. 136861, 344 SCRA 756, 765 (2000) (citing People vs. Luayon, G.R. No. 105672, 260 SCRA 739 (1996)).

211. CAMPANILLA, *supra* note 206, at 159.

The term “grave offense” does not have a legal or technical meaning; it pertains to an offense directed against the honor of the accused and/or his relatives.²¹² There is also no specific criteria to determine whether an act is tantamount to a “grave offense.”²¹³ Similar to provocation, surrounding circumstances such as “the social [status] of the person, the place, and the time when the insult was made” are considered.²¹⁴

c. Passion or Obfuscation

Passion or obfuscation requires the presence of the following elements:

- (1) [That] there was an act that was both unlawful and sufficient to produce such condition (passion or obfuscation) of the mind;
- (2) [That] such act was not far removed from the commission of the crime by a considerable length of time, during which the perpetrator might have covered his normal equanimity; and
- (3) [That] passion must arise from a lawful sentiment of the offender and not a spirit of lawlessness or revenge.²¹⁵

Similar to provocation and immediate vindication, the act of the offended party must be sufficient to produce such a condition in the accused’s mind that it deprived him of control.²¹⁶ Thus, not every improper act of the victim can justify the invocation of passion or obfuscation.

The Court has held that the act of stealing one’s carabao,²¹⁷ causing trouble during the accused’s father’s wake,²¹⁸ and causing injuries to the accused’s daughter²¹⁹ are sufficient acts on the part of the victim to appreciate the circumstance of passion or obfuscation in favor of the accused.

²¹² REYES, *supra* note 20, at 292.

²¹³ *Id.*

²¹⁴ *Id.* (emphases omitted).

²¹⁵ CAMPANILLA, *supra* note 206, at 160 (citing *People v. Comillo, Jr.*, G.R. No. 186538, 605 SCRA 756, 780 (2009)).

²¹⁶ *People v. Lobino*, G.R. No. 123071, 317 SCRA 606, 613-14 (1999) (citing *People v. Ramy Valles*, G.R. No. 110564, 267 SCRA 103, 116 (1997) & *People v. Bautista*, G.R. No. 109800, 254 SCRA 621, 629 (1996)).

²¹⁷ *People v. Noynay*, 58 Phil. 393, 396-97 (1933).

²¹⁸ *People v. Samonte, Jr.*, G.R. No. L-31225, 64 SCRA 319, 329-30 (1975).

²¹⁹ *Jabalde v. People*, G.R. No. 195224, 793 SCRA 405, 420 (2016).

d. Common Denominator — the Subjective Aspect

Considering the foregoing discussion on provocation, immediate vindication, and passion or obfuscation, it is clear that there is a common denominator among them — their *subjective aspect*. For provocation, the victim must have sufficiently provoked the accused.²²⁰ For immediate vindication, on the other hand, the victim must have committed a grave offense.²²¹ Both “sufficient provocation” and “grave offense” lack technical or legal meaning under jurisprudence.

Lastly, for passion or obfuscation, the act must be both unlawful and sufficient.²²² It must be noted however that while the requisites cite an “unlawful” act, the Supreme Court has applied passion or obfuscation even in cases when the victim has not done anything “illegal.” For instance, in *U.S. v. De La Cruz*,²²³ the accused killed his concubine after discovering her having sexual intercourse with a mutual acquaintance.²²⁴ In this case, passion was appreciated even though the accused and the victim were not married; hence, the victim had no legal obligation of fidelity towards the accused.²²⁵

Thus, for all three circumstances, the victims in each case must have acted in a way that would “stir the emotions” of the accused before they can be appreciated by the courts. This finding, when understood in the context that Philippines jurisprudence has always considered the surrounding circumstances of each case, points to the conclusion that these mitigating circumstances are indeed highly subjective.

To be clear, the Authors do not discount the jurisprudential rules providing that the act of the victim must be proportionate to the crime committed,²²⁶ and that mere annoyance or improper conduct of the victim is not sufficient,²²⁷ which may be argued as making the application more

220. REYES, *supra* note 20, at 283.

221. *Id.* at 291.

222. *Id.* at 295.

223. *U.S. v. De la Cruz*, 22 Phil. 429 (1912).

224. *Id.* at 431.

225. *Id.* at 431-33.

226. *Racal*, 838 SCRA at 495; *People v. Tangan*, G.R. No. 103613, 354 SCRA 599, 613 (2001) (citing *People v. Naboro*, 73 Phil. 434 (1941)); & *Tangan v. People*, G.R. No. 105830, 373 SCRA 119, 124 (2002).

227. REYES, *supra* note 20, at 300.

objective. However, a survey of jurisprudence will show that the subjective aspect of these three circumstances remains controlling.

For provocation, the case of *People v. Marquez*²²⁸ is illustrative. In this case, the accused killed his wife after he saw an unknown man jump out of their window at midnight.²²⁹ In addition to the fact that the wife insistently begged for the forgiveness of the accused, these circumstances were considered by the Court as “sufficient provocation.”²³⁰ Thus, the mere belief of the accused that the wife committed infidelity was held to be “proportionate” to the killing of his wife, where the mitigating circumstance of provocation was appreciated.²³¹

For the defense of immediate vindication, the case of *People v. Diokno and Diokno*²³² is relevant. Here, one of the accused killed the victim because the latter, who was Chinese, eloped with his daughter.²³³ The Court held that the act of eloping, albeit initiated by the daughter of the accused, was as a grave offense committed by the victim because the accused “belong[ed] to a family of ‘old customs.’”²³⁴ In *U.S. v. Ampar*,²³⁵ the accused killed the victim because the latter insulted him and told him “I will make a roast pig of you” during a *fiesta*.²³⁶ The Court considered the insults as grave offense against the honor of the accused because of his old age and the circumstances at that time.²³⁷ Notably, the Court admitted that had the offense been directed towards an average person, the same may have been a “mere trifle;” however, because of the age of the defendant, it became a serious matter.²³⁸ Thus, the mitigating circumstance of immediate vindication was considered in favor of the accused in both cases.²³⁹

228. *People v. Marquez*, 53 Phil. 260 (1929).

229. *Id.* at 262.

230. *Id.*

231. *Id.* at 262-63.

232. *People v. Diokno and Diokno*, 63 Phil. 601 (1936).

233. *Id.* at 603-04

234. *Id.* at 608.

235. *United States v. Ampar*, 37 Phil. 201 (1917).

236. *Id.* at 202.

237. *Id.*

238. *Id.* at 203.

239. *Id.* & *Diokno and Diokno*, 63 Phil. at 608.

Lastly, for passion or obfuscation, the Supreme Court has appreciated this mitigating circumstance even on the basis of a *mere belief* of the accused, such as when the defendant “truly believed” that he was going to be dismissed from employment,²⁴⁰ or when an accused believed the victim had cast a spell that caused serious illness of his mother.²⁴¹ These cases further attest to the subjectivity of this mitigating circumstance because despite the absence of an “unlawful act” on the part of the victim, passion or obfuscation was still appreciated.

Indeed, the LGBTQIA+ “panic” defense may easily be transplanted in Philippine law through provocation, immediate vindication, and passion or obfuscation. The accused need only convince the judge that, given his stature, age, or family background, the act of the victim, either through non-violent sexual advances or “deceit that he is a male,” was a sufficient provocation, a grave offense, or an act that caused an uncontrollable burst of passion.

It must be noted that provocation under American law is somewhat similar. The difference is that while provocation, immediate vindication, and passion or obfuscation in the Philippines tend to look at the crime on a case-to-case basis, the American law provocation is subjective in a sense that there is no normative standard — rather, the basis is the culturally accepted norms of masculinity and sexuality²⁴² or the “reasonable man.”²⁴³ “Reasonableness” as used in provocation defense is “understood to mean that the average or typical person in the defendant’s shoes would have been provoked into a heat of passion[.]”²⁴⁴ Lee explains that a heterosexual cisgender male “is supposed to [feel] disgusted and outraged when another man attempts a sexual advance.”²⁴⁵ Thus, when a heterosexual cisgender male acts violently in response to a non-violent sexual advance, it is covered by “reasonableness.”²⁴⁶

240. U.S. v. Ferrer, 1 Phil. 56, 62 (1901).

241. U.S. v. Macalintal, 2 Phil. 448, 451 (1903) & People v. Zapata, 107 Phil. 103, 109 (1960).

242. Lee, *Gay Panic Defense*, *supra* note 14, at 505.

243. *Id.*

244. *Id.* (citing Dressler, *supra* note 25, at 753).

245. Lee, *Gay Panic Defense*, *supra* note 14, at 511.

246. *Id.* at 508 & 510.

3. Justifying Circumstance

The presence of justifying circumstances, as the name suggests, justifies the accused's act, such that he is deemed to have acted in accordance with law.²⁴⁷ In such instances, the law recognizes the no crime was committed and, thus the accused cannot be punished.²⁴⁸ Justifying circumstances include self-defense, defense of relative, defense of stranger, avoidance of greater evil or injury, performance of duty, and obedience.²⁴⁹ Within these circumstances, the LGBTQIA+ "panic" defense may manifest under self-defense.

a. Self-Defense

The elements of self-defense are "(1) unlawful aggression ... ; (2) reasonable necessity of the means employed to prevent or repel it; and (3) "[l]ack of sufficient provocation on the part of the person defending himself."²⁵⁰

The first element requires unlawful aggression, which refers to actual or imminent peril to one's life, limb, or right.²⁵¹ Mere belief of an impending threat is not enough.²⁵² The Supreme Court has held that a threatening stance or posture,²⁵³ insulting words without physical assault,²⁵⁴ intimidating attitude,²⁵⁵ as well as oral threats,²⁵⁶ and the act of pulling "something" out²⁵⁷ are not acts of unlawful aggression. The second element, on the other hand, requires that there must be a rational equivalence in the means of the attack of the unlawful aggressor, and the means of the defense of the accused.²⁵⁸ For the

247. REYES, *supra* note 20, at 154.

248. *Id.*

249. REV. PENAL CODE, art. 11.

250. People v. Roxas, G.R. No. 218396, 784 SCRA 47, 55 (2016) (citing People v. Herrera, G.R. No. 140557-58, 371 SCRA 480, 497 (2001)).

