Discrimination in Social Legislation: Is There State Protection for the Modern Family?

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I. INTRODUCTION

The concept of social justice under the Constitution is best encapsulated by the tenet popularized by President Ramon Magsaysay — that "[t]hose who have less in life should have more in law[.]"[1] "It commands a legal bias in favor of those who are underprivileged."[2]

The promotion of social justice is one of the urgent mandates of the State. This is exemplified by the fact that, in addition to being included in the Declaration of Principles and State Policies,[3] an entire article under the Constitution is devoted to it.[4] However, unlike the guarantees of civil and political rights found in the Bill of Rights which are self-executory, *social rights* are generally in the "nature of claims or demands which people expect

1. Senate of the Philippines, Senator Ramon B. Magsaysay, Jr., *available at* https://www.senate.gov.ph/senators/sen_bio/magsaysay_bio.asp (last accessed Aug. 15, 2020).

2. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1237 (2009 ed.) [hereinafter BERNAS, THE 1987 CONSTITUTION].

3. PHIL. CONST. art. II, § 10.

4. *See* PHIL. CONST. art. XIII.

government to satisfy, or they are ideals which government is expected to respect."[5] Hence, their satisfaction "depend[s] on legislation."[6] In this regard, Congress is mandated by the Constitution to "give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."[7] According to the eminent constitutionalist, Fr. Joaquin G. Bernas, S.J., the "choice of the expression '*highest priority*' is deliberate"[8] because it means that Congress is expected "not just [to] exercise [ ] day to day police power but [ ] powers needed to achieve radical social reform of critical urgency."[9] The areas to which Congress must give highest priority include "diffusi[on] of [economic] wealth ... labor, agrarian and natural resources reform, urban land and housing reform, health delivery systems, protection of women, voluntary people's organizations, and structures for the protection of human rights."[10]

In fulfillment of its mandate, Congress has passed several laws that deal with social justice. Among these laws, which shall be the focus of this Article, are: (1) Republic Act No. 1161, otherwise known as the Social Security Law (SSS Law),[11] (2) Republic Act No. 8291 or the Government Service Insurance System Act (GSIS Law),[12] (3) Republic Act No. 7875 or

5. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 1238.

6. *Id.*

7. PHIL. CONST. art. XIII, § 1.

8. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 1238-39 (citing 2 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 48, at 684 & NO. 49, at 736 & 739-40 (1986)) (emphasis supplied).

9. *Id.*

10. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 1239.

11. An Act Further Strengthening the Social Security System Thereby Amending for this Purpose Republic Act No. 1161, as Amended, Otherwise Known as the Social Security Law [Social Security Act of 1997], Republic Act No. 8282 (1997) & An Act to Create a Social Security System Providing Sickness, Unemployment, Retirement, Disability and Death Benefits for Employees [Social Security Act of 1954], Republic Act No. 1161 (1954) (as amended).

12. An Act Amending Presidential Decree No. 1146, as Amended, Expanding and Increasing the Coverage and Benefits of the Government Service Insurance System, Instituting Reforms Therein and for Other Purposes [Government Service Insurance System Act of 1997], Republic Act No. 8291 (1997).

the National Health Insurance Act (PhilHealth Law),[13] and (4) Republic Act No. 9679 or the Home Development Mutual Fund Law (PAG-IBIG Law).[14] These laws may be collectively termed as *social protection laws* which "encompass all public interventions that help individuals, households, and communities to manage risk or that provide support to the critically poor."[15] These laws provide various kinds of protection and benefits to its members and their dependents and/or beneficiaries such as disability benefits, sickness benefits, death benefits, funeral benefits, pension, health insurance, and housing programs.

A common feature of these laws is that they represent systems wherein membership has been declared mandatory for employers and employees in the public and private sectors.[16] Even those outside the employer-employee category, such as the self-employed, may also be members either on a voluntary or mandatory basis.[17] Another common feature of these laws is that they already define who can be the member's beneficiaries and dependents. These are enumerated as follows:

> For the SSS Law, Section 8 (e) provides —
>
> The dependents shall be the following:
>
> (1) The legal spouse entitled by law to receive support from the member;
>
> (2) The legitimate, legitimated, or legally adopted, and illegitimate child who is unmarried, not gainfully employed and has not reached twenty- one years (21) of age, or if over twenty- one (21) years of age, he is congenitally or while still a minor has been permanently incapacitated and incapable of self-support, physically or mentally; and

13. An Act Instituting a National Health Program for all Filipinos and Establishing the Philippine Health Insurance Corporation for the Purpose [National Health Insurance Act of 1995], Republic Act No. 7875 (1995).

14. An Act Further Strengthening the Home Development Mutual Fund, and for Other Purposes [Home Development Mutual Fund Law], Republic Act No. 9679 (2009).

15. THE WORLD BANK GROUP, SOCIAL PROTECTION SECTOR STRATEGY: FROM SAFETY NET TO SPRINGBOARD ix (2001 ed.).

16. Social Security Act of 1997, § 9 (as amended); Government Service Insurance System Act of 1997, § 3; National Health Insurance Act of 1995, § 6; & Home Development Mutual Fund Law, § 6.

