Rethinking the Iron Curtain Rule: Protecting the Rights of Non-Marital Children

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I. MEMORANDUM

Let it be remembered that illegitimate children are human beings like others and are entitled to the same rights and privileges. And no one can deny that many of them have afforded substantial contributions for the improvement of the lot of man. Much of

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This Article is an edited version of the *amicus curiae* memorandum submitted by the Author to the Supreme Court in the recently decided case of Amadea Angela K. Aquino v. Rodolfo C. Aquino and Abdulah C. Aquino, G.R. No. 208912, Dec. 7, 2021, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68154 (last accessed July 31, 2022). The memorandum is accompanied by a transcript of the oral arguments.

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> *the strength and greatness of the greatest democracy of modern times is due to the genius of Alexander Hamilton, who has been called the 'sublime bastard.'*
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> — Justice Gregorio M. Perfecto[1]

> *The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth*[,] *and penalizing the illegitimate child is an ineffectual* [—] *as well as an unjust* [—] *way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where* [—] *as in this case* [—] *the classification is justified by no legitimate state interest, compelling*[,] *or otherwise.*
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> — Justice Lewis Franklin Powell, Jr.[2]

> *Illegitimacy indicates nothing about a person's moral status; what it may indicate is something about the moral status of the person's parents. Any governmental action based on the view that a child, because he is illegitimate, is morally inferior to, and less deserving than another, is said to violate equal protection. Justice Stevens has argued that the* [*sovereign*] *should firmly reject the tradition of thinking of illegitimates as less deserving persons, writing: 'The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious.'*
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> — Miriam Defensor Santiago[3]

Undersigned *amicus* counsel respectfully submits this Consolidated Memorandum,[4] pursuant to the Order issued by the Court *en banc* on 9 July

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1. Malonda v. Malonda, 81 Phil. 149, 156 (1948) (J. Perfecto, dissenting opinion).
2. Weber v. Aetna Casualty & Surety Company et al., 406 U.S. 164, 175-76 (1972) (citing John C. Gray Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); Graham v. Richardson, 403 U.S. 365 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Brown v. Board of Education of Topeka, 349 U.S. 294 (1955); & Hirabayashi v. United States, 320 U.S. 81 (1943) (emphases supplied)). *See also* Walter Wadlington, *Book Review: Illegitimacy: Law and Social Policy by Harry D. Krause*, 58 VA. L. REV. 188 (1972).
3. Miriam Defensor Santiago, *The New Equal Protection*, 58 PHIL. L.J. 1, 4 (1983) (citing Mathews v. Lucas, 427 U.S. 495, 523 (1976) (J. Stevens, dissenting opinion)).
4. Amicus Curiae Consolidated Memorandum, Oct. 7, 2019 (on file with the Supreme Court), *in* Amadea Angela K. Aquino v. Rodolfo C. Aquino and

2019, appointing her as *amicus curiae* and her undertaking to respond to the questions posed by the Honorable Court, made during the hearing on 3 September 2019 and in her Manifestation of 11 September 2019.

This Consolidated Memorandum supersedes the original Memorandum filed on 2 September 2019 and incorporates it with counsel's responses to the Court's questions. This is for the convenience of the Honorable Court, in order to avoid repetitive cross-references to the original Memorandum and to situate counsel's responses in the relevant context.

A. The Issues

1. This Memorandum will address the following issues among those set forth in the Honorable Court's Advisory received on 29 August 2019:

    1.1. Whether or not the constitutionality of Article 992 of the Civil Code[5] has been squarely raised in the settlement proceeding;

        1.1.1. Whether or not Article 992 of the Civil Code as currently interpreted is unconstitutional in that it violates the equal protection and due process clauses of the Constitution;[6] and

        1.1.2. Whether or not Article 992 of the Civil Code in itself is unconstitutional in that it violates the equal protection and due process of the Constitution.[7]

    1.2. Whether or not Article 992 of the Civil Code can be interpreted to allow the illegitimate descendants of legitimate children to inherit *ab intestato* from their descendants;

Abdulah C. Aquino, G.R. No. 208912, Dec. 7, 2021, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68154 (last accessed July 31, 2022).

5. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 992 (1949). Article 992 provides that "[a]n illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother; nor shall such children or relatives inherit in the same manner from the illegitimate child." *Id.*

6. *See* PHIL. CONST. art. III, § 1. ("No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.").

7. *Id.*

1.2.1. Whether or not illegitimate descendants of legitimate children or illegitimate descendants of illegitimate children are similarly situated; and

1.2.2. Whether or not the classification between illegitimate descendants of illegitimate children and illegitimate descendants of illegitimate children is germane to the purpose of the law.

B. Summary

2. Undersigned *amicus* counsel respectfully submits that the Court should, *at the barest minimum*, recognize that Article 992 of the Civil Code of the Philippines, insofar as it excludes illegitimate children from successional rights, is unfair and discriminatory.

   The Court can note these deficiencies of the law but defer to legislative action to correct these, following the Supreme Court's decisions in *People v. Genosa*,[8] *Silverio v. Republic*,[9] *Santos v. Court of Appeals*,[10] and several other cases.

   Undersigned *amicus* counsel respectfully endorses this option as the most consistent with the constitutional principle of the separation of powers and with the Court's own judicial precedents, especially considering that a contrary line of cases entails judicial activism in statutory interpretation.

3. Second, the Court may choose to exercise its power of judicial review over "[a]ll cases in which the constitutionality or validity of any ... law ... is in question."[11] The Court may thus declare a law to be "void" for being "inconsistent with the Constitution,"[12] and such "[j]udicial decision applying ... the Constitution shall form part of the legal system of the Philippines."[13] Accordingly, the Court can examine the constitutionality of Article 992 within the meaning of the Equal Protections Clause.[14]

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8. People v. Genosa, G.R. No. 135981, 419 SCRA 537 (2004).
9. Silverio v. Republic, G.R. No. 174689, 537 SCRA 373 (2007).
10. Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20 (1995).
11. PHIL. CONST. art. VIII, § 5 (2) (a).
12. CIVIL CODE, art. 7, para. 2.
13. *Id.* art. 8.
14. PHIL. CONST. art. III, § 1.

3.1. The Court must first determine the proper standard of review under the Equal Protection Clause.[15] *Amicus* counsel submits that the Court must apply intermediate or heightened scrutiny, considering that a classification on the basis of illegitimacy constitutes discrimination on the basis of status proscribed under the Convention on the Rights of the Child (CRC)[16] (wherein the Philippines undertook to "respect and ensure ... within [its] jurisdiction[,]"[17] the rights of the child against "discrimination of any kind, irrespective of the child's ... birth or other status.").[18] Accordingly, the exclusion of illegitimate children, in order to be valid, must serve an important governmental purpose and must be substantially related to the accomplishment of that purpose.[19]

3.2. The Court can declare that the exclusion of illegitimate children from certain successional rights under Article 992 constitutes invidious classification on the basis of status that is prohibited by the Equal Protection Clause of the Bill of Rights and the CRC, and strike down Article 992 as unconstitutional to the extent that it constitutes impermissible discrimination.

4. Third, the Court can declare that, under the later-in-time rule, an international treaty, having been approved by the Senate, becomes "valid and binding" under Article VII, Section 21 of the Constitution,[20] partakes the nature of law in the national legal order and thus supersedes and repeals inconsistent earlier laws.[21] Accordingly, when the Senate concurred in the ratification of the CRC in 1990,[22] it *ipso facto* repealed Article 992 of the Civil Code of the Philippines.

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15. *See* Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City, G.R. No. 135981, 835 SCRA 350, 410-12 (2017).

16. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

17. *Id.* art. (2) (1).

18. *Id.*

19. *See* Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352, 447 (2013) (J. Leonardo-De Castro, concurring opinion).

20. *See* PHIL. CONST. art. VII, § 21.

21. Secretary of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, 197 (2000).

22. Office of the United Nations High Commissioner for Human Rights, Ratification Status for CRC - Convention on the Rights of the Child, *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/

C. Statement of Facts

5. Miguel T. Aquino and Amadea C. Aquino had four legitimate children:

   5.1. Rodolfo C. Aquino;

   5.2. Arturo C. Aquino;

   5.3. Wilfredo C. Aquino; and

   5.4. Abdulah C. Aquino

   Amadea Angela Kwan Aquino (hereinafter *Amadea Angela*) is the illegitimate child of Arturo, now deceased, and says she is entitled to inherit from Miguel through representation. Her claim is opposed by Miguel's sons Rodolfo and Abdulah.