251. People v. Crisostomo, G.R. No. L-38180, 108 SCRA 288, 298 (1981).

252. People v. Bautista, G.R. No. 109800, 254 SCRA 621, 627 (1996).

253. People v. Tac-an, G.R. No. 76338-39, 182 SCRA 601, 602 (1990).

254. United States v. Carrero, 9 Phil. 544, 547 (1908).

255. Nacnac v. People, G.R. No. 191913, 668 SCRA 846, 856 (2012).

256. People v. Lachica, G.R. No. L-38175, 132 SCRA 230, 235 (1984).

257. People v. De Leon, G.R. No. 197546, 754 SCRA 147, 159 (2015).

258. Espinosa v. People, G.R. No. 181071, 615 SCRA 446, 452 (2010).

third and last element, the accused must not have given a cause for aggression through his unlawful or improper acts.²⁵⁹

Given that homosexual cisgender males are stereotyped as sexually aggressive even in the Philippines, the LGBTQIA+ “panic” defense might manifest itself under the claim of self-defense. This is exactly what happened in the reported death of the 63-year-old doctor.²⁶⁰ In that reported incident, one of the assailants initially told investigators that he was defending himself from a sexual assault by the victim, when in fact, the real motive was to rob the victim.²⁶¹

It must be noted that the lack of one of the elements for self-defense may still benefit the accused in the form of a privileged mitigating circumstance.²⁶² A privileged mitigating circumstance has the effect of reducing the imposable penalty by one or two degrees.²⁶³ However, the requisite of unlawful aggression is indispensable.²⁶⁴ Thus, only one of the other two requisites may be absent: (1) “reasonable necessity of the means employed to prevent or repel it, or [(2)] the lack of sufficient provocation on the part of the person defending himself.”²⁶⁵

259. *Rimano v. People*, G.R. No. 156567, 416 SCRA 569, 577 (2003) (citing *People v. Alconga*, 78 Phil. 366 (1947)).

260. *Dangcalan*, *supra* note 188.

261. *Id.*

262. REYES, *supra* note 20, at 760.

263. REV. PENAL CODE, art. 69. The provision states —

Penalty to Be Imposed When the Crime Committed is Not Wholly Excusable.
— A penalty lower by one or two degrees than that prescribed by law shall be imposed if the deed is not wholly excusable by reason of the lack of some of the conditions required to justify the same or to exempt from criminal liability in the several cases mentioned in articles 11 and 12, provided that the majority of such conditions be present. The courts shall impose the penalty in the period which may be deemed proper, in view of the number and nature of the conditions of exemption present or lacking.

Id.

264. REYES, *supra* note 20, at 760.

265. *People v. Dulin*, G.R. No. 171284, 760 SCRA 413, 428-29 (2015) (citing *Mendoza v. People*, G.R. No. 139759, 448 SCRA 158, 161-62 (2005)).

B. Effect of Successful Use

After determining the possible basis for transplantation of the LGBTQIA+ “panic” defense in the Philippines, the Authors will discuss what happens if the defense is successfully invoked.

To illustrate, suppose a heterosexual cisgender male kills a homosexual cisgender male after a robbery went wrong. Suppose further that upon apprehension, the defendant argued that he was walking along the alley when the victim said, “*Hi pogi!*” (“Hey handsome!”) — and when he ignored the victim, the victim allegedly grabbed his arm and seemed to intend to drag him somewhere. Suppose further that the defendant claimed that he was so scared of being “raped” that he picked up a stone and hit the victim on the head with a blow that was strong enough not only to ward off the victim, but also to kill him. Suppose even further that the information alleged several aggravating circumstances such as treachery, use of night time, and with evident premeditation, while the defendant raised only the circumstance of self-defense. In this case, since the aggravating circumstances of treachery and evident premeditation were alleged, the charge becomes one of murder with the prescribed penalty of *reclusion perpetua* or imprisonment from 20 years and one day to 40 years.²⁶⁶ However, if the judge of that case appreciates the self-defense, then the defendant would be acquitted.

This successful invocation of self-defense is perpetuated by the stereotype against members of the LGBTQIA+ community — usually transgender women or homosexual cisgender males — which depicts such members as sexually aggressive against heterosexual males. If for example, the victim were to be a female, or perhaps another heterosexual cisgender male, then there is no way that even the defendant’s lawyer would invoke self-defense. Comstock noted that in the U.S., the testimony of the defendant is “often sufficient to convince the court that he was in [‘physical danger and ‘imminent harm’]” because of the judge’s bias against homosexuals.²⁶⁷ In connection with a survey that found that older age groups — to which most Filipino judges belong — are less “accepting” of homosexuality, then the possibility becomes even greater.²⁶⁸

To illustrate a possible use of the trans “panic” defense, suppose a heterosexual cisgender male kills a transgender woman after finding out she is

266. REV. PENAL CODE, art. 248.

267. Comstock, *supra* note 25, at 98.

268. UNDP & USAID, Being LGBT in Asia, *supra* note 33, at 35.

not biologically female. Suppose further that there is no aggravating circumstance alleged in the information, so the charge is merely for homicide, which has the prescribed penalty of *reclusion temporal* or 12 years and one day to 20 years.²⁶⁹ Suppose further that the defendant raised the privileged mitigating circumstances of “incomplete self-defense,” and the mitigating circumstance of “passion or obfuscation.” Should the trial court appreciate the presence of such mitigating circumstances, the penalty imposable will be one degree lower from *reclusion temporal*, which is *prision mayor* or six years and one day to 12 years. This is because the privileged mitigating circumstance has the effect of lowering the imposable penalty by one degree.²⁷⁰ But since there is another mitigating circumstance with no aggravating circumstance, then the maximum imposable penalty would be *prision mayor* in the minimum period or six years and one day to eight years, and the minimum imposable would be *prision correccional* in the minimum period or six months and one day to two years and four months.²⁷¹ Thus, the imposable penalty from which the judge may choose would be anywhere between six months and one day to eight years. This is a far cry from the 12–20 years that he would have gotten should there have been no gender-related circumstances considered.

Based on the foregoing examples, it is clear that the effect of a successful invocation of the LGBTQIA+ “panic” defense is different here in the Philippines from the U.S. The effect of the LGBTQIA+ “panic” and trans “panic” defenses in the U.S. usually involves the lowering of the crime from homicide of the first degree, to that of the second degree, or perhaps, from homicide to either voluntary or involuntary manslaughter, or even battery. In contrast, here in the Philippines, even if the felony charged is the same as that for which the defendant is convicted, the defense may still be successfully invoked as long as the imposed penalty is lowered. This is perhaps the reason why even Harry Roque, the former legal counsel of Jennifer, refuted the applicability of the LGBTQIA+ “panic” defense in our jurisdiction.²⁷²

To avoid future confusion as to its application, the Authors believe that there should be a separate definition for Philippine homosexual “panic”

269. REV. PENAL CODE, art. 249.

270. *Id.* art. 69. The penalty may be lowered one or two degrees, depending on the appreciation of the judge of the circumstances. But for purposes of this discussion, the Authors will use only one degree.

271. See REYES, *supra* note 20, at 789–813 (discussing the Indeterminate Sentence Law).

272. Macatuno, *supra* note 27.

defense, that is: “LGBTQIA+ “panic” defense, otherwise known as homosexual/gay/trans “panic” defense, is the invocation by heterosexual cisgender males of circumstances affecting liability, which is heavily premised on the SOGIE of the offended party, in order to secure his acquittal in case the circumstance alleged is considered either justifying or exempting, or lessen the penalty imposed on him in the event the circumstance alleged is considered mitigating.”

VI. THE JENNIFER LAUDE CASE

Based from the previous discussions, it would seem that Philippine criminal law has always been susceptible to the transplantation of the LGBTQIA+ “panic” defense, and was just waiting for it to be invoked in the hundred-year history of the Philippine justice system. Unfortunately, the exact opportunity arose when an American literally brought the defense to the country and used it in the case of *People v. Pemberton*.

In this part of the Article, the Authors pick up from the earlier narration of the case and discuss at length how Pemberton exactly argued for the trans “panic” defense, how the same was appreciated by the lower courts, and the effect of invocation in the Philippine legal system.

A. Use of Trans “Panic” Defense

As mentioned in the first part of this Article, Pemberton had met Jennifer while at a bar just outside the former U.S. Naval Base in Subic.²⁷³ There was immediate attraction and the couple decided to check in at a motel.²⁷⁴ It was at this point in time that Pemberton claimed to have “discovered” Jennifer’s biological sex, resulting to his killing of the latter.²⁷⁵

During trial, Lance Corporal Jaim Michael Rose, who was with Pemberton on the night of the incident,²⁷⁶ testified for the prosecution, saying that after the incident, Pemberton confessed what he had done.²⁷⁷ According to Rose, Pemberton confessed that he killed Jennifer when he saw that she had a penis because he got so angry that it made him choke her until she

273. *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 5-6 (unreported).

274. *Id.* at 6.

275. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 14 (unreported).

276. *Id.* at 8.