17. For instance, Section 9 of the SSS Law provides those who may opt to be included in the coverage. Social Security Act of 1997, § 9 (as amended).

(3) The parent who is receiving regular support from the member.[18]

Section 8 (k) of the same law provides the definition of *beneficiaries* as

> [t]he dependent spouse until he or she remarries, the dependent legitimate, legitimated or legally adopted, and illegitimate children, who shall be the primary beneficiaries of the member: Provided, That the dependent illegitimate children shall be entitled to fifty percent (50%) of the share of the legitimate, legitimated or legally adopted children: Provided, further, That in the absence of the dependent legitimate, legitimated or legally adopted children of the member, his/her dependent illegitimate children shall be entitled to one hundred percent (100%) of the benefits. In their absence, the dependent parents who shall be the secondary beneficiaries of the member. In the absence of all of the foregoing, any other person designated by the member as his/her secondary beneficiary.[19]

Under Section 2 (f) of the GSIS Law,

> Dependents shall be the following: (a) the legitimate spouse dependent for support upon the member or pensioner; (b) the legitimate, legitimated, legally adopted child, including the illegitimate child, who is unmarried, not gainfully employed, not over the age of majority, or is over the age of majority but incapacitated and incapable of self-support due to a mental or physical defect acquired prior to age of majority; and (c) the parents dependent upon the member for support[.][20]

The same Section provides the following:

> (g) Primary beneficiaries [—] The legal dependent spouse until he/she remarries and the dependent children;
>
> (h) Secondary beneficiaries [—] The dependent parents and, subject to the restrictions on dependent children, the legitimate descendants[.][21]

Section 4 (a) of the PhilHealth Law, as amended, defines a *beneficiary* as "[a]ny person entitled to health care benefits under this Act."[22] Section 4 (f) of the same law defines the *legal dependents* of a member, as follows:

(1) the legitimate spouse who is not a member;

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18. *Id.* § 8 (e).

19. *Id.* § 8 (k).

20. Government Service Insurance System Act of 1997, § 2 (f).

21. *Id.* § 2 (g) & (h).

22. National Health Insurance Act of 1995, § 4 (a).

(2) the unmarried and unemployed legitimate, legitimated, illegitimate, acknowledged children as appearing in the birth certificate; legally adopted or stepchildren below twenty-one (21) years of age;

(3) children who are twenty one (21) years old or above but suffering from congenital disability, either physical or mental, or any disability acquired that renders them totally dependent on the member for support;

(4) the parents who are sixty (60) years old or above whose monthly income is below an amount to be determined by the Corporation in accordance with the guiding principles set forth in Article I of this Act.[23]

Under the PAG-IBIG Law, Section 4 simply states that *dependents* "[refer] to legal dependents of a deceased member, as defined under the Family Code."[24] As for the *beneficiaries*, Rule III, Section 1 of its Implementing Rules and Regulations (IRR) provides that they are the "[p]erson or persons who are entitled to receive the member's [benefits] arising from the death of the member who shall be the heirs, as provided for under the Civil Code of the Philippines, of said member."[25]

While the lists of beneficiaries and dependents vary among the laws, they are similar in the sense that the premise of their relationship with the member is primarily by blood or marriage.

At first glance, it may seem that these laws comply with the social justice mandate enshrined in the Constitution. However, upon closer scrutiny, it becomes apparent that the way these laws define who can be dependents and beneficiaries of its members effectively excludes certain classes of people who do not fit the categories provided by law. Since protection is afforded only for the *bona fide* member's designated dependents or beneficiaries, this becomes discriminatory for the so-called *non-conventional families* or the *modern family* whose members do not fit the definition provided by law because their choice of dependents and beneficiaries are unduly restricted. As will be used in this Article, *non-conventional family* or *modern family* refers to a group of at least two persons who form a familial bond and consider each other as family but are outside the category of having two heterosexual married individuals who may or may not have children. These include

23. *Id.* § 4 (f).

24. Home Development Mutual Fund Law, § 4 (d).

25. Rules and Regulations Implementing the Home Development Mutual Fund Law, Republic Act No. 9679, rule III, § 1 (a) (2009).

unmarried heterosexual and homosexual couples (and their children, if any) living together as family. As a result of the rigid definitions of dependents and beneficiaries, these laws systematically deprive these persons of social protection that are otherwise provided for others, leading to their further marginalization.

Undeniably, Philippine laws have a certain bias in favor of marriage. However, while marriage is indeed an "inviolable social institution,"[26] this should not mean that those who are not bound by marriage, but nonetheless consider themselves as family, should be denied certain rights, especially under social legislation which is meant to benefit *all* citizens. While this Article will not challenge the institution of marriage *per se*, it will nonetheless seek to show the bias of the State towards marriage, and how, in the particular area of social legislation, it becomes discriminatory against non-conventional families.