6. By way of background, Miguel was predeceased by two of his sons. Son Arturo died in 1978. Son Wilfredo died in 1986, and was survived by his wife Linda and five legitimate children: Amparo, Wilfredo Jr., Leonardo, Leopoldo, and Leonor.

7. In the meantime, Miguel's wife Amadea died in 1977, and Miguel contracted a second marriage with Enerie B. Aquino.

8. In 1999, Miguel died intestate, leaving various real and personal properties. He was survived by wife Enerie; sons Rodolfo and Abdulah; and the heirs of his predeceased son, Wilfredo.

9. In 2005, the Regional Trial Court (RTC) of Davao City issued Letters of Administration to son Rodolfo. During those proceedings, Amadea Angela filed a *Motion to Be Included in the Distribution and Partition of the Estate* and later a *Motion for Distribution of Residue of Estate or for Allowance to the Heirs*, claiming to be the only child of the late Arturo and entitled to inherit from Miguel through representation. Rodolfo opposed Amadea Angela's claims.

10. The RTC of Davao City, on 22 April 2005, declared Amadea Angela "an acknowledged natural child or legitimated child of Arturo C. Aquino for purposes of determining her share in the estate of her grandfather ... in representation of her father Arturo[.]"

11. Rodolfo and Abdulah separately challenged Amadea Angela before the Court of Appeals (CA).

Treaty.aspx?Treaty=CRC&Lang=en (last accessed July 31, 2022) [https://perma.cc/QZ87-DQ2U]. *See* PHIL. CONST. art. II, § 21.

12. In August 2012, the CA rejected Rodolfo's appeal. In September 2013, Rodolfo filed for *Certiorari* before the Court.

13. In January 2013, the CA granted Abdulah's appeal, reversing and setting aside the RTC's finding that Amadea Angela is an acknowledged or legitimated child of Arturo. In September 2013, Amadea Angela likewise filed for *Certiorari* before the Court, which rejected her plea via Minute Resolution in November 2013. She later moved to reconsider the November 2013 Minute Resolution and, upon her Motion, the Court referred her Motion to the *en banc*.

D. The Relevant Laws and Discussion

14. This discussion revolves on the following textual authorities:

14.1. The 1987 Constitution of the Republic of the Philippines

Article III, Section 1 —

> Section 1. No person shall be ... denied the equal protection of the laws.[23]

Article II, Section 2 —

> Section 2. The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[24]

Article II, Section 21 —

> Section 21. No treaty or international agreement shall be *valid and effective* unless concurred in by at least two-thirds of all the Members of the Senate.[25]

14.2. Civil Code of the Philippines, R.A. No. 386 (1949)

> Article 992. An illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother; nor shall such children or relatives inherit in the same manner from the illegitimate child.[26]

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23. PHIL. CONST. art. III, § 1.

24. PHIL. CONST. art. II, § 2 (emphasis supplied).

25. PHIL. CONST. art. II, § 21 (emphasis supplied).

26. CIVIL CODE, art. 992.

14.3. Convention on the Rights of the Child

Article 2

1. States Parties shall *respect and ensure the rights* set forth in the present Convention to each child within their jurisdiction *without discrimination of any kind*, irrespective of the child's or his or her parent's or legal guardian's race, [color], sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth[,] or other status.[27]

14.4. Vienna Convention on the Law of Treaties (VCLT)

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.[28]

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[29]

E. The Discriminatory Nature of the Article 992 Classification

15. Article 992 discriminates on the basis of birth or status.

16. The reason behind the law has been explained in the leading case of *Diaz v. Intermediate Appellate Court*[30] —

Article 992 of the New Civil Code provides a barrier or iron curtain in that it prohibits absolutely a succession *ab intestato* between the illegitimate child and the legitimate children and relatives of the father or mother of said [legitimate] child. They may have a natural tie of blood, but this is not recognized by law for the purpose of Article 992. Between the legitimate family and the illegitimate family[,] there is presumed to be an intervening antagonism and incompatibility. The illegitimate child is disgracefully looked down upon by the legitimate family; and the family is in turn, hated by the illegitimate child; the latter considers the privileged condition of the former,

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27. CRC, *supra* note 16, art. 2 (1) (emphases supplied).

28. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

29. *Id.* art. 27.

30. Diaz v. Intermediate Appellate Court, G.R. No. 66574, 182 SCRA 427 (1990).

> and the resources of which it is thereby deprived; the former, in turn, sees in the illegitimate child nothing but the product of sin, palpable evidence of a blemish broken in life; the law does no more than recognize this truth, by avoid[i]ng further ground of resentment.[31]

17. In *Diaz*, the Court expounded —

> While the New Civil Code may have granted successional rights to illegitimate children, those articles, however, in conjunction with Article 992, prohibit the right of representation from being exercised where the person to be represented is a legitimate child. Needless to say, the determining factor is the legitimacy or illegitimacy of the person to be represented. If the person to be represented is an illegitimate child, then his descendants, whether legitimate or illegitimate, may represent him; however, if the person to be represented is legitimate, his illegitimate descendants cannot represent him because the law provides that only his legitimate descendants may exercise the right of representation by reason of the barrier imposed in Article 992.[32]

18. Article 992 is a discriminatory provision for the reason that the right of succession is dependent on the marital status of the child's parents. Arturo M. Tolentino explicates —

> In the present article, the Code Commission took a step forward by giving an illegitimate child the right of representation, which he did not have under the old Code. *But in retaining without change provisions of the old Code in Article 992, it created an absurdity and committed an injustice, because while the illegitimate descendant of an* [*illegitimate*] *child can represent, the illegitimate descendant of a legitimate child cannot*. The principle that the illegitimate child should succeed by operation of law only to persons with the same status of illegitimacy has thus been preserved. And this is unfair to the illegitimate descendants of legitimate children. *Dura lex, sed lex*.[33]

19. Justice Hugo E. Gutierrez, Jr.'s dissenting opinion in *Diaz* is in point —

> We have here a case of grandchildren who cannot inherit from their direct ascendant, their own grandmother, simply because their father (who was a legitimate son) failed to marry their mother. There are no other direct heirs. Hence, the properties of their grandmother goes to a collateral relative [—] her niece. If the niece is no longer alive, an even more distant group of

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31. *Id.* at 432-33 (citing Grey v. Fabie, 68 Phil. 128, 130-31 (1939) (citing VII JOSE MARIA MANRESA Y NAVARRO, COMMENTARIOS AL CODIGO CIVIL ESPAÑOL 110 (7th ed. 1951))).

32. *Diaz*, 182 SCRA at 433.

33. 3 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 330 (1979) (emphasis supplied).

> grandnieces and grandnephews will inherit as against the grandmother's own direct flesh and blood.
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> ...
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> My dissent from the majority opinion is also premised on a firm belief that law is based on considerations of justice. The law should be interpreted to accord with what appears right and just. Unless the opposite is proved, I will always presume that a grandmother loves her grandchildren [—] legitimate or illegitimate [—] more than the second cousins of said grandchildren or the parents of said cousins. The grandmother may be angry at the indiscretions of her son but why should the law include the innocent grandchildren as objects of that anger. 'Relatives' can only refer to collateral relatives, to members of a separate group of kins but not to one's own grandparents.[34]

20. Former Justice Jose B.L. Reyes as *amicus curiae* in *Diaz* commented on the indefensibility of Article 992 —

> In the Spanish Civil Code of 1889[,] the right of representation was admitted only within the legitimate family; so much so that Article 943 of that Code prescribed that an illegitimate child [cannot] inherit ab intesta[d]o from the legitimate children and relatives of his father and mother. The Civil Code of the Philippines apparently adhered to this principle since it reproduced Article 943 of the Spanish Code in its own [Article] 992, but with fine inconsistency, in subsequent articles ([Articles] 990, 995[,] and 998)[,]) our Code allows the hereditary portion of the illegitimate child to pass to his own descendants, whether legitimate or illegitimate. So that while [Article] 992 prevents the illegitimate issue of a legitimate child from representing him in the intestate succession of the grandparent, the illegitimate[ ] [issue] of an illegitimate child can now do so.
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> This difference being indefensible and unwarranted, in the future revision[s] of the Civil Code[,] we shall have [no] choice and decide either that the illegitimate issue enjoys in all cases the right of representation, in which case [Article] 992 must be suppressed; or [contrariwise,] maintain said article and modify [Articles] 992 and 998. The first solution would be more in accord with an enlightened attitude vis-[à]-vis illegitimate children. [*Dura lex, sed lex*.][35]

21. If the purpose for the uneven rights of legitimate and illegitimate children, in general, and of Article 992, in particular, is to promote the institution

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34. *Diaz,* 182 SCRA at 437-39 (J. Gutierrez, Jr., dissenting opinion).