277. *Id.* at 9.

stopped moving.²⁷⁸ He then dragged Jennifer to the bathroom before leaving the lodge.²⁷⁹ The seeming gap in the testimony was filled in by Doctor Reynaldo Dave, “the medico-legal officer who conducted the autopsy on the body of [Jennifer.]”²⁸⁰ According to Dr. Dave, the “cause of death was ... ‘asphyxia by drowning’ ... [which happened when Jennifer’s head was] submerge[d in water as the toilet was flushed — resulting to Jennifer] inhal[ing] water instead of air.”²⁸¹

This narration of Rose fits perfectly with the common theme of the trans “panic” defense. True enough, Pemberton during trial argued that he should not be held liable for the crime charged because he was “act[ing] in [self-]defense of his life and honor.”²⁸² Pemberton testified that after receiving oral sex from Jennifer, he tried to reach for Jennifer’s “vagina,” but instead, felt something “weird.”²⁸³ This, according to Pemberton, “disgusted” him, so he pushed Jennifer and told her to get away from him.²⁸⁴ Pemberton said that he felt that he was raped by Jennifer which made him even angrier.²⁸⁵ In this narrative, Pemberton claimed that Jennifer slapped him in the face when he pushed her away, turning the confrontation into a full-on melee, with each of them exchanging blows against each other²⁸⁶ and where Jennifer was described by Pemberton as fighting “like a man.”²⁸⁷

It is at this point of the testimony that Pemberton was quoted to have called Jennifer an “it,” saying that he wrapped his arm around “its” neck and held “it” until he realized “it” was not moving anymore.²⁸⁸ Afterwards, Pemberton claimed that he brought Jennifer to the bathroom to “splash water on [her face], but [because] there was no running water [and since he saw that

278. *Id.*

279. *Id.*

280. *Id.* at 11.

281. *L/CPL Joseph Scott Pemberton, C.A.-G.R. CR No. 38620, at 11 (unreported).*

282. *Id.* at 12.

283. *Id.* at 14.

284. *Id.*

285. *Id.* (“At that point, Pemberton got angrier as he felt he had just been raped ...”).

286. *Id.*

287. *L/CPL Joseph Scott Pemberton, C.A.-G.R. CR No. 38620, at 25 (unreported).*

288. Luna, *supra* note 178.

Jennifer] was still breathing,” he decided to just leave her in the bathroom, and go back to the ship.²⁸⁹

Recall that the third motivation for committing violence against transgender women is the feeling that one was “deceived” by a transgender who did not disclose her biological sex.²⁹⁰ Further recall that one of the ways of defense in the U.S. is by arguing that the act was done during a “heat of passion” which corresponds to a lower offense.²⁹¹ Thus, it is clear that the narration of Pemberton is the textbook definition of trans “panic” defense, as has been traditionally used in the U.S.

B. Ruling of the Regional Trial Court

On 18 November 2015, the trial court found Pemberton guilty of homicide and sentenced him to a penalty of six to 12 years²⁹² because of the presence of two mitigating circumstances. The trial court found that Pemberton’s experience of “having been kissed and [being] orally stimulated by a [transgender woman who was born biologically male was] so revolting and disgusting” to him that it became the motive for the killing.²⁹³

The trial court did not give merit to Pemberton’s invocation of the justifying circumstance of self-defense, nor to the privileged mitigating circumstance of incomplete self-defense, as he failed to prove the existence of unlawful aggression on the part of Jennifer — the most integral element of self-defense.²⁹⁴ Nevertheless, he was convicted only of homicide and not murder, as none of the qualifying circumstances for murder were proved by the prosecution.²⁹⁵

289. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 14 (unreported).

290. Refer to the discussion in Part IV, B of this Article.

291. Refer to the discussion in Part III, B, 2 of this Article.

292. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 15 (unreported).

Note that this was changed to six to 10 years after a successful “motion for clarification” by the camp of Pemberton. See Tetch Torres-Tupas, *Olongapo RTC reduces Pemberton prison sentence to 10 years*, PHIL. DAILY INQ., Apr. 4, 2016, available at <https://globalnation.inquirer.net/138326/olongapo-rtc-reduces-pemberton-prison-sentence-to-10-years> (last accessed Nov. 30, 2020).

293. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 16 (unreported).

294. *Id.* at 17.

295. *Id.*

The decision in the case was celebrated as victory despite the fact that it was only for homicide, and not for a graver offense. However, a closer inspection would demonstrate that while the same may be treated as a victory²⁹⁶ — it is a pyrrhic one. Not only was Pemberton eventually released earlier than the penalty imposed by the judge, but the successful invocation of the LGBTQIA+ “panic” defense may transcend Jennifer’s case so long as it operates to suggest that a transgender is more deserving of death than a heterosexual cisgender. At this point, it becomes imperative to further dissect the ruling.

1. Homicide, not Murder

While Pemberton was charged with murder by the Olongapo City Prosecutor’s Office, the trial court convicted Pemberton of homicide, stating that the prosecution failed to establish any of the qualifying circumstances alleged in the Information, which consisted of treachery, abuse of superior strength, and cruelty.²⁹⁷ In the Philippine jurisdiction, murder is different from homicide in that the former requires the concurrence of any of the attendant circumstances listed in Article 248 of the Revised Penal Code.²⁹⁸

296. See Allan Macatuno & Marlon Ramos, *Court of Appeals affirms conviction of Pemberton*, PHIL. DAILY INQ., Apr. 11, 2017, available at <https://globalnation.inquirer.net/154636/court-appeals-affirms-conviction-pemberton> (last accessed Nov. 30, 2020) (“[The] lawyer for the Laude family[] described the [] court ruling as a ‘victory for the Filipino people’”).

297. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 2 & 17 (unreported).

298. REV. PENAL CODE, art. 248. The provision states —

Any person who, not falling within the provisions of Article 246, shall kill another, shall be guilty of murder and shall be punished by *reclusion perpetua*, to death if committed with any of the following attendant circumstances:

- (1) With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense, or of means or persons to insure or afford impunity.
- (2) In consideration of a price, reward, or promise.
- (3) By means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a railroad, fall of an airship, by means of motor vehicles, or with the use of any other means involving great waste and ruin.

The trial court held that there was no treachery because Jennifer's wounds were inflicted upon her while she was facing Pemberton.²⁹⁹ As for the circumstance of superior strength, the trial court held that the prosecution failed to prove the same as her family — who was brought in to testify to this matter — were not credible to determine the strength of Jennifer.³⁰⁰ The trial court chided the prosecution for not presenting an expert witness, who would have been in a better position to answer the question of whether or not an older transgender woman could be physically weaker than a teenage U.S. Marine.³⁰¹

By rejecting the charge of murder,³⁰² the maximum impossible penalty was reduced significantly from *reclusion perpetua*, which is 20 years and one day to 40 years,³⁰³ to *reclusion temporal*, which is 12 years and one day to 20 years.³⁰⁴

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- (4) On occasion of any calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic, or any other public calamity.
 - (5) With evident premeditation.
 - (6) With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.

Id.

299. Tetch Torres-Tupas, *Prosecution fails to establish treachery in Laude case*, PHIL. DAILY INQ., Dec. 1, 2015, available at <https://globalnation.inquirer.net/133162/prosecution-fails-to-establish-treachery-in-laude-case> (last accessed Nov. 30, 2020).

300. *Id.*

301. *Id.* The court stated —

[A]s to the question of whether a person who is born as a man but acts, dresses, feels, talks and behaves like a woman or what is called as a transgender would diminish the strength of that person is beyond the capacity of an ordinary witness to prove and also beyond the judicial notice of the court and that an expert witness should have been presented by the Prosecution to prove the same but the Prosecution did not.

Id. & *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 46 (unreported) (citing 1989 REVISED RULES ON EVIDENCE, rule 130, § 49).

302. *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 48 (unreported).

303. REV. PENAL CODE, art. 27.

304. *Id.* & *L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14, at 58 (unreported).

2. Mitigating Circumstances

The trial court ruled that Pemberton was entitled to the mitigating circumstance of passion or obfuscation, as well as intoxication.³⁰⁵

The mitigating circumstance of passion or obfuscation was appreciated by the court, which held that Jennifer’s “misrepresentation” drove Pemberton into anger.³⁰⁶ Thus in the heat of passion, he “arm-locked [Jennifer] ... and [later] dunked [her] head in[] the toilet bowl.”³⁰⁷ The trial court noted that the said action was done within a time frame which would not have allowed Pemberton to “regain ... control of himself.”³⁰⁸

As for the mitigating circumstance of intoxication, the trial court accorded this to Pemberton since he was inebriated at the time of the incident which “slowed down his reflexes and mental faculties and resulted [in] his lack of physical coordination.”³⁰⁹ The trial court rationalized this by saying that Pemberton, a member of the U.S. Marines, could not be a habitual drinker.³¹⁰ Lastly, the trial court held that Pemberton had no intention to kill Jennifer when he went out to drink with his friends — holding that “his drunkenness [was] not a subsequent plan to commit a felony” as he did not know Jennifer before their meeting in the bar.³¹¹

Because the trial court did not appreciate any of the alleged aggravating circumstances against Pemberton while appreciating two mitigating circumstances in his favor, the impossible penalty was lowered by one degree.³¹² Since the ruling was for homicide, which carries the penalty of *reclusion temporal*, lowering the degree would result in the impossible penalty being only *prision mayor*, which ranges from six years and one day to 12 years.³¹³ Thus, from the supposed 20 to 40 years in prison, the prescribed penalty became one that is between six years and one day to 12 years.³¹⁴

305. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 17 (unreported).

306. *Id.*

307. *Id.*

308. *Id.*

309. Torres-Tupas, *supra* note 292.

310. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 17 (unreported).

311. *Id.*

312. *Id.* at 58.