This resulting discrimination clearly goes against the equal protection clause enshrined in the Bill of Rights, which states that "nor shall any person be denied the equal protection of the laws."[27] Based on jurisprudence, "equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others."[28] Nonetheless, "[i]t is [also] an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification."[29] "[T]he classification, to be reasonable[:] (1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class."[30]

As will be laid down in this Article, the way the cited social protection laws define who can be beneficiaries and dependents creates classifications which do not rest on substantial distinctions and are not germane to the

26. PHIL. CONST. art. XV, § 2.

27. PHIL. CONST. art. III, § 1.

28. Philippine Judges Association v. Prado, 227 SCRA 703, 712 (1993).

29. People v. Cayat, 68 Phil. 12, 18 (1939).

30. *Id.* (citing Borgnis v. Falk Co., 147 Wis. 327 (1911) (U.S.); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919); & People v. Vera., 65 Phil. 56 (1937)).

purposes of the law on social justice.[31] Equal justice "requires the [S]tate to govern impartially, and it may not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective."[32]

In addition to violating the Equal Protection Clause, this Article will also explain how the State violates the right to social security of those persons excluded by the laws. The right to social security has long been recognized in international law under various human rights instruments.[33] As a state party to these treaties and international instruments, the Philippines has an obligation to respect, protect, and fulfill the right of its citizens to social security.

Moreover, in evaluating the State's violation of the Equal Protection Clause, the right of the member to choose his or her beneficiary and dependents, as an aspect of privacy, must also be considered. As will be demonstrated in this Article, it is arguable that the protection that the Constitution gives to the family is not limited to the traditional family alone but encompasses other kinds of families.[34] In addition, various human rights instruments have affirmed every person's right to found a family.[35] This

31. The invalidity of the classification will be further discussed in the succeeding Chapters.

32. Biraogo v. Philippine Truth Commission of 2010, 637 SCRA 78, 167 (2010).

33. These are: (1) the Universal Declaration of Human Rights; (2) the International Covenant for Economic, Social, and Cultural Rights; (3) the Convention on the Elimination of All Forms of Discrimination Against Women; (4) the Convention on the Rights of the Child; (5) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) A (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; 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]; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; & International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW].

34. *See* PHIL. CONST. art. XV.

35. *See* UDHR, *supra* note 33, art. 16 (1) & The International Covenant on Civil and Political Rights art. 23, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

reflects the principle that family relations is one of the fundamental aspects of a person's life, hence it belongs to a sphere of privacy that the government may not unjustifiably intrude in.

Whoever a person chooses to establish a family with is a decision that goes into the core of his or her right to privacy and the State must respect such a choice. However, in examining the social protection laws, it seems that the State has put an undue burden on non-traditional families by excluding them from its coverage, which may be considered an infringement on a member's right to decisional privacy.

The reality is that what constitutes a family differs across society. This reality does not warrant the State to exclude certain families from the protection and coverage of social legislation. In this modern age, the State should not ignore the existence of families which do not fit the conventional and traditional definition of a family (i.e., having a married mother and father and their children). The State should recognize and accept that more and more people are part of unions that do not depend on marriage but who nonetheless consider themselves as family. This does not mean that marriage should be discouraged. This is only to emphasize that, as will be discussed later, there are many Filipinos who do not get married for valid reasons, whether it is by *choice* as for some opposite-sex couples, or because they are *prevented* from doing so as for same-sex couples.

Philippine laws should begin to reflect the existence of diverse kinds of relationships and not merely assume that all people conform to the conventional definition of a family. For it is only in recognition that the State can truly attain its mandate of respecting equality and promoting social justice for all.

II. THE RIGHT TO SOCIAL SECURITY UNDER INTERNATIONAL LAW

International law has long recognized the right to social security.[36] In 1944, the human rights dimensions of social security were stated in the *Declaration of Philadelphia* which called for the "extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care."[37] Years later, social security was recognized as a human right

36. U.N. Econ & Soc. Council, *General Comment No. 19: The right to social security (art. 9)*, ¶ 9, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) [hereinafter General Comment No. 19].

37. *Id.* ¶ 6 (citing Declaration Concerning the Aims and Purposes of the International Labor Organisation III (f), *adopted* May 10, 1944, 15 U.N.T.S. 104).

in the Universal Declaration of Human Rights (UDHR).[38] The right was then subsequently incorporated in a range of international human rights treaties as well as regional human rights treaties, some of which will be discussed below.[39]

A. Various Human Rights Instruments on the Right to Social Security

On 10 December 1948, the United Nations (U.N.) General Assembly adopted the UDHR[40] as a response by the international community to the atrocities of the Second World War.[41] The UDHR is composed of 30 Articles covering a wide range of rights and fundamental freedoms and it is "generally agreed to be the foundation of international human rights law."[42]

The right to social security is enshrined in Article 22 of the UDHR, which states —

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[43]

38. UDHR, *supra* note 33, art. 22.

39. General Comment No. 19, *supra* note 35, ¶ 6 (citing International Convention on the Elimination of All Forms of Racial Discrimination art. 5 (e) (iv), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; CEDAW, *supra* note 33, art. 11, para. 1 (e) & art. 14, para. 2 (c); & CRC, *supra* note 33, art. 26). *See also* American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. XVI, O.A.S. Doc. OEA/Ser.L/V/I.4 Rev. (May 2, 1948); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", art. 9, A-52 (Nov. 16, 1999); & European Social Charter (revised), arts. 12, 13, & 14, *opened for signature* May 3, 1996, 529 U.N.T.S. 89 (these international documents explicitly mention the right to social security).