35. *Id.* at 434 (citing Jose B. L. Reyes, *Reflections on the Reform of Hereditary Succession*, 50 PHIL. L.J. 277, 286-87 (1975)).

of marriage,[36] and to protect legitimate family relations,[37] there is no evidence that people who engage in sexual relations will shun unmarried cohabitation because their offspring will not one day enjoy successional rights from the former's legitimate relatives.

22. According to the most recent Philippine Statistics Authority (PSA) data regarding child births in the Philippines —

> More than half (907,061 or 53.3%) of the total registered live births in 2017 were born out of wedlock [... .] The three regions that recorded the highest number of illegitimate children born in 2017 by usual residence of mother were CALABARZON (144,622), NCR (141,206), and Central Luzon (100,956).
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> The proportion of illegitimate babies in [10] regions of the country, as usual residence of mother [was] more than half of its total births, including Eastern Visayas (65.4%), NCR (64.9%), CALABARZON (58.2%), Davao (57.4%), Central Visayas (56.7%), Bicol (55.7%), Caraga (55.6%), Northern Mindanao (53.6%), Central Luzon (52.7%), and Ilocos Region (50.6%).[38]

23. In this context, the legal and societal disadvantages suffered by illegitimate children have not sufficiently deterred unmarried couples from creating them. Article 992 of the Civil Code and other provisions such as Article 175 of the Family Code that deny illegitimate children rights merely because of their status do not achieve any state interest and is inconsistent with our treaty obligation.[39]

F. Corrective Action via Legislation

24. In a long line of cases, the Court has found relevant statutes deficient for being unfair or discriminatory, and yet did not strike them down outright, but merely deferred to corrective legislation.

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36. *See generally* Alcantara v. Alcantara, G.R. No. 167746, 531 SCRA 446, 460 (2007).

37. *See Diaz,* 182 SCRA at 432-33 (citing Grey v. Fabie, 68 Phil. 128, 130-31 (1939) (citing VII JOSE MARIA MANRESA Y NAVARRO, COMMENTARIOS AL CODIGO CIVIL ESPAÑOL 110 (7th ed. 1951))).

38. Philippine Statistics Authority, Registered Live Births in the Philippines, 2017 (Reference No. 2018-199), at 4, *available at* https://psa.gov.ph/sites/default/files/attachments/crd/specialrelease/2017%20Births_SR%20%28approval%29.pdf (last accessed July 31, 2022) [https://perma.cc/KLJ4-JWLF].

39. *See* CIVIL CODE, arts. 175 & 992 & CRC, *supra* note 16, art. 2, ¶ 1.

25. In *Suntay III v. Cojuancgo-Suntay*,[40] counsel for petitioner argued that "the successional bar between the legitimate and illegitimate relatives of a decedent" in Article 992 of the New Civil Code, "does not apply in [the case] where facts indubitably demonstrate" that there was only love and acceptance, not antipathy and enmity between the legitimate and illegitimate members of the family.[41] The Court stated that they are "not unmindful of the critiques of civilists of a conflict and a *lacuna* in the law concerning the bone of contention that is Article 992 of the Civil Code[.]"[42] However, the Court exercised judicial restraint, refraining from making a "final declaration of heirship and [distribution of] presumptive shares" since the subject of the case was the administration of properties, not succession.[43]

26. In *People v. Genosa*, the defendant prayed for acquittal on a novel theory of self-defense — the "battered woman syndrome."[44] Despite ultimately staying its hand in due deference to legislative action, the "Court agonized on how to apply the theory as a modern-day reality."[45]

27. The Court ruled —

> While our hearts empathize with recurrently battered persons, we can only work within the limits of law, jurisprudence[,] and given facts. We cannot make or invent them. Neither can we amend the Revised Penal Code. Only Congress, in its wisdom, may do so.
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> The Court, however, is not discounting the possibility of self-defense arising from the battered woman syndrome. We now sum up our main points. *First*, each of the phases of the cycle of violence must be proven to have characterized at least two battering episodes between the appellant and her intimate partner. *Second*, the final acute battering episode preceding the killing of the batterer must have produced in the battered person's mind an actual fear of an imminent harm from her batterer and an honest belief that she needed to use force in order to save her life. *Third*,[ ]at the time of the killing, the batterer must have posed probable [—] not necessarily immediate and actual [—] grave harm to the accused, based on the history of violence perpetrated by the former against the latter. Taken altogether, these circumstances could satisfy the requisites of self-defense. Under the existing

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40. Suntay III v. Cojuangco-Suntay, G.R. No. 183053, 621 SCRA 142 (2010).

41. *Id.* at 155.

42. *Id.*

43. *Id.* at 157.

44. *Genosa*, 419 SCRA at 601 (J. Ynares-Santiago, dissenting opinion).

45. *Genosa*, 419 SCRA at 594.

facts of the present case, however, not all of these elements were duly established.[46]

28. Similarly, in *Silverio v. Republic*,[47] the Court acknowledged the petitioner's plight yet stayed its own hand by deferring to the legislative processes —

> It is true that Article 9 of the Civil Code mandates that '[n]o judge or court shall decline to render judgment by reason of the silence, obscurity[,] or insufficiency of the law.' However, it is not a license for courts to engage in judicial legislation. The duty of the courts is to apply or interpret the law, not to make or amend it.
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> In our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern ... where the claims asserted are statute-based.
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> To reiterate, the statutes define who may file petitions for change of first name and for correction or change of entries in the civil registry, where they may be filed, what grounds may be invoked, what proof must be presented and what procedures shall be observed. If the legislature intends to confer on a person who has undergone sex reassignment the privilege to change his name and sex to conform with his reassigned sex, it has to enact legislation laying down the guidelines in turn governing the conferment of that privilege.
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> ...
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> Petitioner pleads that '[t]he unfortunates are also entitled to a life of happiness, contentment and [the] realization of their dreams.' No argument about that. 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. However, the remedies petitioner seeks involve questions of public policy to be addressed solely by the legislature, not by the courts.[48]

29. Significantly, the Court unequivocally ruled —

> It might be theoretically possible for this Court to write a protocol on when a person may be recognized as having successfully changed his sex. However, this Court has no authority to fashion a law on that matter, or on anything else. The Court cannot enact a law where no law exists. It can only apply or interpret the written word of its co-equal branch of government, Congress.[49]

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46. *Id.*
47. Silverio v. Republic, G.R. No. 174689, 537 SCRA 373 (2007).
48. *Id.* at 394-95.
49. *Id.* at 395.

30. In *Moy Ya Lim Yao v. Commissioner of Immigration*,[50] the Court addressed the legality of Section 15 of the Naturalization Law,[51] which finds its foundations in "Section 1994 of the Revised Statutes of the United States, ... under such provision an alien woman who married a citizen became, upon such marriage, likewise a citizen, by force of law[.]"[52] Section 1994 was, however, subsequently amended by the United States (U.S.) Congress to explicitly require "all [ ] alien wives to submit to judicial naturalization[.]"[53]

31. The Court ruled —

32. "[T]he Philippine Legislature, instead of following suit and adopting such a requirement, enacted Act 3448 on [30 November] 1928[,] which copied verbatim the aforementioned Section 1994 of the Revised Statutes, thereby indicating its preference to adopt the latter law and its settled construction rather than the reform introduced by the Act of 1922."[54]

33. "Obviously, these considerations leave Us no choice. Much as this Court may feel that as the United States herself has evidently found it to be an improvement of her national policy vis-[à]-vis the alien wives of her citizens to discontinue their automatic incorporation into the body of her citizenry without passing through the judicial scrutiny of a naturalization proceeding, as it used to be before 1922, it seems but proper, without evidencing any bit of colonial mentality, that as a developing country, the Philippines adopt a similar policy, unfortunately, the manner in which our own legislature has enacted our laws on the subject, as recounted above, provides no basis for Us to construe said law along the line of the 1922

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50. Moy Ya Lim Yao v. Commissioner of Immigration, G.R. No. L-21289, 41 SCRA 292 (1971).

51. *See* An Act to Provide for the Acquisition of Philippine Citizenship by Naturalization, and to Repeal Acts Numbered Twenty-Nine Hundred and Twenty-Seven and Thirty-Four Hundred and Forty-Eight [Revised Naturalization Law], Commonwealth Act No. 473, § 15 (1939).