313. REV. PENAL CODE, art. 27.

314. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 58 (unreported).

However, pursuant to the Indeterminate Sentence Law, the judge, upon motion for reconsideration by the camp of Pemberton, changed the imposed penalty from six years and one day to 12 years, to six years and one day to 10-year imprisonment.³¹⁵

C. Ruling of the Court of Appeals

Pemberton then filed an appeal before the Court of Appeals, questioning, among others, the trial court's ruling that he was not entitled to the justifying circumstance of self-defense, as well as the other mitigating circumstances of having no intention to commit so grave a wrong and of voluntary surrender.³¹⁶

The Court of Appeals rejected Pemberton's argument that he was entitled to the justifying circumstance of complete self-defense as unlawful aggression was not proved by the defense.³¹⁷ The "molestation" done to Pemberton, which he claims to be the unlawful aggression done by Jennifer, cannot be considered unlawful aggression because there was no injury suffered by Pemberton when oral sex was performed on him.³¹⁸ Even assuming that the concept of unlawful aggression was to be expanded to include dignity and self-respect, unlawful aggression was still not present because the moment Pemberton pushed Jennifer away, there was no longer any unlawful aggression that could have justified the killing.³¹⁹

The Court of Appeals affirmed the award of exemplary damages to the Laude family in the amount of ₱30,000.³²⁰ As explained by the appellate court, Pemberton's act of plunging Jennifer's head into the toilet bowl represented Pemberton's belief that Jennifer was never a human being, but as "fecal

315. Torres-Tupas, *supra* note 292. Under the Indeterminate Sentence Law, the range of penalties that the judge may choose from is anywhere between the minimum of one degree lower than the prescribed penalty (one degree lower than *reclusion temporal* is *prision mayor*) and the maximum being the said prescribed penalty (*reclusion temporal*), taking into consideration the attendant circumstances. Since there were no aggravating circumstances, the maximum penalty should only be in the medium period which is 8 years and one day to 10 years. See *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 18 (unreported) (discussing fully the application of penalties and as applied to the Pemberton case).

316. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 20-21 (unreported).

317. *Id.* at 24-25.

318. *Id.* at 23-24.

319. *Id.* at 25.

320. *Id.* at 44-45.

matter” due to her sexual orientation.³²¹ Thus, exemplary damages were awarded to “deter ... similar offense[s] in the future[,] and to respect Filipino citizens regardless of their sexual orientation[.]”³²²

While this pronouncement may present itself as a silver lining, the Authors do not feel that way, given that ₱30,000 as an amount is nominal at best, and that the same constitutes as lip service. More significantly, in the decision itself, Jennifer was addressed by both the trial court and the appellate court as a “he” rather than a “she.”³²³

D. Aftermath

The testimony of Pemberton marked the first time the trans “panic” defense was successfully used inside the Philippine courtroom. The grant of the mitigating circumstance of passion or obfuscation³²⁴ to Pemberton affirmed that the LGBTQIA+ “panic” defense, specifically the trans “panic” defense, is an effective criminal defense strategy. While Pemberton was still convicted of homicide,³²⁵ the penalty was significantly lower than what should have been imposed if the circumstances affecting liability premised on Jennifer’s gender-identity were not appreciated by the courts. This implies that the trial court considered Jennifer’s “misrepresentation” as an unlawful or unjust act that caused a legitimate stimulus so powerful as to overcome reason, which are the requisites for the finding of passion or obfuscation as a mitigating circumstance. Thus, the trial court’s ruling suggests that Jennifer committed “misrepresentation” for expressing her sexual orientation and gender identity, which in the first place, Pemberton should not have assumed.

Pemberton filed an appeal before the Supreme Court on 5 October 2017.³²⁶ However, on 2 June 2020, Pemberton withdrew the same appeal,

321. *Id.*

322. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 45 (unreported).

323. *See L/CPL Joseph Scott Pemberton*, Criminal Case No. 865-14 (unreported) & *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620 (unreported) (the two decisions are replete with instances where the courts misgendered Jennifer).

324. *L/CPL Joseph Scott Pemberton*, C.A.-G.R. CR No. 38620, at 17 (unreported).

325. *Id.* at 15.

326. Dona Z. Pazzibugan, *SC allows Pemberton to withdraw conviction appeal*, PHIL. DAILY INQ., Aug. 25, 2020, available at <https://newsinfo.inquirer.net/1326543/sc-allows-pemberton-to-withdraw-conviction-appeal> (last accessed Nov. 30, 2020) (“Pemberton appealed his conviction to the high court in October 2017, after the Court of Appeals upheld the verdict”).

saying that he had already accepted and recognized that his conviction was final and executory.³²⁷

On 1 September 2020, Olongapo RTC Presiding Judge Roline Ginez-Jabalde ordered the early release of Pemberton after crediting him with good conduct time allowance of 1,548 days under Republic Act No. 10592, which, when added to his actual time served in detention, would amount to 10 years, one month and 10 days.³²⁸ This order was questioned by legal experts who saw no objective basis for the computation of the trial court and who claim that, in the first place, the trial court had no jurisdiction.³²⁹

When news broke out, members of the LGBTQIA+ community and their allies denounced the trial court's order and vowed to challenge it.³³⁰ Any challenge, however, became moot when on 7 September 2020, President

327. Lian Buan, *Pemberton withdraws appeal, accepts 10-year sentence from 2015*, RAPPLER, Aug. 24, 2020, available at <https://www.rappler.com/nation/pemberton-withdraws-appeal-accepts-10-year-sentence> (last accessed Nov. 30, 2020).

328. Eimor Santos, *Court orders Pemberton's early release on 'good conduct'*, CNN PHIL., Sept. 2, 2020, available at <https://cnnphilippines.com/news/2020/9/2/Pemberton-release-order-Laude-killing.html> (last accessed Nov. 30, 2020).

329. CNN Philippines Staff, *Ex-SC spokesman intrigued how GCTA applied to American convict Pemberton*, CNN PHIL., Sept. 4, 2020, available at <https://cnnphilippines.com/news/2020/9/4/Ted-Te-intrigued-GCTA-Pemberton-release.html> (last accessed Nov. 30, 2020); Vanne Elaine Terrazola, *De Lima questions basis of Pemberton release under GCTA*, MANILA BULL., Sept. 5, 2020, available at <https://mb.com.ph/2020/09/05/de-lima-questions-basis-of-pemberton-release-under-gcta> (last accessed Nov. 30, 2020) (reporting former Secretary of Justice Leila De Lima assailing the jurisdiction of the trial court and the appreciation of good conduct in favor of Pemberton when there is "no proof ... of participation in rehabilitation facilities while in jail"); & Ben Rosario, *Court order granting Pemberton GCTA bereft of legal basis — Lagman*, MANILA BULL., Sept. 7, 2020, available at <https://mb.com.ph/2020/09/07/court-order-granting-pemberton-gcta-bereft-of-legal-basis-lagman> (last accessed Nov. 30, 2020) (reporting Congressman Edcel Lagman assailing the jurisdiction of the trial court judge to grant good conduct time allowance).

330. CNN Philippines Staff, *Laude family's lawyer challenges basis for Pemberton's early release*, CNN PHIL., Sept. 3, 2020, available at <https://www.cnn.ph/news/2020/9/3/Jennifer-Laude-Joseph-Scott-Pemberton-GCTA-law-release.html> (last accessed Nov. 30, 2020).

Rodrigo Duterte granted Pemberton an absolute pardon on the belief that the latter was “not treated fairly.”³³¹

Despite backlash from the LGBTQIA+ community, Pemberton walked as a free man on 11 September 2020.³³² Pemberton’s departure on 13 September 2020,³³³ left significant repercussions on the Philippine legal system. By successfully transplanting the LGBTQIA+ “panic” defense, the Pemberton ruling carved a lengthy detour in the path towards equality. Moreover, the unequal and favorable treatment of foreign transphobic murderers by the Philippine government was also exposed. Even though Pemberton spent only almost six years in a comfortable air-conditioned detention facility³³⁴ — a huge contrast to the inhumane living conditions in the country’s jail and prison system³³⁵ — the President still thought of his V.I.P.-like detention incommensurate to his act of killing a transgender person. This led LGBTQIA+ organizations to conclude that even the highest official of the land is unapologetically transphobic.³³⁶

331. Krissy Aguilar, *Duterte: We have not treated Pemberton fairly*, PHIL. DAILY INQ., Sept. 7, 2020, available at <https://newsinfo.inquirer.net/1332455/duterte-we-have-not-treated-pemberton-fairly> (last accessed Nov. 30, 2020).

332. John Eric Mendoza, *Pemberton released from jail, transferred to immigration*, MANILA TIMES, Sept. 11, 2020, available at <https://www.manilatimes.net/2020/09/11/second-headline/pemberton-released-from-jail-transferred-to-immigration/767210> (last accessed Nov. 30, 2020).

333. Regine Cabato, *Philippines deports U.S. Marine pardoned for killing transgender woman*, WASH. POST, Sept. 13, 2020, available at https://www.washingtonpost.com/world/asia_pacific/philippines-deports-us-marine-pardoned-for-murdering-transgender-woman/2020/09/13/8300e39a-f332-11ea-8025-5d3489768ac8_story.html (last accessed Nov. 30, 2020).

334. Alexis Romero, *Harry Roque cries ‘special treatment’ over Pemberton’s air-conditioned detention*, PHIL. STAR, Oct. 22, 2014, available at <https://www.philstar.com/headlines/2014/10/22/1383211/harry-roque-cries-special-treatment-over-pembertons-air-conditioned-detention> (last accessed Nov. 30, 2020).