40. UDHR, *supra* note 33.

41. United Nations, History of the Document, *available at* https://www.un.org/en/sections/universal-declaration/history-document/index.html (last accessed Aug. 15, 2020).

42. United Nations, The Foundation of International Human Rights Law, *available at* https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (last accessed Aug. 15, 2020).

43. UDHR, *supra* note 33, art. 22.

In addition, Article 25 (1) of the UDHR states —

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age[,] or other lack of livelihood in circumstances beyond his control.[44]

Eighteen years after its adoption, the U.N. solidified the aspirations of the UDHR into treaties as embodied in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[45] Together with the Optional Protocol to the ICCPR[46] and the Second Optional Protocol to the same Covenant as regards the abolition of the death penalty,[47] the UDHR, ICCPR, and ICESCR comprise the International Bill of Human Rights.[48]

"The rights specific to the [ICESCR] are social welfare rights stated in detail."[49] Article 9 of the ICESCR provides that "[t]he States Parties to the [ ] Covenant recognize the right of everyone to social security, including social insurance."[50] The right to social security under Article 9 was explained by the Committee on Economic, Social and Cultural Rights in General Comment No. 19, which will be discussed later.

Other than the International Bill of Human Rights, there are several core international human rights instruments covering specific members of society that also include the right to social security. These are: the Convention on the Elimination of All Forms of Discrimination Against

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44. *Id.* art. 25 (1).

45. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 251 (2009 ed.) [hereinafter BERNAS, PUBLIC INTERNATIONAL LAW].

46. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302.

47. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, *adopted* Dec. 15, 1989, 1642 U.N.T.S. 414.

48. Office of the High Commissioner for Human Rights, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights at ⋆1, *available at* https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (last accessed Aug. 15, 2020).

49. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 45, at 260.

50. ICESCR, *supra* note 33, art. 9.

Women (CEDAW);[51] the Convention on the Rights of the Child (CRC);[52] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).[53]

B. The Binding Force of Human Rights Instruments and the Obligation of the Philippines Under International Law

The Philippines is a state party to the ICESCR,[54] CEDAW,[55] CRC,[56] and ICRMW.[57] All these instruments are treaties, regardless of their nomenclature.[58] Under the Constitution, a treaty is not valid and effective without the concurrence of two-thirds of all the members of the Senate.[59]

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51. *See* CEDAW, *supra* note 33, art. 11.

52. *See* CRC, *supra* note 33, art. 26.

53. *See* ICRMW, *supra* note 33, art. 27.

54. The Philippines signed the ICESCR on 19 December 1966 and ratified the same on 7 June 1974. United Nations Treaty Collection, 3. International Covenant on Economic, Social and Cultural Rights, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last accessed Aug. 15, 2020).

55. The Philippines "signed [the CEDAW] on July 15, 1980 and ratified it on August 5, 1981." Philippine Commission on Women, Philippine participation to CEDAW, *available at* https://www.pcw.gov.ph/international-commitments/cedaw/philippine-participation (last accessed Aug. 15, 2020).

56. "The Philippines signed the [ ] CRC on January 26, 1990 ... [and] ratified [the same] on August 21, 1990." Philippine NGO Coalition on the UN CRC, Guide for Monitoring the UN CRC in the Philippines at 1, *available at* https://civilsocietyasia.org/uploads/resources/64/attachment/Guide%20for%20Monitoring%20the%20UN%20CRC%20in%20the%20Philippines.pdf (last accessed Aug. 15, 2020).

57. The Philippines signed the ICRMW on November 15, 1993 and ratified the same on July 5, 1995. United Nations Treaty Collection, 13. International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families at 1, *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-13.en.pdf (last accessed Aug. 15, 2020).

58. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 45, at 22. "Treaties can assume various names. They can be *conventions*, pacts, *covenants*, charters, protocols, concordat, modus vivendi, etc." *Id.* (emphases supplied).

59. PHIL. CONST. art. VII, § 21.

As a result of the Senate's concurrence with the ratification by the President, a treaty becomes binding on the Philippines.[60] Since the Philippines ratified the four instruments aforementioned, it bound itself to fulfill the obligations set forth therein. In *Agustin v. Edu*,[61] the Supreme Court held that "[i]t is not for this country to repudiate a commitment to which it had pledged its word. The concept of [*p*]*acta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality."[62] The meaning of *pacta sunt servanda* is contained in Article 26 of the Vienna Convention on the Law of Treaties, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[63]

The UDHR is only a declaration and not a treaty; hence, it is not considered as law but only as "a common standard for nations to attempt to reach. Its authority is primarily moral and political."[64] It also contains several generally accepted principles of international law, which according to Article II, Section 2 of the Constitution, form part of the law of the land.[65]

1. General Comment No. 19

All the international human rights instruments mentioned above uphold social security as a human right and the Philippines has an obligation under international law to ensure that its citizens enjoy this right.