52. *Moy Ya Lim Yao*, 41 SCRA at 359 (citing Embracing the Statutes of the United States, General and Permanent in Their Nature, in Force on the First Day of December, One Thousand Eight Hundred and Seventy-Three, as Revised and Consolidated by Commissioners Appointed Under an Act of Congress; and as Reprinted, with Amendments, Under Authority of An Act of Congress Approved the Second Day of March, in the Year One Thousand Eight Hundred and Seventy-Seven [Revised Statutes of the United States], § 1994 (1874) (U.S.)).

53. *Moy Ya Lim Yao*, 41 SCRA at 360.

54. *Id.*

modification of the American Law. For Us to do so would be to indulge in judicial legislation which it is not constitutionally permissible for this Court to do. Worse, this Court would be going precisely against the grain of the implicit [l]egislative intent."[55]

34. In *Santos v. Court of Appeals*,[56] the Court denied the petition for review on *certiorari* of the Court of Appeals' decision that affirmed the trial court dismissal of Santos' petition for nullity of marriage[57] on the ground of psychological incapacity (Article 36, Family Code).[58] The Court held —

> The Family Code did not define the term 'psychological incapacity.'
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> ...
>
> Until further statutory and jurisprudential parameters are established, every circumstance that may have some bearing on the degree, extent, and other conditions of that incapacity must, in every case, be carefully examined and evaluated so that no precipitate and indiscriminate nullity is peremptorily decreed.
>
> ...
>
> The factual settings in the case at bench, in no measure at all, can come close to the standards required to decree a nullity of marriage. Undeniably and understandably, [the petitioner] stands aggrieved, even desperate, in his present situation. Regrettably, neither law nor society itself can always provide all the specific answers to every individual problem.[59]

35. In a long line of cases, the Court has recognized the deficiencies of legislation without declaring its invalidity. Even if there are evils sought to be avoided, "[t]he Court cannot indulge in judicial legislation without violating the principle of separation of powers, and, hence, undermining the foundation of our republican system."[60]

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55. *Id.*
56. Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20 (1995).
57. *Id.* at 36.
58. *See* The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209, art. 36 (1987).
59. *Santos*, 240 SCRA at 26, 35, & 36.
60. People v. Hernandez, et al., G.R. No. L-6025, 99 Phil. 515, 550 (1956). *See also* People v. Lava, G.R. No. L-4974, 28 SCRA 72, 101 (1969).

36. As pronounced in *People v. Vera*,[61] to do so would be tantamount to

> arguing on what the law *may* be or *should b*e and not on what the law *is*. Between is and *ought* there is a far cry. The wisdom and propriety of legislation is not for us to pass upon. We may think a law better otherwise than it is. But much [ ] has been[ ] said regarding progressive interpretation and judicial legislation[,] we decline to amend the law. We are not permitted to read into the law matters and provisions which are not there. Not for any purpose [—] not even to save a statute from the doom of invalidity.[62]

37. If there is a saving interpretation, "[a] law should, by all reasonable intendment and feasible means, be saved from the doom of unconstitutionality, the rule corollary thereto being that if a law is susceptible to two interpretations, one of which would make it constitutional, that interpretation should be adopted that will not kill the law."[63]

38. In *Paredes v. Executive Secretary*,[64] the Court stated —

> For one thing, it is in accordance with the settled doctrine that between two possible constructions, one avoiding a finding of unconstitutional[ity] and the other yielding such a result, the former is to be preferred. That which will save, not that which will destroy, commends itself for acceptance. After all, the basic presumption all these years is one of validity. The onerous task of proving otherwise is on the party seeking to nullify a statute. It must be proved by clear and convincing evidence that there is an infringement of a constitutional provision, save in those cases where the challenged act is void on its face. Absent such a showing, there can be no finding of unconstitutionality. A doubt, even if well-founded, does not suffice. Justice Malcolm's aphorism is *apropos*: 'To doubt is to sustain.'[65]

39. The reason for this

> can be traced to the doctrine of separation of powers which enjoins on each department a proper respect for the acts of the other departments. [...] The theory is that, as the joint act of the legislative and executive authorities, a law is supposed to have been carefully studied and determined to be constitutional before it was finally enacted. Hence, as long as there is some other basis that can be used by the courts for its decision, the constitutionality

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61. People v. Vera, 65 Phil. 56 (1937).

62. *Id.* at 135.

63. De la Llana v. Alba, G.R. No. L-57883, 112 SCRA 294, 372 (1982).

64. Paredes v. Executive Secretary, G.R. No. 55628, 128 SCRA 6 (1984).

65. *Id.* at 10 (citing Yu Cong Eng v. Trinidad, G.R. No. L-20479, 47 Phil. 385, 414 (1925)).

of the challenged law will not be touched upon and the case will be decided on other available grounds.[66]

40. Following the principle of separation of powers, corrective action of a vague or erroneous law is best accomplished via legislation. After all, the basic rule in legal interpretation is that such interpretation may go beyond the text but not beyond the law,[67] the making of which is a power placed primarily with the legislative branch of government.[68]

G. Corrective Action via Judicial Interpretation

41. On the other hand, the Court has also taken a contrary position in a select line of cases.

42. In *Republic v. Molina*,[69] the issue before the Court was whether or not the marriage of the parties was void ab initio on the ground of the husband's psychological incapacity to comply with essential marital obligations.[70]

    42.1. Article 36 of the Family Code provides — "Article 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization."[71]

    42.2. The Court through Chief Justice Artemio Panganiban stated that "[d]uring its deliberations, the Court decided to go beyond merely ruling on the facts of this case vis-[à]-vis existing law and jurisprudence. In view of the novelty of [Article] 36 of the Family Code[,] and the difficulty experienced by many trial courts in interpreting and applying it," the Court, taking into consideration the submissions of *amici curiae* and the Court's deliberations, handed

66. Aris (Phil.) Inc. v. National Labor Relations Commission, G.R. No. 90501, 200 SCRA 246, 256 (1991) (citing La Union Electric Cooperative, Inc. v. Yaranon, G.R. No. 87001, 179 SCRA 828, 836 (1989) (citing ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 232 (1st ed. 1989))).

67. *See* RICARDO M. PILARES III, STATUTORY CONSTRUCTION: CONCEPTS AND CASES 4 (2019).

68. *See* PHIL. CONST. art. VI, § 1.

69. Republic v. Molina, G.R. No. 108763, 268 SCRA 198 (1997).

70. *Id.* at 204-07.

71. FAMILY CODE, art. 36.

down eight guidelines in the interpretations and application of Article 36.[72]

43. The Court held in *Antonio v. Reyes*[73] that

> [i]t is under the auspices of the deliberate ambiguity of the framers that the Court has developed the *Molina* rules, which have been consistently applied since 1997. *Molina* has proven indubitably useful in providing a unitary framework that guides courts in adjudicating petitions for declaration of nullity under Article 36.[74]

In *Ngo Te v. Yu-Te*,[75] the Court acknowledged that in applying the *Molina* guidelines, the Court "impose[d] a rigid set of rules" in deciding all psychological incapacity cases.[76]

44. In *Republic v. Orbecido III*,[77] the issue before the Court was "does Paragraph 2 of Article 26 of the Family Code apply to the case of respondent?"[78]

44.1. Article 26 of the Family Code states —

> Article 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5)[,] and (6)[;] 36[;] 37[;] and 38.[79]

44.2. The Court stated —

> On its face, the foregoing provision does not appear to govern the situation presented by the case at hand. It seems to apply only to cases where at the time of the celebration of the marriage, the parties are a Filipino citizen and a foreigner. The instant case is one where at the time the marriage was solemnized, the parties were two Filipino citizens, but later on, the wife was naturalized as an American citizen and subsequently obtained a divorce granting her

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72. *Molina*, 268 SCRA at 208-09.

73. Antonio v. Reyes, G.R. No. 155800, 484 SCRA 353 (2006).

74. *Id.* at 370.

75. Ngo Te v. Yu-Te, G.R. No. 161793, 579 SCRA 193 (2009).

76. *Id.* at 224.

77. Republic v. Orbecido III, G.R. No. 154380, 472 SCRA 114 (2005).

78. *Id.* at 119.