335. See Nicole Beatriz Y. Veloso, *Life and Death Sentence: A Case for the Accelerated Decongestion of Prisons and Jails in the Philippines in Light of Covid-19*, 93 (Special Online Feature) PHIL. L.J. 217, 217-18 (2020).

336. Joviland Rita, *Duterte ‘transphobic’ for granting Pemberton pardon — LGBTQI groups*, GMA NEWS ONLINE, Sept. 8, 2020, available at <https://www.gmanetwork.com/news/news/nation/754709/duterte-transphobic-for-granting-pemberton-pardon-lgbtqi-groups/story> (last accessed Nov. 30, 2020).

VII. REJECTING LGBTQIA+ “PANIC” DEFENSE IN THE PHILIPPINES

Having discussed the transplantation of the LGBTQIA+ “panic” defense in Philippine law, the Authors will reject this transplantation by showing that under international law and existing legal principles, the LGBTQIA+ “panic” defense should not have a place in the country’s legal system. Furthermore, the Authors argue that the transplantation of these “panic” defenses has the effect of institutionalizing homophobia, transphobia and prejudice against the members of the LGBTQIA+ community.

A. Obligations Under International Law

At the onset, it is important to note that the Philippines treats international obligations, whether from customary international law or treaties, as law.³³⁷ Hence, these agreements are not only binding but should also guide the courts in coming up with decisions.³³⁸

The Philippines is a party to various international agreements, treaties, and declarations,³³⁹ such as the United Nations (UN) Charter,³⁴⁰ Universal Declaration of Human Rights (UDHR),³⁴¹ and the International Covenant on Civil and Political Rights (ICCPR),³⁴² among others. These international

337. PHIL. CONST. art. 2, § 2. *See also Ang Ladlad LGBT Party*, 618 SCRA at 77 (The Supreme Court stated that it “stands willing to assume the responsibility of giving effect to the Philippines’ international law obligations ...”).

338. *See Pharmaceutical and Health Care Association of the Philippines v. Duque III*, G.R. No. 173034, 535 SCRA 265, 291 (2007).

‘Generally accepted principles of international law’ refers to norms of general or customary international law which are binding on all states, i.e. renunciation of war as an instrument of national policy, the principle of sovereign immunity, a person’s right to life, liberty and due process, and *pacta sunt servanda*, among others.

Id. (citing MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 525-26 (2005); *Government of Hong Kong Special Administrative Region v. Olalia*, G.R. No. 153675, 521 SCRA 470 (2007); & *Tañada v. Angara*, 338 Phil. 546 (1997)).

339. *Republic v. Sandiganbayan*, G.R. No. 104768, 407 SCRA 10, 90 (2003).

340. Gerard Lim, FAST FACTS: The Philippines’ role in the United Nations, RAPPLER, Oct. 24, 2015, available at <https://www.rappler.com/newsbreak/iq/fast-facts-philippines-role-united-nations> (last accessed Nov. 30, 2020).

341. *Republic v. Sandiganbayan*, 407 SCRA at 90.

342. *Id.*

documents include provisions that aim to afford protection to individuals regardless of sexual identity or orientation. The UN Charter states that one of the purposes of the UN is to “promot[e] and encourage[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁴³ On the other hand, the UDHR provides for the equality of all people before the law and guarantees all people equal protection of the law without any discrimination.³⁴⁴ The UDHR provides that “[a]ll are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”³⁴⁵ Lastly, the ICCPR states that

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁴⁶

As noted by the Human Rights Committee established under the ICCPR, the reference to “sex” in Article 26 is to be understood as including sexual orientation.³⁴⁷

The Supreme Court, in *Ang Ladlad*, has already expressly recognized these international obligations.³⁴⁸ The issue in the case was whether the COMELEC validly rejected the application for accreditation of *Ang Ladlad* — an organization composed of men and women who identify themselves as lesbians, gays, bisexuals, or transgendered individuals.³⁴⁹ In ruling for the petitioners, the Supreme Court held that while moral judgments based on

343. U.N. CHARTER, art. 1 (3).

344. Universal Declaration of Human Rights, G.A. Res. 217 (A) (III), art. 7, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

345. *Id.*

346. International Convention on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

347. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994). *See also Ang Ladlad LGBT Party*, 618 SCRA at 74-75.

348. *See Ang Ladlad LGBT Party*, 618 SCRA at 74-76.

349. *Id.* at 46. The Court found that it was a grave violation of the non-establishment clause for the COMELEC to utilize the Bible and the Koran to justify the exclusion of *Ang Ladlad*. *Id.* at 58.

religion might have a compelling influence on legislation, the proscription of immorality must have a secular purpose.³⁵⁰ More relevant to this topic, the Court held that its decision to allow *Ang Ladlad's* application was in line with the Philippines' international obligations to protect and promote human rights, particularly the principle of non-discrimination, as enunciated under the UDHR and ICCPR.³⁵¹

Having said these, the Authors argue that there is a conclusive international obligation on the part of the Philippines and its institutions to treat with respect, as well as protect members of the LGBTQIA+ community from discrimination and prejudice. There is also jurisprudence stating that the same obligations must be used by courts to protect the rights of the LGBTQIA+ community.³⁵² It is under these contexts that the Authors profusely argue that it is the obligation of the judiciary to interpret the provisions of the Revised Penal Code in such a manner that would not be contrary to these legally enforceable rights and affirm its finding that international obligations impose the obligation on the Philippines to protect LGBTQIA+ rights.

B. Insanity

In the previous Section, it was discussed that in order to successfully invoke the defense of insanity in the context of the LGBTQIA+ "panic" defense, the accused need not prove any medical history,³⁵³ only that there was complete deprivation of intelligence at the time of the commission of the crime, or immediately before it.³⁵⁴

The time of the presence of the insanity is strictly adhered to by the courts.³⁵⁵ The accused must have an absolute absence of reason precisely at the time of commission or immediately before it.³⁵⁶ The factual circumstances of the accused far removed from the crime itself do not bear any weight. Thus,

350. *Id.* at 59.

351. *Id.* at 74. See also *Republic v. Sandiganbayan*, 407 SCRA at 57-58. The Supreme Court held that the UDHR and the ICCPR, which are based on generally accepted principles of international law, are binding on the Philippines even in the absence of a Constitution. *Id.*

352. *Ang Ladlad LGBT Party*, 618 SCRA at 74.

353. *Contra Lee, Gay Panic Defense*, *supra* note 14, at 492.

354. *Verdadero*, 785 SCRA at 502.

355. *Id.*

356. See REYES, *supra* note 20, at 226.

the fact of admission to the National Center for Mental Health of the accused because of signs of mental illness,³⁵⁷ drastic change in behavior,³⁵⁸ and difficulty in sleeping mere weeks prior³⁵⁹ to the crime, were disregarded by the Supreme Court in *People v. Pantoja*³⁶⁰ because no evidence was presented to show that the accused was insane at the time of the commission of the crime.³⁶¹

Unlike in American law, which requires that the accused suffer an actual mental disease or defect at the time of the act,³⁶² insanity in Philippine law does not require precise medical diagnosis.³⁶³ This character of Philippine criminal law arguably makes it more difficult to prove. History of medicating existing mental illness has not been given much weight by the Supreme Court if it does not show that the accused suffered from “complete deprivation of intelligence” at the time of the commission of the offense.³⁶⁴

Even assuming that the accused can prove that he absolutely lacked intelligence at that time, he would then have to show that he was not aware of the legal implications of his actions.³⁶⁵ The act of the accused escaping into hiding after the commission of the crime,³⁶⁶ threatening the victim to stay quiet,³⁶⁷ and immediately surrendering to the police officers,³⁶⁸ negate the defense of insanity because these acts show that the accused was aware of the

357. *Pantoja*, 874 SCRA at 315.

358. *Id.* at 312

359. *Id.*

360. *People v. Pantoja*, G.R. No. 223114, 874 SCRA 300 (2017).

361. *Id.* at 315.

362. Lee, *Gay Panic Defense*, *supra* note 14, at 492.

363. Tugade, *supra* note 197, at 874 (“What jurisprudence involving the insanity defense shows is that it is complete deprivation of reason that would exculpate a person”).

364. *People v. Haloc*, G.R. No. 227312, Sept. 5, 2018, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64572> (last accessed Nov. 30, 2020).

365. See REYES, *supra* note 20, at 224 (citing *People v. Formigones*, 87 Phil. 658, 661 (1950)).

366. *Belonio*, 429 SCRA at 586-87.

367. *Alipio*, 603 SCRA at 54.

368. *People v. Villa, Jr.*, G.R. No. 129899, 331 SCRA 142, 150 (2000).

gravity of his criminal act, and any similar act would immediately negate the defense of insanity.

In relation to the LGBTQIA+ “panic” defense, the accused should first show that at the time he killed the victim, he completely lacked intelligence. Assuming *arguendo* that he overcomes that obstacle, it is highly improbable that the accused can convince the judge that he was *not aware* of the implications of his violent assault against a member of the LGBTQIA+ community.³⁶⁹

Violence committed against LGBTQIA+s and transgender persons in particular are often rooted on bias and prejudice against the LGBTQIA+ community.³⁷⁰ Thus, such acts of violence are often done consciously which negates any claim by the defendant that he was “unaware” of the implications of his actions.³⁷¹

C. Self-Defense

In the previous Section, the Authors surmised that the LGBTQIA+ “panic” defense may manifest itself in the Philippines should the accused argue that the non-violent sexual advances of the victim amount to unlawful aggression. However, similar to insanity, an analysis of Philippine jurisprudence will show that it is unlikely that self-defense may be successfully invoked. First, the nature of the sexual advance is in itself “non-violent,” contrary to the requirement that there must be a real danger to the life or personal safety of the defendant.³⁷² Sexual advances by the victim, while annoying or uncomfortable are not — and should not — be considered unlawful aggression.³⁷³ Second,

369. See Tugade, *supra* note 197, at 873 (“Therefore, to be able to cross the threshold and successfully raise the defense of insanity, the accused must be reduced to a mere object — nothing more than a tool — to commit the crime”).