In order to better understand the right to social security, the Committee on Economic, Social, and Cultural Rights (Committee) adopted General Comment No. 19 (General Comment) on 23 November 2007.[66] It explains

60. *See* Jose Eduardo E. Malaya III & Maria Antonina Mondoza-Oblena, *Philippine Treaty Law and Practice*, 85 PHIL. L.J. 505, 518-19 (2011).

61. Agustin v. Edu, 88 SCRA 195 (1979).

62. *Id*. at 213 (emphasis supplied).

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

64. BERNAS, *supra* note 45, at 251 (citing John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact, and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (B.D. Ramcharan ed., 1979)).

65. *See* Mejoff v. Director of Prisons, 90 Phil. 70, 73 (1951).

66. General Comment No. 19, *supra* note 36, at 1.

in detail the right to social security as stated in Article 9 of the ICESCR,[67] which may possibly be applied to the CEDAW, CRC, and ICRMW.

The General Comment states that

> the right to social security encompasses the right to access and maintain benefits ... *without discrimination* in order to secure protection, inter alia, from[:] (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.[68]

The General Comment gave several types of measures to be used in providing social security benefits, stressing that the wording of Article 9 cannot be narrowly defined, but in all instances should guarantee *all persons* a minimum enjoyment of this human right.[69]

Additionally, the General Comment also discusses the obligations of the States parties. For the *general legal obligations*, it states that even if the ICESCR provides for progressive realization and notes limitations in availability of resources, there are still obligations which are of an immediate nature, which include the right to social security and its exercise *without discrimination* of any kind.[70]

As for *specific legal obligations*, the General Comment states that like any other human right, the right to social security carries with it three types of obligations: (1) respect, (2) protect, and (3) fulfill.[71] The *obligation to respect* proscribes the States parties from directly or indirectly interfering "with the enjoyment of the right to social security."[72] This includes "refraining from engaging in any practice or activity [which] ... *denies or limits equal access* to adequate social security[.]"[73] The *obligation to protect* requires the "States parties [to] prevent third parties from interfering ... with the enjoyment of the right to social security."[74] As for the *obligation to fulfill*, the General Comment subdivided it into three more particular obligations: (1) the

67. ICESCR, *supra* note 50, art. 9.

68. General Comment No. 19, *supra* note 36, ¶ 2 (emphasis supplied).

69. *Id.* ¶ 4.

70. *Id.* ¶ 40.

71. *Id.* ¶ 43.

72. *Id.* ¶ 44.

73. *Id.* (emphasis supplied).

74. General Comment No. 19, *supra* note 36, ¶ 45.

obligation to facilitate, which "requires States [P]arties to take positive measures to assist individuals and communities to enjoy the right to social security[;]"[75] (2) the obligation to promote, which includes appropriate education and public awareness as regards access to social security services;[76] and (3) the obligation to provide, especially when *individuals or groups are unable to realize their own rights*.[77]

2. Compliance by the Philippines

Throughout the General Comment, the Committee always underscores the *principle of non-discrimination in social security*.[78] The Committee emphasizes that "[t]he obligation of [s]tates parties to guarantee that the right [of] social security is enjoyed *without discrimination* ... [and] *pervades all of the obligations*" under the ICESCR.[79] It is also a core obligation for States parties to "ensure the right of access to social security or schemes on a *non-discriminatory basis*[.]"[80]

In addition, the Philippines is also a party to the ICCPR by signing it on 19 December 1966 and ratifying it on 23 October 1986.[81] Among the central themes of this international instrument is equality and non-discrimination. Paragraph 1 of Article 2 states that

> [e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind,

75. *Id.* ¶ 48.

76. *Id.* ¶ 49.

77. *Id.* ¶ 50.

78. *See* General Comment No. 19, *supra* note 36.

79. *Id.* ¶ 29 (emphases supplied).

80. *Id.* ¶ 59 (b) (emphases supplied).

81. United Nations Treaty Collection, 4. International Covenant on Civil and Political Rights, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last accessed Aug. 15, 2020) & Commission on Human Rights of the Philippines & Dr. Christopher Ward, In Defense Of The Right To Life: International Law And Death Penalty In The Philippines at 4, *available at* http://regnet.anu.edu.au/sites/default/files/uploads/2017-03/In-Defense-of-the-Right-to-Life-IL-and-Death-Penalty-in-the-Philippines.pdf (last accessed Aug. 15, 2020).