79. FAMILY CODE, art. 26.

> capacity to remarry, and indeed she remarried an American citizen while residing in the [U.S.].
>
> ...
>
> Does the same principle apply to a case where at the time of the celebration of the marriage, the parties were Filipino citizens, but later on, one of them obtains a foreign citizenship by naturalization?
>
> ...
>
> [T]aking into consideration the legislative intent and applying the rule of reason, we hold that Paragraph 2 of Article 26 should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree. The Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage. To rule otherwise would be to sanction absurdity and injustice. Where the interpretation of a statute according to its exact and literal import would lead to mischievous results or contravene the clear purpose of the legislature, it should be construed according to its spirit and reason, disregarding as far as necessary the letter of the law. A statute may therefore be extended to cases not within the literal meaning of its terms, so long as they come within its spirit or intent.[80]

45. In the case of *Republic v. Manalo,*[81] the Court was asked to "resolve whether, under the same provision, a Filipino citizen has the capacity to remarry under Philippine law after initiating a divorce proceeding abroad and obtaining a favorable judgment against his or her alien spouse who is capacitated to remarry."[82]

    The Court ruled in the affirmative and held —

    > Assuming, for the sake of argument, that the word '*obtained*' should be interpreted to mean that the divorce proceeding must be actually initiated by the alien spouse, still, the Court will not follow the letter of the statute when to do so would depart from the true intent of the legislature or would otherwise yield conclusions inconsistent with the general purpose of the act.

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80. *Orbecido III*, 472 SCRA at 120-22 (citing Lopez & Sons, Inc. v. Court of Tax Appeals, 100 Phil. 850, 855 (1957)).

81. Republic v. Manalo, G.R. No. 221029, 862 SCRA 580 (2018).

82. *Id.* at 601.

> Laws have ends to achieve, and statutes should be so construed as not to defeat but to carry out such ends and purposes.[83]

It also stressed that "the purpose of [P]aragraph 2 of Article 26 is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after a foreign divorce decree that is effective in the country where it was rendered, is no longer married to the Filipino spouse."[84]

Thus, it has been said that

> [a] Filipino who initiated a foreign divorce proceeding is in the same place and in [ ]like circumstance as a Filipino who is at the receiving end of an alien initiated proceeding. Therefore, the subject provision should not make a distinction. In both instance[s], it is extended as a means to recognize the residual effect of the foreign divorce decree on Filipinos whose marital ties to their alien spouses are severed by operation of the latter's national law.[85]

46. In the Author's own writings, she has expressed misgivings about the activist exercise of judicial review in these cases. In the Author's book "Marriage and Unmarried Cohabitation: The Rights of Husbands, Wives and Lovers,"[86] the Author explained that although she agrees with the conclusion of the Court in *Republic v. Manalo*,[87] she found it "difficult to navigate around the plain meaning of the law"[88] and that Paragraph 2 of Article 26 "refers discernibly to the alien spouse filing for divorce."[89]

H. Domestic Legal Effects of the Convention on the Rights of the Child (CRC)

47. The CRC was adopted by the United Nations (UN) General Assembly on 30 November 1989, and was signed on 26 January 1990 and ratified by the Philippines on 21 August 1990.[90] The CRC is the most widely

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83. *Id.* at 607 (citing Mariano, Jr. v. Commission on Elections, G.R. No. 118577, 242 SCRA 211, 219 (1995)).

84. *Manalo*, 862 SCRA at 607.

85. *Id.* at 608.

86. ELIZABETH AGUILING-PANGALANGAN, MARRIAGE AND UNMARRIED COHABITATION: THE RIGHTS OF HUSBANDS, WIVES AND LOVERS (2d ed. 2014).

87. *Manalo*, 862 SCRA at 621-22.

88. AGUILING-PANGALANGAN, *supra* note 86, at 265.

89. *Id.*

90. Office of the United Nations High Commissioner for Human Rights, *supra* note 22.

ratified treaty in the world, having been signed by 196 countries.[91] It has been signed by every member of the UN except the United States.[92]

48. Under the Philippine Constitution, a treaty, once signed by the President and "concurred in by at least two-thirds of all the Members of the Senate,"[93] becomes "valid and effective"[94] and thereby becomes "part of the law of the land."[95]

49. The Court has anchored several decisions on the CRC in a long line of cases, to wit —

    49.1. *Perez v. Court of Appeals*,[96] where the Court awarded custody to the mother (petitioner Nerissa Perez), as this was in the best interest of the child[97] and held that

    > [i]t has long been settled that in custody cases, the foremost consideration is always the welfare and best interest of the child. In fact, no less than an international instrument, the [CRC] provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities[,] or legislative bodies, the best interests of the child shall be a primary consideration.'[98]

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91. *See* Endah Rantau Itasari & Dewa Gede Sudika Mangku, *Fulfillment of Educational Rights for Indonesian Citizens Who Are in the Border Areas with Neighborhoods*, 17 SEAJBEL 7, 9 (2018).

92. PHILIP ALSTON & JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS: AN INDEPENDENT STUDY OF SOME KEY LEGAL AND INSTITUTIONAL ASPECTS OF THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD 10 (2005).

93. PHIL. CONST. art. VII, § 21.

94. PHIL. CONST. art. VII, § 21.

95. PHIL. CONST. art. II, § 2.

96. Perez v. Court of Appeals, G.R. No. 118870, 255 SCRA 661 (1996).

97. *Id.* at 671-72.

98. *Id.* at 669 (citing Santos, Sr. v. Court of Appeals, G.R. No. 113054, 242 SCRA 407, 413 (1995); Cervantes v. Fajardo, G.R. No. 79955, 169 SCRA 575, 578-79 (1989); Unson III v. Navarro, G.R. No. 52242, 101 SCRA 183, 189 (1980); Medina v. Makabali, G.R. No. L-26953, 27 SCRA 502, 504 (1969); Pelayo v. Lavin Aedo, 40 Phil. 501, 503 (1919); Lozano v. Martinez and De Vega, 36 Phil. 976, 978 (1917) (citing An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands [1901 CODE OF CIVIL

49.2. *In the Matter of the Adoption of Stephanie Nathy Astorga Garcia*,[99] in deciding the issue of the name of an adopted child, the Court held —

> The modern trend is to consider adoption not merely as an act to establish a relationship of paternity and filiation, but also as an act which endows the child with a legitimate status. This was, indeed, confirmed in 1989, when the Philippines, as a State Party to the [CRC] initiated by the [UN], accepted the principle that adoption is impressed with social and moral responsibility, and that its underlying intent is geared to favor the adopted child. Republic Act No. 8552, otherwise known as the 'Domestic Adoption Act of 1998,' secures these rights and privileges for the adopted.[100]

49.3. *Gamboa-Hirsch v. Court of Appeals*,[101] where the Court stated —

> The [CRC] provides that '*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities*[,] *or legislative bodies, the best interests of the child shall be a primary consideration*.' The Child and Youth Welfare Code, in the same way, unequivocally provides that in all questions regarding the care and custody, among others, of the child, his/her welfare shall be the paramount consideration.[102]

The Court held that "the mother was not shown to be unsuitable or grossly incapable of caring for her minor child. All

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PROCEDURE], Act No. 190, § 771 (1901) (superseded in 1940) & CRC, *supra* note 16, art. 3, ¶ 1)).

99. In the Matter of the Adoption of Stephanie Nathy Astorga Garcia, G.R. No. 148311, 454 SCRA 541 (2005).

100. *Id.* at 551-52 (citing 1 EDGARDO LARDIZÁBAL PARAS, CIVIL CODE OF THE PHILIPPINES ANNOTATED 685 (15th ed. 2002) (citing Prasnik v. Republic or the Philippines, 98 Phil. 665, 669 (1956)); Lahom v. Simbulo, G.R. No. 143989, 406 SCRA 135, 141 (2003) (citing Convention on the Rights of the Child, G.A. Res. 44/25, annex, art. 21, U.N. Doc. A/44/49 (Nov. 20, 1989)); & An Act Establishing the Rules and Policies on the Domestic Adoption of Filipino Children and for Other Purposes [Domestic Adoption Act of 1998], Republic Act No. 8552, § 17 (1998)) (emphases omitted).