370. See generally Lee & Kwan, *supra* note 25, at 95-96.

371. See Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1423 (citing SANDY E. JAMES, ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 203 (2016)).

372. *Nacnac*, 668 SCRA at 856 (citing *People v. Borreros*, G.R. No. 125185, 306 SCRA 680, 690 (1999)).

373. *But see* REYES, *supra* note 20, at 153. Self-defense includes not only the defense of the person or body of the one assaulted but also that of his rights, that is, those rights the enjoyment of which is protected by law. *Id.*

violence and death can hardly be considered reasonably necessary to ward-off these non-violent sexual advances.³⁷⁴

On the other hand, as regards trans “panic” defense, the alleged “deceit” of the victim cannot be considered as an imminent danger. The law requires danger to the life of the accused.³⁷⁵ Assuming that the victim “misrepresented” herself, the real question to ask is: was the life of the accused in danger? Was there actual harm? Was it imminent? A negative answer to all those questions should remove the case from the ambit of self-defense.

Given that the acts of the victim cannot be considered as unlawful aggression, the accused also cannot benefit from the privileged mitigating circumstance of incomplete self-defense.

D. Provocation, Immediate Vindication, and Passion or Obfuscation

The Authors earlier discussed that for the mitigating circumstances of provocation, immediate vindication, and passion or obfuscation, there is a common aspect of subjectivity. Unfortunately, in some cases, the Supreme Court has used this subjectivity to provide a judicial stamp of acceptance to the assignment of certain sex and gender roles in society — that a concubine should remain loyal to an already-married man,³⁷⁶ or that eloping of one’s daughter with a person from another race desecrates the honor of one’s family.³⁷⁷

The complicity of the Court in furthering discrimination is precisely what the Authors seek to avoid by arguing against the compatibility of the LGBTQIA+ and trans “panic” defenses in the Philippines. The Authors are not unaware that judicial standards are constantly evolving and adjusting to the times. With the Supreme Court having already recognized the concept of SOGIE,³⁷⁸ the Authors argue that the heteronormative judicial standards from

374. *But see* REYES, *supra* note 20, at 180–81. The reasonableness of the necessity to take a course of action and the reasonableness of the necessity of the means employed depend upon the circumstances of the case. *Id.*

375. *People v. Crisostomo*, G.R. No. L-38180, 108 SCRA 288, 298 (1981). “There is unlawful aggression when the peril to one’s life, limb[,] or right is either actual or imminent.” *Id.*

376. *See De La Cruz*, 22 Phil. at 431.

377. *See Diokno*, 63 Phil. at 608.

378. *See Falcis*, G.R. No. 217910, at 17. The Court stated that

a century ago should not be given much weight in this discussion on the three circumstances. To do so would be to discredit the accomplishments of the LGBTQIA+ movement.

Moving forward, the inherent subjectivity of provocation, immediate vindication, and passion or obfuscation make such principles susceptible to use in invoking the LGBTQIA+ “panic” defense. The pivotal question for the three circumstances should be whether the act of the victim may be considered so intrinsically repulsive or so wrong as to lead to the conclusion that the defendant deserves to be granted the benefit of the mitigating circumstances. The Authors categorically answer in the negative.

On the contrary, the Authors argue that the idea of reduced perversity for a crime driven by prejudice and gender bias is the antithesis of the principles behind mitigating circumstances. The Authors will also show that the successful invocation of the LGBTQIA+ “panic” defense would erode the tenets of Philippine criminal law, and institutionalize homophobia, transphobia and prejudice against the LGBTQIA+ community.

1. Aggravating Circumstance

Under Philippine criminal law, attendant circumstances that increase the imposable penalty are known as aggravating circumstances.³⁷⁹ The rationale behind the imposition of a higher penalty is the treatment of the circumstances as “signs of a dangerous state and greater dreadfulness of the offender.”³⁸⁰ This is the opposite of mitigating circumstances, which instead serve to lower the imposable penalty because of the reduced perversity of the accused.

Atadero, citing Article 14 (3) of the Revised Penal Code, argues that the criminal acts committed with aggravating circumstances show the greater

[t]o continue to ground the family as a social institution on the concept of the complementarity of the sexes is to perpetuate the discrimination faced by couples, whether opposite-sex or same-sex, who do not fit into that mold. It renders invisible the lived realities of families headed by single parents, families formed by sterile couples, families formed by couples who preferred not to have children, among many other family organizations. Furthermore, it reinforces certain gender stereotypes within the family.

Id.

379. REV. PENAL CODE, art. 14.

380. Atadero, *supra* note 29, at 748 (citing GUILLERMO GUEVARA, COMMENTARIES ON THE REVISED PENAL CODE 65 (1946 ed.)).

perversity of the offender, who has chosen to commit the crime on account of some protected characteristic of the offended party such as the latter’s sex.³⁸¹ Thus, the lengthened confinement is justified by the aggravation of the crime due to the offender’s bias.³⁸² In a similar vein, because the LGBTQIA+ “panic” defense is likewise premised on a bias-induced crime against members of the LGTBQIA+ community, the offense displays the offender’s greater perversity, and not the same to a lesser degree, which is the rationale of appreciating mitigating circumstances.

While Atadero argues that the interpretation of “sex” in Article 14, Section 3 is “the female sex, not the male sex,” citing *Silverio*,³⁸³ it bears stressing that the Supreme Court already acknowledged in *Ang Ladlad* that the term “sex” under international obligations includes “sexual orientation.”³⁸⁴ In any case, the point remains that the use of the LGBTQIA+ and trans “panic” defenses to justify bias-induced crimes like murder is antithetical to the concept of mitigating circumstances. If Philippine criminal law rejects biased-induced crimes by imposing a lengthier prison sentence for their commission, it does not make sense why the LGBTQIA+ “panic” as a defense in a bias-induced crime should be considered as a mitigating circumstance.

2. Problems with the Defense

Aside from disregarding the greater perversity of the accused, the successful invocation would reinforce the negative stereotypes and biases against members of the LGBTQIA+ community.

The LGBTQIA+ “panic” defense is rooted in prejudicial heteronormative norms.³⁸⁵ A male defendant is expected to feel uncomfortable with unwanted male attention,³⁸⁶ even if it is non-violent. This is contrary to the basic principle of criminal law which requires persons to maintain a certain degree of control.³⁸⁷ Not everyone who feels wronged or

381. Atadero, *supra* note 29, at 749 (citing I LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW 341 (16th ed. 2006)).

382. See Atadero, *supra* note 29, at 749-754.

383. *Id.* at 753-54 (citing *Silverio*, 537 SCRA at 392-93).

384. *Ang Ladlad LGBT Party*, 618 SCRA at 74-75 (citing *Toonen*, *supra* note 347).

385. Lee & Kwan, *supra* note 25, at 112.

386. *Id.* at 108.

387. See generally REYES, *supra* note 20 & Mison, *supra* note 25, at 172 (citing HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976)).

annoyed can simply vindicate his or her feelings.³⁸⁸ This is also reflected in Philippine criminal law because jurisprudence dictates that not everything annoying or improper can be used to invoke mitigating circumstances.³⁸⁹ Thus, if a sexual advance is non-violent, then there is no reason for it to be considered as sufficient provocation, grave offense, or an unlawful act.

With respect to the trans “panic” defense, the Authors agree with Lee that it has two main problems.

First, it reinforces the negative stereotype that all transgenders are sexual deviants.³⁹⁰ The trans “panic” defense essentially argues that the defendant was tricked by a “man pretending to be a woman” and “robbed ... of his masculinity[.]”³⁹¹ Because he was “tricked” and “robbed,” he may then argue that this is “sufficient provocation” to invoke the defense of provocation, immediate vindication, or passion or obfuscation to mitigate his crime. This completely disregards the fluidity of gender, as already acknowledged by the Supreme Court.³⁹² The transwoman is not “pretending” to be a woman when she *is* a woman. There is no deceit involved. Nevertheless, because of heteronormative norms that dictate that a person with a “penis” is a man, then the victim is a “man,” even if she has identified herself as a female all her life.

Second, it reinforces the notion that “the transgender [] deserve[d] to die.”³⁹³ Granted that mitigating circumstances do not extinguish criminal liability, the fact that it significantly lowers the penalty to the point of absurdity essentially allows prejudiced views against transgenders to serve as a defense. Moreover, it is usually invoked in the form of a justification so that the accused is “justified” because the crime is proportionate to the act of “misrepresentation” by the victim.³⁹⁴

Having established that the LGBTQIA+ “panic” defense is contrary to the rationale behind mitigating circumstances, and that it does more harm than good by perpetuating baseless prejudice, its outright rejection is necessary.

388. *People v. Court of Appeals*, G.R. No. 103613, 352 SCRA 599, 612 (2001).

389. *Id.*

390. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1432.

391. Lee & Kwan, *supra* note 25, at 111.

392. *Falcis*, G.R. No. 217910, at 43.

393. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1434.

394. *Id.* at 1435.

Otherwise, the defense would erode the Philippine legal system and permit irrational and biased violence that criminal laws were designed to control.³⁹⁵

3. Adopting the Defense is Institutionalizing Homophobia, Transphobia, and Prejudice Against LGBTQIA+ Community

Decisions of the Supreme Court applying and interpreting the Constitution and the law form part of the legal system.³⁹⁶ Thus, these decisions become legal principles that may be invoked by any and all persons to assert or deny their legal rights or obligations.