> such as race, [color], sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.[82]

Article 26 of the same instrument similarly provides for the equality of everyone before the law and the proscription of discrimination based on the same grounds mentioned in Article 2.[83]

By the use of the term *other status*, it is clear that the list of prohibited grounds for discrimination is not exhaustive —

> *The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds* in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the *intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability*.[84]

While there is yet no clear guidance as to what falls in the category of *other status*, the UN Human Rights Committee has admitted communications alleging discrimination on the basis of marital status[85] and

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82. ICCPR, *supra* note 34, art 2, ¶ 1 (emphasis supplied).

83. *Id.* art. 26.

> All 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.

Id.

84. U.N. Econ. & Soc. Council, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 27, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter General Comment No. 20] (emphases supplied).

85. Judy Walsh & Fergus Ryan, The Rights of *De Facto* Couples (A Research Report Commissioned by the Irish Human Rights Commission) at 64, *available at*

sexual orientation,[86] among others. Also, in its comments on State Reports submitted to it, the Human Rights Committee has specified that Article 26 also encompasses *illegitimacy* and *family responsibility*.[87]

Although the ICCPR makes no mention of social justice or social security, the provisions of Article 26 may still be applicable in guaranteeing the right to social security. General Comment No. 18, which deals with Article 26 of the ICCPR, provides the following —

> While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, *article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right*. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. *Article 26 is therefore concerned with the obligations imposed on [s]tates parties in regard to their legislation and the application thereof.* Thus, when legislation is adopted by a [s]tate party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, *the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant*.[88]

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https://pdfs.semanticscholar.org/3305/bf2c1639657532621693 6c109364a6076306.pdf?_ga=2.113601089.718777649.1585067937-1466269901.1585067937 (last accessed Aug. 15, 2020) (citing L. G. Danning v. The Netherlands, Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2 at 205 (Apr. 9, 1987); Sprenger v. The Netherlands, Communication No. 395/1990, U.N. Doc. CCPR/C/44/D/395/1990 (Mar. 31, 1992); & Cornelis Hoofdman (represented by Mr. L. J. L. Heukels, a lawyer in Haarlem) v. the Netherlands, Communication No 602/1994, U.N. Doc. CCPR/C/64/D/602/1994 (Nov. 25, 1998)) [hereinafter Rights of De Facto Couples].

86. Rights of De Facto Couples, *supra* note 85, at 64.

87. *Id.* (citing U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant*, ¶ 30, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001) & U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 21, U.N. Doc. CCPR/CO/72/NET (Aug. 27, 2001)).

88. UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989) [hereinafter General Comment No. 18] (emphases supplied).

Due to the broad scope of the non-discrimination guarantee of the ICCPR, Article 26 has proved to be "significant with respect to individual communications by *de facto* couples. In particular[,] it has meant that a number of complaints addressing substantive issues such as social protection payments have been based solely on Article 26."[89] As such, the Philippines must ensure that in enacting social legislation, the principle of non-discrimination must be highlighted.

For the Philippines to be able to comply with its obligations under the ICESCR, ICCPR, as well as in other international instruments, it is essential that the scope of the law be broadened in order to accommodate persons belonging to all kinds of families. By excluding those that fall outside the traditional definition of the family, the State continues to be in breach of its obligations under international law.

III. SOCIAL JUSTICE UNDER PHILIPPINE LAW

It is said that the attempt to find security for people is one of "the oldest of political obligations and the greatest of the tasks of a [S]tate."[90] As such, "[a]ll nations of the world, whether highly developed, developing, or emerging, seek to achieve ... social security" for its citizens through legislation and government services.[91] The Philippines is no exception. It is understood that the concept of social justice encompasses the right to social security; hence a discussion of the former is necessary to understand the latter.

A. Evolution of Social Justice in the Constitution

During the drafting of the 1935 Constitution, the idea of social justice was developed to mean "[j]ustice to the common *tao*, the 'little man' so-called. It means justice to him, his wife, and children in relation to their employers in the factories, in the farms, in the mines, and in other employments."[92] This was quite similar with the idea of social justice under the 1973 Constitution.[93] While these former Constitutions focused on the notion of

89. Rights of De Facto Couples, *supra* note 85, at 65 (emphasis supplied).

90. HUGO E. GUTIERREZ JR., PHILIPPINE SOCIAL SECURITY: LAW AND PRACTICE 1 (1971).

91. *Id.*

92. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 77 (citing JOSÉ MAMINTA ARUEGO, 1 THE FRAMING OF THE PHILIPPINE CONSTITUTION 147 (1936)).