101. Gamboa-Hirsch v. Court of Appeals, G.R. No. 174485, 527 SCRA 380 (2007).

102. *Id.* at 383 (citing Pablo-Gualberto v. Gualberto V, G.R. No. 154994, 461 SCRA 450, 475 (2005) (citing CRC, *supra* note 16, art. 31, ¶ 1)) & Salientes v. Abanilla, G.R. No. 162734, 500 SCRA 128, 134 (2006) (citing The Child and Youth Welfare Code [CHILD & YOUTH WELFARE CODE], Presidential Decree No. 603, art. 8 (1974)).

told, no compelling reason has been adduced to wrench the child from the mother's custody."[103]

49.4. *In the Matter of Application for the Issuance of a Writ of Habeas Corpus*,[104] where the Court cited the CRC as the basis for its ruling that Republic Act No. 8369 (R.A. 8369)[105] did not divest the CA of jurisdiction despite R.A. 8369 explicitly stating that family courts have exclusive original jurisdiction over petitions for habeas corpus.[106] The Court stated that "a literal interpretation of the word 'exclusive' will result in grave injustice and negate the policy 'to protect the rights and promote the welfare of children' under the Constitution and the [UN CRC]."[107]

50. These decisions, having referred to the CRC, are part of the legal system in accordance with Article 8 of the Civil Code, which states that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."[108]

51. Under Article 2 (1) of the CRC, the Philippines undertook to protect "each child within their jurisdiction [from] discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, [color], sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth*[,] *or other status*."[109]

52. The VCLT provides that a State party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[110]

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103. *Gamboa-Hirsch*, 527 SCRA at 384.

104. In the Matter of Application for the Issuance of a Writ of Habeas Corpus, G.R. No. 154598, 436 SCRA 550 (2004).

105. *See generally* An Act Establishing Family Courts, Granting Them Exclusive Original Jurisdiction over Child and Family Cases, Amending Batas Pambansa Bilang 129, as Amended, Otherwise Known as the Judiciary Reorganization Act of 1980, Appropriating Funds Therefor and for Other Purposes [Family Courts Act of 1997], Republic Act No. 8369 (1997).

106. *In the Matter of Application for the Issuance of a Writ of Habeas Corpus*, 436 SCRA at 555-57. *See* Family Courts Act of 1997, § 5 (b).

107. *In the Matter of Application for the Issuance of a Writ of Habeas Corpus*, 436 SCRA at 557 (citing Family Courts Act of 1997, § 2).

108. CIVIL CODE, art. 8.

109. CRC, *supra* note 16, art. 2, ¶ 1 (emphasis supplied).

110. VCLT, *supra* note 28, art. 27.

53. If the Court is minded to apply the CRC to this case, the Court has two paths of action.

I. The Nature of CRC Article 2 (1) in Domestic Law: The Later-in-Time Rule (lex posterior derogate priori)

54. The first is to declare Article 992 adopted in 1948 to have been overtaken by the treaty obligation under Article 2 (1) of the CRC under the later-in-time rule.

55. The Court has held that a treaty, once it becomes binding on the Philippines, partakes the nature of statute law.[111] As such, a subsequent statute accordingly supersedes an earlier statute under the later-in-time rule.[112]

56. The Court has recognized that treaties, and explicitly referring inter alia to the CRC, once ratified under Article VII, Section 21 of the Constitution,[113] is thus "transformed into municipal law that can be applied to domestic conflicts[,]"[114] to wit —

> Under the 1987 Constitution, international law can become part of the sphere of domestic law either by *transformation* or *incorporation*. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.
>
> Treaties become part of the law of the land through *transformation* pursuant to Article VII, Section 21 of the Constitution which provides that '[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.' Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts.[115]

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111. *Lantion*, 322 SCRA at 197.

112. *Id.*

113. *See* PHIL. CONST. art. VII, § 12.

114. Pharmaceutical and Health Care Association of the Philippines v. Duque III, G.R. No. 173034, 535 SCRA 265, 289 (2007) (citing JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 57 (2002)).

115. *Pharmaceutical and Health Care Association of the Philippines*, 535 SCRA at 289 (citing JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT (NOTES AND CASES) PART I (2005) & BERNAS, *supra* note 114, at 57).

57. The Court has further invoked the Incorporation Clause which "adopts the generally accepted principles of international law as part of the law of the land[,]"[116] to place treaty law on the same level as municipal law in the eyes of national courts —

> Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing *equal, not superior, to national legislative enactments* [... .][117]

58. The Incorporation Clause transforms international obligations into national law "and no further legislative action is needed to make such rules applicable in the domestic sphere."[118] Accordingly, the courts may enforce them directly without requiring domestic implementing legislation.[119]

59. Indeed, in a case involving the constitutionality of the Philippine maritime baselines law, the Court even suggested that the Philippines passing a law that contravenes a treaty (UN Convention on the Law of the Seas)[120] would have "adverse legal effects" and would constitute a breach of international law.[121]

60. Since treaties become equivalent to Philippine statute law, the Court has held that the treaty can be superseded by supervening legislation[122] —

> In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but, also, when it runs counter to an act of Congress*.[123]

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116. PHIL. CONST. art. II, § 2.

117. Philip Morris, Inc. v. Court of Appeals, G.R. No. 91332, 224 SCRA 576, 593 (1993) (citing JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 16 (4th ed. 1974)) (emphasis supplied).

118. *Lantion*, 322 SCRA at 196 (2000) (citing JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 12 (5th ed. 1992)).

119. *See* JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 60-61 (2009).

120. *See* United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (entered into force Nov. 16, 1994).

121. Magallona v. Ermita, G.R. No. 187167, 655 SCRA 476, 494 (2011).

122. *See* Ichong, et al. v. Hernandez, 101 Phil. 1155, 1190-91 (1957).

123. Gonzales v. Hechanova, G.R. No. L-21897, 9 SCRA 230, 243 (1963).

61. Moreover, Supreme Court decisions, including those based on treaties, "form part of the legal system of the Philippines."[124]

J. Effect of the Treaty Obligations Under the CRC on the Equal Protection Clause of the Constitution: Triggering Heightened Scrutiny

62. The second use of the CRC in this case is to rely upon it to trigger heightened scrutiny under the Equal Protection Clause because it relies on impermissible criteria. Those criteria can be found infra in the Constitution (e.g., on the basis of gender, religion, or against members of indigenous cultural communities)[125] or in international treaties valid and binding in the Philippines (e.g., the CRC).

63. Accordingly, the Court can find that discrimination against illegitimate children in their successional rights is based on a classification on the basis of "birth or other status" under Article 2 (1) of the CRC,[126] and thus triggers intermediate scrutiny under the Equal Protection Clause.

64. The Court has the power directly to strike down Article 992 under the Equal Protection Clause of the Constitution —

> SECTION 5. The Supreme Court shall have the following powers:
>
> (2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> (a) *All cases in which the constitutionality or validity* of any treaty, international or executive agreement, *law*, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.[127]

65. The Author starts with the fundamental principle, long affirmed by the Court, that "the 'equal protection' clause does not prevent Congress from establishing classes of individuals or objects upon which different rules shall operate [—] so long as the classification is not unreasonable."[128]

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124. CIVIL CODE, art. 8.

125. *See* PHIL. CONST. art. II, § 14 & 22 & art. III, § 5.

126. CRC, *supra* note 16, art. 2, ¶ 1.

127. PHIL. CONST. art. VIII, § 5 (2) (a) (emphases supplied).

128. Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, 343 (2004).

66. Furthermore, the Court held in *JMM Promotion and Management, Inc. v. Court of Appeals*[129] —

> We have held, time and again, that the equal protection clause of the Constitution does not forbid classification for so long as such classification is based on real and substantial differences[,] having a reasonable relation to the subject of the particular legislation. If classification is germane to the purpose of the law, concerns all members of the class, and applies equally to present and future conditions, the classification does not violate the equal protection guarantee.[130]

67. Even when such classifications lead to differential treatment, it can be valid under the Equal Protection Clause, using the "minimum test of rationality" —

> The classification is considered valid and reasonable provided that
>
> (1) it rests on substantial distinctions;
>
> (2) it is germane to the purpose of the law;
>
> (3) it applies, all things being equal, to both present and future conditions; and
>
> (4) it applies equally to all those belonging to the same class.[131]

68. Another test of judicial review is the strict scrutiny test which "applies when a classification either[:] (i) interferes with the exercise of fundamental rights, including the basic liberties guaranteed under the Constitution[;] or (ii) burdens suspect classes."[132] The Court has applied this test to issues involving the right to privacy,[133] the right to liberty,[134] and the freedom of religion.[135]

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129. JMM Promotion and Management, Inc. v. Court of Appeals, G.R. No. 120095, 260 SCRA 319 (1996).

130. *Id.* at 331-32.

131. British American Tobacco v. Camacho, G.R. No. 163583, 562 SCRA 511, 549 (2008) (citing Government Service Insurance System v. Montesclaros, G.R. No. 146494, 434 SCRA 441, 451-52 (2004)).