Thus, should the Supreme Court uphold the invocation of the LGBTQIA+ “panic” defense, the same would have the effect of institutionalizing homophobia, transphobia, and prejudice as valid reasons for committing acts of violence against the LGBTQIA+ community. Even though the appreciation of mitigating circumstances does not acquit the defendant, the lowering of his sentence still sends a message that homophobic and transphobic feelings are valid and legitimate. Inevitably, this opens the floodgates to further violence and discrimination.³⁹⁷

Be that as it may, the Authors do not want to remove the subjective aspect of provocation, immediate vindication, and passion or obfuscation. The judge’s discretion is there to ensure that the disposition of cases will be just as regards each circumstance of the case. However, the SOGIE of a person should never be weighed in determining the propriety of the invocation of these mitigating circumstances.

From the foregoing discussion, it is clear that any ruling that accepts the LGBTQIA+ “panic” defense would amount to the judicial institutionalization of homophobia, transphobia, and prejudice against members of the LGBTQIA+ community.

395. Mison, *supra* note 25, at 172.

396. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 8 (1950) (“Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.”).

397. As noted in Part I of this Article, the March 2016 report of the Trans Murder Monitoring Project listed 41 reported cases of transgender people murdered in the country since 2008. UNDP & CHR, Legal Gender Recognition in the Philippines, *supra* note 15, at 15-16 (citing Transgender Europe, *supra* note 92).

VIII. RECOMMENDATIONS

While the Authors have already discussed why the LGBTQIA+ “panic” defense should be denied by the courts on the basis of international obligations, local criminal laws, and jurisprudence, the Authors recognize that this may be insufficient to effectively bar its institutionalization, considering its successful transplantation. According to social psychology professor Raymond Macapagal, “as long as people consider trans women like Jennifer Laude to be pretenders and deceivers ... people like Pemberton are afforded the possibility of employing a trans [“panic”] defense.”³⁹⁸ Thus, in order to truly ensure that such defense, and consequently the further degradation of the members of the LGBTQIA+ community will be avoided, the Authors propose the enactment of legislation expressly banning the invocation of the LGBTQIA+ “panic” defense.

A. Legislation as a Solution

1. Difference from the United States

In the U.S., several states have enacted legislative bans on the use of the LGBTQIA+ “panic” defense.³⁹⁹ However, several commentators have expressed alarm over such legislation, believing that the “research on implicit bias suggests that making race salient can diminish the otherwise automatic effect of racial stereotypes on perception and belief[.]”⁴⁰⁰ which can also be applied to bias against sex and gender.⁴⁰¹ The Authors believe that this is not

398. Eugenio, *supra* note 31.

399. Thomas Prol, Why NJ Needs a Law Banning the Gay-Trans ‘Panic’ Murder Defense, *available at* <https://www.law.com/njlawjournal/2020/02/13/why-nj-needs-a-law-banning-the-gay-trans-panic-murder-defense> (last accessed Nov. 30, 2020).

400. Lee, *Gay Panic Defense*, *supra* note 14, at 477.

401. *See id.*; Lee & Kwan, *supra* note 25, at 119-32; Perkiss, *supra* note 17, at 806-20 (agreeing with Lee, using as context the Lawrence King case); & Lee, *Masculinity on Trial*, *supra* note 25, at 829 (suggesting strategy to combat the invocation of gay or trans panic defense inside the courtroom). *But see* Tilleman, *supra* note 24, at 1686 (“While the danger from coded appeals to anti-gay or anti-trans bias is apparent, the either/or choice that is implicit in Professor Lee’s proposals for combatting the gay panic defense seems to be false.”); Patel, *supra* note 25, at 128-29 (arguing against the proposal of Lee and recommending legislative bans); Woods, *supra* note 25, at 873 (arguing that the question of whether or not banning

an issue in the Philippines because it is ultimately the judge who decides the case.⁴⁰² The only factor that can make a difference between homicide with the penalty of *reclusion temporal*, and homicide with the penalty of *reclusion perpetua*, would be the judge’s appreciation of the mitigating circumstances based on his personal views, his application of jurisprudence, and whether the law allows the same. Thus, a statute, which can come as a form of an additional provision in the Anti-Discrimination Bill, or a special law prohibiting judges from considering the LGBTQIA+ “panic” defense with respect to circumstances affecting liability, would suffice to reverse the transplantation of the LGBTQIA+ “panic” defense and prevent the institutionalization of homophobia, transphobia, and prejudice in the judiciary.

2. Model Legislation

Legislation may be effected through a provision in a bill or a separate law. The Authors believe that choosing between the two modes, considering the present context, would be a matter of strategy for the advocates.

a. As an Additional Provision in the Anti-Discrimination Bill

The Anti-Discrimination Bill that was approved by the House of Representatives during the last Congress was House Bill No. 4982,⁴⁰³ entitled the “SOGIE Equality [Bill].”⁴⁰⁴ The bill defines the meaning of sex, sexual orientation, gender orientation, gender expression, discrimination, among others, and makes illegal the practice of outlined discriminatory practices.⁴⁰⁵

Section 8 of H.B. 4982 creates a special aggravating circumstance for any person “who commits any crime punished under the Revised Penal Code or by any special law[,] and who is proven to have committed [the felony or

the gay and trans panic defenses can effectively combat anti-LGBTQ juror biases “require[s further] empirical study”); & Russo, *supra* note 25, at 836. It must be noted, however, that Lee, in her most recent article on trans “panic” defense, has completely changed her views on legislative bans for trans “panic” defenses. Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1446.

402. Diokno, *supra* note 96.

403. H.B. No. 4982, 17th Cong., 2d Reg. Sess. (2017).

404. *Id.* § 1.

405. See *id.* §§ 3 (b)-(c) & (h)-(i); & 4.

illegal act] motivated by bias, prejudice, or hate based on sex, sexual orientation, or gender identity or expression[.]”⁴⁰⁶

The Authors believe that the provision against LGBTQIA+ and trans “panic” defenses may be inserted in the succeeding provisions as Sections 9, 10, and 11. The Authors suggest that the provision be worded in the following manner —

SEC. 9. Prohibition on Justifying Circumstance. — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the justifying circumstance of self-defense premised on a non-violent homosexual advance, or discovery of another person’s biological sex. Non-violent sexual advances by a lesbian, gay, bisexual, transgender, queer, intersex, asexual, or any other non-binary gender cannot be considered as “unlawful aggression.”

SEC. 10. Prohibition on Exempting Circumstance. — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the exempting circumstance of insanity or diminished capacity premised on homosexual panic or acute panic disorder.

SEC. 11. Prohibition on Mitigating Circumstances. — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the mitigating circumstances of provocation, immediate vindication of a grave offense, and passion or obfuscation, if such circumstances were premised on the sexual orientation, gender identity and expression of the victim. Non-violent sexual advances by a lesbian, gay, bisexual, transgender, queer, intersex, asexual, or any other non-binary gender cannot be considered as “sufficient provocation,” “grave offense,” “unlawful and unjust act,” and “unlawful aggression” as to effectuate the mitigating circumstances of

406. *Id.* § 8.

Section 8. *Special Aggravating Circumstance.* — A person who commits any of the crimes in the Revised Penal Code or any special law and who is proven to have committed the same motivated by bias, prejudice, or hate based on sex, sexual orientation, or gender identity or expression, shall suffer the maximum penalty imposed by the Code or the relevant special law for such prohibited act.

Id.

provocation, immediate vindication, passion or obfuscation, and incomplete self-defense, respectively.

b. As its Own Special Law

Given the urgent need for a solution to reverse the effects of the transplanted and the fact that the anti-discrimination bills face strong opposition in the Senate, an alternative option for an ally lawmaker would be to file a separate bill to ban the use of LGBTQIA+ “panic” and trans “panic” defenses. The Authors propose that the bill should be drafted as close as possible to the following model legislation —

AN ACT PROHIBITING THE USE OF JUSTIFYING CIRCUMSTANCE OF SELF-DEFENSE, EXEMPTING CIRCUMSTANCE OF INSANITY, AND MITIGATING CIRCUMSTANCES OF PROVOCATION, IMMEDIATE VINDICATION OF A GRAVE OFFENSE, AND PASSION OR OBFUSCATION, OR ANY OTHER CIRCUMSTANCES AFFECTING LIABILITY, PREMISED ON GENDER, AS DEFENSE IN CRIMES AGAINST PERSONS COMMITTED AGAINST MEMBERS OF THE LGBTQIA+ COMMUNITY, OTHERWISE KNOWN AS THE LGBTQIA+ “PANIC” DEFENSE

SEC. 1. *Short Title.* — This bill shall be known as the “LGBTQIA+ “Panic” Defense Law”.

SEC. 2. *Definition of Terms.* — As used in this Act:

(a) *Gender expression* refers to the way a person communicates gender identity to others;

(b) *Gender identity* refers to the personal sense of identity as characterized, among others, by manner of clothing, inclinations, and behavior in relation to masculine or feminine conventions. A person may have a male or female identity with the physiological characteristics of the opposite sex, in which case this person is considered transgender;

(c) *Sex* refers to male, female, or intersex. Intersex refers to people born with the sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies, all of which are natural bodily variations along a spectrum;

(d) *Sexual orientation* refers to the direction of emotional, sexual attraction, or conduct towards people of the same sex (homosexual orientation) or towards people of both sexes (bisexual orientation), or towards people of the opposite sex (heterosexual orientation) or to the absence of sexual attraction (asexual orientation).

SEC. 3. *Prohibition on Justifying Circumstance.* — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the justifying circumstance of self-defense premised on a non-violent homosexual advance, or discovery of another person's biological sex. Non-violent sexual advances by a lesbian, gay, bisexual, transgender, queer, intersex, asexual, or any other non-binary gender cannot be considered as "unlawful aggression."