93. 1973 PHIL. CONST. art. II, § 6 (superseded 1987).

social justice in terms of economic equities,[94] the present Constitution goes beyond such notion, while "cover[ing] all phases of national development[,] with [focus] not [only] on socio-economic but also on political and cultural inequities."[95]

The drafters of the 1987 Constitution were aware that inequalities and injustices plagued the nation. The most serious problems faced by the Philippines can be traced back to a long-standing history of injustice to the underprivileged.[96] In her sponsorship speech for the proposed Article on Social Justice, Commissioner Ma. Teresa F. Nieva expressed their Committee's desire to make social justice the centerpiece of the new Constitution because "social justice provides the material and social infrastructure for the realization of basic human rights, the enhancement of human dignity[,] and effective participation in democratic processes. *Rights*, *dignity*[,] *and participation remain illusory without social justice*."[97]

As earlier mentioned, social justice is basically understood to mean that those who "have less in life should have more in law."[98] However, the Constitution did not provide a precise definition. In their discussions about the parameters of social justice, Commissioner Florenz D. Regalado mentioned what was considered to be a classic definition of social justice given by Justice Jose P. Laurel: "[s]ocial justice is neither atomism, nor communism, nor anarchy[,] but the *humanization of laws and the equalization of social and economic forces by the State*, so that justice, in its rational and objectively secular conception may at least be approximated."[99]

In highlighting the primacy of social justice, Commissioner Edmundo G. Garcia said that they wanted the State to put an emphasis not simply on economic growth, but more importantly on creating egalitarian conditions in order to achieve social justice.[100] This is important because in the hierarchy of rights — life, liberty, and property — property is often relegated

94. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 82.

95. *Id.*

96. JOAQUIN G. BERNAS S.J., CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES PART II 1006 (3d ed. 2010) [hereinafter BERNAS, CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS].

97. 2 RECORD, 1987 PHIL. CONST., at 606 (emphasis supplied).

98. *Del Rosario*, 22 SCRA at 1198-99.

99. 2 RECORD, 1987 PHIL. CONST., at 617 (citing Calalang v. Williams et al., 70 Phil. 726, 734 (1940)) (emphasis supplied).

100. 2 RECORD, 1987 PHIL. CONST., at 620.

as compared with the other two rights. Property *is* a basic right and it "has an intimate relation with life and liberty."[101] Fr. Bernas elucidates —

> [E]xperience does teach a very clear lesson that property is an important instrument for the preservation and enhancement of personal dignity. The poor are the oppressed precisely because they are poor. In their regard therefore property is as important as life and liberty — and to protect their property is really to protect their life and their liberty.[102]

Fr. Bernas also mentioned that throughout the Constitution, particularly under Article XIII, there are various provisions that protect property. But it is always understood that property "has a social dimension and that the right to property is [weighed] with a social obligation."[103]

As presently worded, the Constitutional provisions on social justice are found in Article II[104] on the Declaration of Principles and State Policies and Article XIII[105] on Social Justice and Human Rights. While social security is

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101. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 112.

102. *Id.*

103. *Id.* at 113.

104. Article II of the 1987 Constitution on Declaration of Principles and State Policies provides —

> [Section] 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through *policies that provide adequate social services*, promote full employment, a rising standard of living, and an improved quality of life for all.
>
> [Section] 10. The State shall promote *social justice* in all phases of national development.

PHIL. CONST. art. II, §§ 9-10 (emphases supplied).

105. Article XIII of the 1987 Constitution on Social Justice and Human Rights provides —

> [Section] 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
>
> To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

PHIL. CONST. art. XIII, § 1.

only mentioned once in the Constitution as regards the services for the elderly,[106] this right is understood to be subsumed in social justice.

B. Social Protection Laws

A necessary factor in promoting social justice is the enactment of social protection laws. Among these laws are the SSS Law, GSIS Law, PAG-IBIG Law, and PhilHealth Law.

The SSS Law provides —

> It is the policy of the State to establish, develop, promote and perfect a sound and viable tax-exempt social security system suitable to the *needs of the people throughout the Philippines* which shall promote social justice and provide *meaningful protection to members and their beneficiaries* against the hazards of disability, sickness, maternity, old age, death, and other contingencies resulting in loss of income or financial burden. Towards this end, the State shall endeavor to extend social security protection to workers and their beneficiaries.[107]

Its counterpart in the government service is the GSIS Law, which provides and administers a pension fund that has various social security benefits in order to secure the future of *all* employees of the government.[108]

As for a national program for health insurance, the PhilHealth Law was created in order to "provide health insurance coverage and ensure affordable, acceptable, available[,] and accessible health care services for *all* citizens of the Philippines[.]"[109] For housing needs, the Pag-IBIG Fund was established with a vision of "*every* Filipino worker ... [having] decent shelter."[110]

These social protection laws were intended to be inclusive of *every* Filipino worker, given that they meet the standards provided by the laws. However, other than its inclusiveness, the efficacy of these laws in fulfilling their mandate greatly depends on whether there is *meaningful* membership. This, of course, includes the ability of the *bona fide* member to be able to choose whom he or she will designate as dependents and/or beneficiaries — after all, membership is compulsory in most instances so the members would

106. PHIL. CONST. art. XV, § 4.

107. Social Security Act of 1997, § 2 (as amended) (emphases supplied).

108. Government Service Insurance System Act of 1997, § 3.

109. National Health Insurance Act of 1995, § 5 (emphasis supplied).

110. Pag-IBIG Fund, Our Mission, Vision and Values, *available at* https://www.pagibigfund.gov.ph/missionvisionvalues.html (last accessed Aug. 15, 2020) (emphasis supplied).

want to utilize such in a way that they deem best. Yet by having a restricted definition of who can be dependents and beneficiaries under said laws, certain classes of people are effectively denied the full enjoyment of their compulsory membership. Worse, this situation leads to their further marginalization.