132. *Samahan ng mga Progresibong Kabataan (SPARK)*, 835 SCRA at 410-11 (citing *Central Bank Employees Association*, 446 SCRA at 491-94).

133. *See generally* Ople v. Torres, G.R. No. 127685, 293 SCRA 141 (1998).

134. *See generally* White Light Corporation v. City of Manila, G.R. No. 122846, 576 SCRA 416 (2009).

135. *See generally* Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1 (2003).

69. However, a third standard of review, which lies between the deferential "minimum test of rationality" and "strict scrutiny" is "heightened scrutiny."

70. The Court also calls this third tier of equal protection review "intermediate standard" of review —

> [I]n some areas the *modern Court* has put forth standards for equal protection review that, while clearly more intensive than the deference of the 'old' equal protection, are less demanding than the strictness of the 'new' equal protection. Sex discrimination is the best established example of an '*intermediate*' *level of review*. Thus, in one case, the Court said that 'classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives.' That standard is 'intermediate' with respect to both ends and means[,] where ends must be 'compelling' to survive strict scrutiny and merely 'legitimate' under the 'old' mode, 'important' objectives are required here; and where means must be 'necessary' under the 'new' equal protection, and merely 'rationally related' under the 'old' equal protection, they must be 'substantially related' to survive the 'intermediate' level of review.[136]

Accordingly,

> Congress retains its wide discretion in providing for a valid classification, and its policies should be accorded recognition and respect by the courts of justice except when they run afoul of the Constitution. *The deference stops where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution. When these violations arise, this Court must discharge its primary role as the vanguard of constitutional guaranties, and require a stricter and more exacting adherence to constitutional limitations*. Rational basis should not suffice.[137]

71. Under the heightened scrutiny test, the legislative purpose must be "important" (not merely "legitimate") and the means chosen must be "substantially related" (not merely rationally related).[138]

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136. *Central Bank Employees Association*, 446 SCRA at 373-74 (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98-99 (1973) (J. Marshall, dissenting opinion)).

137. Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, 618 SCRA 32, 88 (2010) (J. Puno, concurring opinion) (citing *Central Bank Employees Association*, 446 SCRA at 386-87).

138. *Central Bank Employees Association*, 446 SCRA at 373-74 (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98-99 (1973) (J. Marshall, dissenting opinion)).

72. What triggers heightened scrutiny? There are many "triggers," *inter alia*,

    (1) when the criteria for classification is "suspect" (e.g., on the basis of race, creed, or gender);[139]

    (2) when it burdens or excludes vulnerable groups (e.g., children, ethnic or linguistic minorities, or indigenous peoples);[140] or

    (3) when it burdens or eviscerates fundamental rights (e.g., freedom of worship, of speech[,] and of expression);[141] and the right to marry.[142]

73. The Court is not limited to the traditional "suspect classification" of race or gender, and has broadly abjured the minimum test of rationality even for classification on the basis of income.[143] Unlike the U.S., our jurisprudence allows the use of strict scrutiny not only in suspect classifications such as race or gender but even classification drawn along income categories. While Congress is given a wide discretion as to provide valid classification, "the deference stops where the classification violate[d] a fundamental right, or prejudices persons accorded special protection by the Constitution."[144]

74. In *Ang Ladlad*, Chief Justice Reynato S. Puno proposed that heightened scrutiny is triggered:

    (1) When the excluded group has suffered a "history of purposeful unequal treatment[,]" suggesting that the exclusion "more likely

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139. *Ang Ladlad LGBT Party*, 618 SCRA at 63-64 (citing JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 139-40 (2009)).

140. *See generally Ang Ladlad LGBT Party*, 618 SCRA at 112-13 (J. Corona, dissenting opinion) (citing Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, 359 SCRA 698, 722 (2001)).

141. The Diocese of Bacolod v. Commission on Elections, G.R. No. 205728, 747 SCRA 1, 174 (2015) (J. Perlas-Bernabe, concurring opinion).

142. *See generally Manalo*, 862 SCRA at 609.

143. *See* Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 255, 280 (2009).

144. *Central Bank Employees Association*, 446 SCRA at 386-87 (J. Puno, concurring opinion) (emphasis omitted).

... reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective[;]"[145]

(2) When the classification "bears no relationship to th[e] ability ... to contribute to society ... indicat[ing that] the classification is likely based on irrelevant stereotypes and prejudice[; and]"[146]

(3) "[W]hether the attribute or characteristic that distinguishes them is immutable or otherwise beyond their control[,]"[147] because this violates the "basic concept of our system that legal burdens should bear some relationship to individual responsibility.[ ]"[148]

75. The Author respectfully submits that all three criteria are satisfied and thus call for the application of heightened scrutiny of Article 992.

76. For the above same reasons, other laws that distinguish between the rights of legitimate and illegitimate children are discriminatory. Included herein is Article 175 in relation to Article 172 of the Family Code which requires that in proving filiation, illegitimate children must bring the action based on the second paragraph of Article 172 "during the lifetime of the alleged parent[.]"[149] In contrast, legitimate children may bring the action during their own lifetime.[150]

77. In the case of *Central Bank Employees Association v. Bangko Sentral ng Pilipinas*,[151] Justice Conchita Carpio-Morales, in her dissenting opinion, citing *Clark v. Jeter*,[152] indicated that "[t]he U.S. Supreme Court has generally applied [i]ntermediate or [h]eightened [s]crutiny when the

145. *Ang Ladlad LGBT Party*, 618 SCRA at 99-100 (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973) & Varnum v. Brien, 763 N.W. 2d 862, 890 (Iowa 2009) (U.S.)).

146. *Ang Ladlad LGBT Party*, 618 SCRA at 100 (citing *Varnum*, 763 N.W. 2d at 890).

147. *Ang Ladlad LGBT Party*, 618 SCRA at 102 (citing Kerrigan v. Commissioner of Public Health, 135, 957 A.2d 407, 436 (Conn. 2008) (U.S.)).

148. *Ang Ladlad LGBT Party*, 618 SCRA at 102 (citing *Varnum*, 763 N.W.2d at 892).

149. FAMILY CODE, art. 175.

150. *Id.* art. 173.

151. *Central Bank Employees Association*, 446 SCRA.

152. Clark v. Jeter, 468 U.S. 456 (1988).

challenged statute's classification is based on either (1) gender or (2) illegitimacy."[153]

78. Justice Carpio-Morales emphasized that classifications which do not provide any "sensible ground for differential treatment" are presumed unconstitutional.[154] Citing *City of Cleburne, Texas v. Cleburne Living Center*,[155] the dissent pointed out —

> '[W]hat differentiates sex from such non[-]suspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.' [...]. Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways[,] very likely reflect outmoded notions of the relative capabilities of men and women.
>
> In the same manner, classifications based on illegitimacy are also presumed unconstitutional as illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society. Similar to [s]trict [s]crutiny, the burden of justification for the classification rests entirely on the government. Thus, the government must show at least that the statute serves an important purpose and that the discriminatory means employed is substantially related to the achievement of those objectives.[156]

79. Furthermore, classifications based on illegitimacy are discriminatory under "the more general proposition that it is unjust to treat a person as morally inferior to another by virtue of any morally irrelevant trait[,] or for government to take action[,] predicated on the view that a person is inferior to another by virtue of *any* morally irrelevant trait."[157]

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153. *Central Bank Employees Association*, 446 SCRA at 503 (J. Carpio-Morales, dissenting opinion) (citing *Clark*, 468 U.S. at 461).

154. *Central Bank Employees Association*, 446 SCRA at 503 (J. Carpio-Morales, dissenting opinion).

155. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985).

156. *Central Bank Employees Association*, 446 SCRA at 504 (J. Carpio-Morales, dissenting opinion) (citing *City of Cleburne, Texas*, 473 U.S. at 440-41 (citing Frontiero v. Richardson, 441 U.S. 667, 668 (1973); Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); & United States v. Virginia, 518 U.S. 515, 533 (1996))).

157. Santiago, *supra* note 3, at 3 (citing Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1031, 1051 (1979)).

80. Classification of children according to their status of birth is unjust, given that children do not have any say or sway in the conduct of their parents or circumstances of their birth. Thus, a law that makes a distinction between the position of legitimate and illegitimate children in respect to their successional rights is invidiously discriminatory.

81. Accordingly, the Court can find that Article 992, which prohibits illegitimate children from inheriting by representation from their grandparents if the parent they are representing is legitimate, is a classification on the basis of "birth or other status" under the CRC Article 2 (1),[158] and thus triggers heightened scrutiny under the Equal Protection Clause.[159]

K. Conclusions

82. It is most respectfully submitted that the discriminatory effects of Article 992 of the Civil Code of the Philippines be recognized by the Honorable Court but, in keeping faith with the constitutional separation of powers and the Court's judicial precedents, reform of the successional rights of illegitimate children may be left to corrective action via legislation.