SEC. 4. *Prohibition on Exempting Circumstance.* — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the exempting circumstance of insanity premised on a non-violent homosexual advance, or discovery of another person's biological sex.

SEC. 5. *Prohibition on Mitigating Circumstances.* — No person charged for committing violence against any person who identifies himself or herself as an lesbian, gay, bisexual, transgender, queer, intersex, asexual, non-conforming, or any other non-binary gender, shall benefit from the mitigating circumstances of provocation, immediate vindication, and passion or obfuscation, if such circumstances were premised on the sexual orientation, gender identity and expression of the victim. Non-violent sexual advances by a lesbian, gay, bisexual, transgender, queer, intersex, asexual, or any other non-binary gender cannot be considered as "sufficient provocation," "grave offense," "unlawful and unjust act," and "unlawful aggression" as to effectuate the mitigating circumstances of provocation, immediate vindication, passion or obfuscation, and incomplete self-defense, respectively.

SEC. 6. *Repealing Clause.* — All laws, orders, issuances, rules and regulations, or parts thereof, inconsistent with any provisions of this Act are hereby repealed, modified or amended accordingly.

SEC. 7. *Effectivity.* — This law shall be effective within 15 days after its publication in the Official Gazette or a newspaper of general circulation.

To be clear, this Article does not argue that other mitigating circumstances that make no reference to sex and gender should not be considered (for instance, the privileged mitigating circumstance of minority). The Authors only assert that sex or gender should not be countenanced by the courts as the basis for commission of the crime of homicide or murder, lest the courts give their stamp of approval in the recognition and validity of homophobia, transphobia, and prejudice.

B. Possible Charges

This proposed form of legislation will certainly not be without contention.⁴⁰⁷ A charge against this proposition would likely argue along the same lines of legislating behaviors and legislating moralities.⁴⁰⁸

However, this possible opposition ignores the fact that affording LGBTQIA+ rights and protection is not a question of morality. Rather, it consists in elevating the status of a group of minorities to a level almost equal to that of their heterosexual cisgender counterparts. Even assuming that it is a moral question, the Legislature has the power to dictate the state policy under its police power to afford ample protection to a sector of society that has suffered from a long history of discrimination and abuse.⁴⁰⁹

Furthermore, the proposition of enacting legislation that specifically prohibits the invocation of certain mitigating circumstances is not novel in the Philippines. The Anti-Hazing Act of 2018⁴¹⁰ is an example of a law which prohibits the defendants prosecuted under the said statute to raise specific mitigating circumstances.

Likewise, the enactment of legislation that favors one sector or group of society over another has already been upheld as constitutional by the Supreme

407. See generally Lee, *Trans Panic Defense Revisited*, *supra* note 25, at 1455-67 (discussing possible contentions to legislative ban in the U.S.).

408. *White Light Corporation v. City of Manila*, G.R. No. 122846, 576 SCRA 416, 444 (2009). The American maxim “that you cannot legislate morality” is more accurately interpreted as meaning that efforts to legislate morality will fail if they are widely at variance with public attitudes about right and wrong. *Id.* (citing Steven G. Calabresi, *Render unto Caesar That Which Is Caesar’s, and unto God That Which Is God’s*, 31 HARV. J. L. & PUB. POL’Y, 495 (2008)).

409. See RENE B. GOROSPE, *POLITICAL LAW* 39-40 (2016) (“[Police Power] is essentially the power used to promote the public welfare by restraining and regulating liberty and the use of property”).

410. An Act Prohibiting Hazing and Regulating Other Forms of Initiation Rites of Fraternities, Sororities, and Other Organizations, and Providing Penalties for Violations Thereof, Amending for the Purpose Republic Act No. 8049, Entitled “An Act Regulating Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Organizations and Providing Penalties Therefor” [Anti-Hazing Act of 2018], Republic Act. No. 11053, § 14 (2018). Any person charged under this Act shall not be entitled to the mitigating circumstances that there was no intention to commit so grave a wrong. *Id.*

Court. In *Garcia v. Drilon*,⁴¹¹ the Supreme Court held that Republic Act No. 9262,⁴¹² otherwise known as the Anti-Violence Against Women and Children Act of 2004, does not violate the guaranty of equal protection of the laws because of the unequal power relations between women and men.⁴¹³ Thus, the Court rejected the petitioner's argument that the law is "anti-male, husband-bashing and hate-men."⁴¹⁴ Instead, the law was likened to the Convention on the Elimination of All Forms of Discrimination Against Women,⁴¹⁵ which required the Philippines to "modify the social and cultural patterns of conduct of men and women, ... [and to achieve] the elimination of prejudice and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or [based] on the stereotyped roles for men and women."⁴¹⁶ The Authors do not see any reason why the same logic that was applied to women on the basis of their unequal footing with men in today's patriarchal society cannot also be applied to members of the LGBTQIA+ community.

IX. CONCLUSION

In the final analysis, the LGBTQIA+ "panic" defense rests not on law, but on the deep-seated bias and stereotypes that Filipinos, and more specifically, the judiciary members, may have against members of the LGBTQIA+ community.⁴¹⁷ Its acceptance can be summed up as the refusal to believe that gender is non-binary, which, ironically, the Supreme Court has already recognized.⁴¹⁸ It must also be stressed that "[j]ust because a society is hetero-centric does not mean that it has to tolerate or encourage violent homophobic and transphobic acts."⁴¹⁹

411. *Garcia v. Drilon*, G.R. No. 179267, 699 SCRA 352 (2013).

412. An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes [Anti-Violence Against Women and Their Children Act of 2004], Republic Act No. 9262 (2004).

413. *Garcia*, 699 SCRA at 411-21.

414. *Id.* at 420.

415. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

416. *Garcia*, 699 SCRA at 504 (citing CEDAW, *supra* note 415, art. 5 (a)).

417. See Lee, *Gay Panic Defense*, *supra* note 14, at 552.

418. *Falcis*, G.R. No. 217910, at 2.

419. Suffredini, *supra* note 25, at 314 (citing Mison, *supra* note 25, at 173).

By allowing this type of defense to be successful in the courtroom, the judiciary affirms that LGBTQIA+ are deviants of society, and that it is only reasonable for any heterosexual cisgender individual to be so enraged by their existence that it is more acceptable to kill LGBTQIA+ than any other heterosexual cisgender person. To reiterate, the recognition of the LGBTQIA+ “panic” defense is tantamount to judicial institutionalization of homophobia and transphobia. This is the status quo.

Dolot and Marin expressed hope that the Supreme Court, “when finally called upon to pass on the issue of LGBT rights, will rule in a manner in consonance with the interests of a group which has for too long, struggled to assert its acceptability.”⁴²⁰ Six years after the article was written, and a decade since *Ang Ladlad* was decided, the judiciary still has not moved an inch closer to the protection of LGBTQIA+ rights, despite already recognizing its history of discrimination and oppression.⁴²¹ In the most recent case concerning LGBTQIA+ rights, the Supreme Court once again blocked the movement towards equality by denying the petition of Jesus Falcis which questioned the constitutionality of Article 1 of the Family Code on procedural grounds.⁴²² The Court held that the *Falcis* case was “not the case” to do so,⁴²³ affirming the theory of Dolot and Marin that indeed, the Supreme Court is only waiting for the perfect case to finally show that they are for the protection of LGBTQIA+ rights.⁴²⁴

The appeal of Pemberton would have been an excellent opportunity for the Court to finally protect such rights, albeit not in terms of marriage equality, but with respect to the invocation of a defense premised on homophobia and transphobia. With the withdrawal of the appeal to the Supreme Court, however, Pemberton ensured his early release and flight back to the U.S. and deprived the Supreme Court of the opportunity to reverse the acceptance of the defense in the Philippine justice system.

420. Diane Jane D. Dolot & Jose Carlos P. Marin, *The Rainbow-Colored Elephant in the Room: A Commentary on LGBT Jurisprudence*, 88 PHIL. L.J. 937, 947 (2014).

421. See *Falcis*, G.R. No. 217910, at 41.

422. *Id.*

423. *Id.* at 307. All Justices except for three concurred with Justice Marvic Leonen’s Opinion. Justice Francis Jardeleza wrote a concurring opinion stating that “he votes to dismiss the petition, but not the right for same-sex marriage,” which was concurred in by Justice Benjamin Caguioa. The only Justice who did not seem to categorically share the sentiment is the new Chief Justice Diosdado Peralta. *Id.*

424. Dolot & Marin, *supra* note 420, at 947.

As it stands, the Authors can only hang on to the same thread of hope to which Dolot and Marin cling to.⁴²⁵ Following the successful transplantation, the LGBTQIA+ community seems to be left with no choice but to continue waiting until a similar case invoking the LGBTQIA+ “panic” defense is elevated to the Supreme Court, or until a law is passed by Congress⁴²⁶ prohibiting the invocation of self-defense as earlier recommended — whichever comes first.

In waiting, however, the discrimination continues. More transgender persons will be killed by cisgender heterosexual males emboldened by the ruling of the Court of Appeals and the judicial stamp of approval that turned the killing into a reasonable response.

“*Ilan pang Richelle Bequilla, Jordan Borabien, Rolando Apolinario, Joice Florance, Alex Nodado? Ilan pang mga Jennifer Laude?*”⁴²⁷ The Philippine Congress must pass a law banning the LGBTQIA+ and trans “panic” defenses.

425. *Id.*

426. Note, however, that while the Anti-Discrimination Bill was unanimously passed in the House of Representatives in the last Congress, the bills remain pending at the committee level in 18th Congress.

427. Hontiveros, *supra* note 86.