83. Nonetheless, should the Court be minded to take the path of judicial activism, the Court can hold that the exclusion of illegitimate children under Article 992 constitutes impermissible discrimination on the basis of "birth or other status" under Article 2 (1) of the CRC,[160] and thus triggers heightened or intermediate scrutiny under the Equal Protection Clause. Applying that standard of review, the Court can determine that the classification does not sufficiently advance any substantial governmental interest in excluding illegitimate children from certain successional rights, and strike down Article 992 as unconstitutional as applied in this case.

84. Finally, the Court can declare that, under the later-in-time rule, Article 992 of the Civil Code of the Philippines, Republic Act No. 386 of 1949 has been superseded and repealed by the CRC, approved by the Senate on 21 August 1990.

158. *See* CRC, *supra* note 16, art. 2, ¶ 1.

159. *See* PHIL. CONST. art. III, § 1.

160. CRC, *supra* note 16, art. 2, ¶ 1.

Respectfully submitted.

Diliman, Quezon City. 7 October 2019.

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II. Oral Arguments Transcript

Oral Arguments on Inheritance Rights

3 September 2019

Supreme Court of the Philippines

G.R. No. 208912 (Amadea Angela K. Aquino v. Rodolfo C. Aquino and Abdulah C. Aquino) and G.R. No. 209018 (Rodolfo C. Aquino v. Amadea Angela K. Aquino)

(Partial Transcript)

Justice Ramon Paul Hernando: Good afternoon, Professor Pangalangan.

Professor Elizabeth Aguiling-Pangalangan: Good afternoon, Your Honor.

Justice Hernando: I am so struck by the statistics of the PSA. It is the first time I came to know that we now have more non-marital children in our country than marital ones.

Professor Aguiling-Pangalangan: Yes, Your Honor.

Justice Hernando: And what is the significance of that? At least from or in relation to the case that we are now hearing, Professor? Does it have any bearing?

Professor Aguiling-Pangalangan: Yes, Your Honor[.] [Definitely,] Your Honor. What I tried to show in my memorandum that I filed with the Court yesterday is that if the purpose of Article 992 and other provisions [—] which treat the rights of legitimate and illegitimate children or marital and non-marital children [—] is to promote the institution of marriage ... traditional family, [and] ... legitimate family relations. [Then,] we should look at how many, in fact, have been deterred from entering into sexual relations outside of wedlock in order to promote the traditional marriage set-up, and how many have avoided entering unmarried cohabitation for fear that one day, their children who are born outside of wedlock, will not enjoy successional rights and other rights from the former's legitimate relatives, Your Honor. And so I went into statistics and was myself surprised that more than half of those born in 2017, which is the latest data of the [PSA], were born out of wedlock.

Therefore, Your Honor, I posited the view that[,] in this context, the legal and societal disadvantages suffered by illegitimate children have not sufficiently deterred unmarried couples from creating them. Therefore, Article 992 of the Civil Code and other provisions such as Article 175 of the Family Code that deny illegitimate children rights merely because of their status do not achieve any state interest and is inconsistent with our treaty obligations, Your Honor.

Justice Hernando: The bigger number of non-marital children as shown by statistics, would that also be reflective of a change in societal attitudes, with respect to marital children, on one hand, and non-marital children? Meaning that, is it safe to assume based on these statistics that now it is more acceptable? Our society is more than willing to accept non-marital children as human beings equal in the eyes of the law and of God and of everything else that stands in our Universe?

Professor Aguiling-Pangalangan: I believe so, Your Honor[.] [People in the] 21st century, Philippines included, now [have] more open mind[s] about non-marital children. Although[,] that is not to say that they are not stigmatized at all. I think that at present ... illegitimate children or non-marital children still suffer some stigma. But at the same time[,] there is a bit more openness about

it. Perhaps from the sheer number of non-marital children that we have, there has to be some acceptance of them.

Justice Hernando: A Supreme Court ruling granting this petition would go a long way towards giving these children equal rights with the marital ones?

Professor Aguiling-Pangalangan: Yes, Your Honor.

Justice Hernando: I mentioned during my questionings [—] with respect to Dean Cynthia [—] about the Supreme Court of Japan Grand Bench ruling in 2013. [I]nterestingly, [ ] Saiko Saibansho of Nippon did not hew to [U.S.] jurisprudence. They built ... their 2013 jurisprudence, based on their own societal standards. [A]nd [the] number one standard was [ ] public opinion ... . And secondly, that international law where there is a modern trend towards giving equal rights to non-marital children similar to what marital children have, was also factored in by the Saiko Saibansho of Japan. In our jurisprudence, we have applied the heightened scrutiny test. When it comes to striking down discriminatory statutes ... .

Professor Aguiling-Pangalangan: Yes, Your Honor.

Justice Hernando: ... But in the [U.S.] in fact, they applied, I believe, [a less rigid counterpart to] the strict scrutiny test that our Court has applied in the past. This is the intermediate scrutiny test that the [U.S.] Supreme Court applied in Clark in 1988, [m]uch later than *Llewellyn*. And according to this test, it is enough that there is a substantial relation to the classification vis-[à]-vis a valid government objective. Now, in this case, is there any valid government objective if we uphold the constitutionality of Article 992?

Professor Aguiling-Pangalangan: Your Honor, I can only speculate based also on what was earlier decided in *Diaz*, the presumed enmity or antagonism between the legitimate and illegitimate lines in the family that the government interest or government purpose behind this law is again to promote marriage as an institution and to protect the legitimate family relationships. But I think that if this is the state interest, that is a legitimate, in fact an important state interest. But my problem ... .

Justice Fernando: But would there be a substantial relation ... .

Professor Aguiling-Pangalangan: Yes.

Justice Hernando: ... to that government objective ... .

Professor Aguiling-Pangalangan: No, there wouldn't.

Justice Hernando: Because we are talking about successional rights of a non-marital child.

Professor Aguiling-Pangalangan: Yes, Your Honor.

Justice Hernando: It has nothing to do with the marital status of the parent?

Professor Aguiling-Pangalangan: That is right, Your Honor.

Justice Hernando: Isn't it?

Professor Aguiling-Pangalangan: Yes, Your Honor, there is no substantial relationship especially since if the reason for Article 992 is to show this approval for illicit liaisons between adults then the children that they may produce should not have to bear the burden of this unlawful act. So there is no substantial relation between or there is no fit between the measure, between the law and an avowed government interest, Your Honor.

Justice Hernando: I fully agree. You're proposing a dual approach to Article 992. And it is that either this Court that strikes down this provision ... .

Professor Aguiling-Pangalangan: Yes, Your Honor.

Justice Hernando: ... and as I would like to use my own phrase "obnoxious vestige of empire days" as unconstitutional or we leave it up to Congress to come up with remedial legislation. Which is the safer and prudent approach do you think, Professor?

Professor Aguiling-Pangalangan: Well[,] Your Honor, I am ... .

Justice Hernando: Shall we take the role of judicial activism?

Professor Aguiling-Pangalangan: Your Honor, that will be [dependent] on the political orientation of the members of the Court. The Court in long line of cases has done that. They have chosen, the members of the Court, have chosen to correct deficient legislation. For instance, what comes into my mind right away would be, although it is not in by my submission, the *Molina* case. The psychological incapacity where Article 36 is rather vague and *Molina* instead identified guidelines. So the Court plugged in a huge gaping hole in the law and it was based on these guidelines that several decisions of the [C]ourt were based.

But on the other hand, Your Honor, I likewise, proffer the possibility of the Court merely identifying that this is a law that is deficient, at the very least. And therefore, as it did for instance in the *People v. Genosa* case, and I have a number of cases that I cited in my memorandum, that the Court instead says, that well there is something wrong with the law or all that we have in the Revised Penal Code is self-defense. The battered woman syndrome does not appear in our Revised Penal Code and therefore Congress should pass a law. And we have to wait for Congress, and soon after, Congress did pass a law. So that it depends, Your Honor, and I leave it to the wisdom of the Court to decide which way. But what is clear to me, Your Honor, is that this law has to be changed.

Justice Hernando: Thank you so much for your presence and time, Professor.

Professor Aguiling-Pangalangan: Thank you, Your Honor.

Justice Hernando: Thank you, Mr. Chief Justice.