It thus becomes clear that the State is defeating its own social justice policy by excluding certain classes of people from the scope of the social protection laws.

IV. DEFINING THE FAMILY

In assessing the discrimination faced by non-conventional families, it is necessary to examine the meaning of *family* as it provides the backbone for the definition of beneficiaries and dependents under social protection laws.

A. Definition Under Philippine Law

In the 1987 Constitution, Section 12 of the Declaration of Principles and State Policies provides that the State "recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution."[111] To emphasize the importance of family, the framers of our Constitution created a separate article solely devoted to the family.[112] In her Sponsorship Remarks, Commissioner Nieva made the following statements —

> The family as a natural society exists prior to the State or any other community. Thus, *Pope John Paul II* has rightly said that the future of humanity passes by way of the family. From this it follows that the family possesses, as given by the *Author of nature Himself*, certain inherent and inalienable rights which are intrinsic to its very existence and perpetuity.
>
> ...
>
> We Filipinos are truly a *family-centered culture* and this is one of our real strengths as a nation.
>
> ...
>
> It deserves the fullest support and protection from the State. Without such protection and support, we may inevitably capitulate to the powerful forces

111. PHIL. CONST. art. II, § 12.

112. PHIL. CONST. art. XV.

> from without and witness the gradual collapse of our Filipino family system.[113]

It can be seen through the choice of words of Commissioner Nieva that they drafted the provisions on family still in the traditional sense. As presently worded, Article XV of the Constitution contains the following provisions:

> [Section] 1. The State recognizes the *Filipino family as the foundation of the nation*. Accordingly, it shall strengthen its solidarity and actively promote its total development.[114]
>
> [Section] 2. *Marriage*, *as an inviolable social institution*, *is the foundation of the family* and shall be protected by the State.[115]
>
> [Section] 3. The State shall defend:
>
> (1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;
>
> (2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development;
>
> (3) The right of the family to a family living wage and income; and
>
> (4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.[116]
>
> [Section] 4. The family has the duty to care for its elderly members but the State may also do so through just programs of social security.[117]

It becomes apparent that the framers of the 1987 Constitution have a bias towards marriage by making it legally inviolable. This means that marriage cannot be dissolved at the whim of the parties. As such, Article 48 of the Family Code provides that

> [i]n all cases of annulment or declaration of absolute nullity of marriage, the [c]ourt shall order the prosecuting attorney or fiscal assigned to it to appear

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113. 5 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 91, at 36-37 (1986) (emphases supplied).

114. PHIL. CONST. art. XV, § 1 (emphases supplied).

115. PHIL. CONST. art. XV, § 2 (emphases supplied).

116. PHIL. CONST. art. XV, § 3.

117. PHIL. CONST. art. XV, § 4.

> on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed.[118]

It is only the active participation of the Public Prosecutor or the Office of the Solicitor General that will ensure that the interest of the State in marriage is represented and protected.[119]

While the importance given by the Constitution to the family cannot be denied, the definition of the family can arguably still be challenged or, rather, expanded. Since the text of the Constitution does not categorically provide a definition of the family, a look at the intent of its framers becomes necessary.

Here is an exchange between Commissioners Jose N. Nolledo and Nieva —

> Mr. [Nolledo]. ... In Section 1, we talk of the Filipino family. What is the *composition of the Filipino family*?
>
> Ms. [Nieva]. There are *different models*, I think.
>
> Mr. [Nolledo]. May I ask the Commissioner a more detailed question. Am I right if I say that *we are adopting the provision of Article 217 of the Civil Code of the Philippines* which states:
>
> *Family relations shall include those*:
>
> (1) Between husband and wife;
>
> (2) Between parent and child;
>
> (3) Among other ascendants and their descendants;
>
> (4) Among brothers and sisters.
>
> Ms. [Nieva]. Basically, yes, that would be the definition of a Filipino family.
>
> ...
>
> Mr. [Nolledo]. With respect to the words 'found a family' on Section 2 (a), and the words "in accordance with their religious convictions and the demands of responsible parenthood," is the Commissioner referring to *procreation of children*?
>
> ...

118. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209, art. 48 (1987).

119. BERNAS, CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS, *supra* note 96, at 1126.

> Ms. [Nieva]. Yes, Mr. Presiding Officer, we are referring to that specifically.
>
> ...
>
> Mr. [Nolledo]. ... Is Congress prevented from passing a divorce law ... if we adopt the provision that the State shall defend the institution of marriage as the foundation of the family?
>
> Mr. [Gascon]. What I mean when I encourage this proposal, "defend the institution of marriage," and if the proposal will be pushed through, "the social institution of marriage," is to emphasize that *those who wish to marry and establish a family have the right to expect from society the moral, educational, social, and economic conditions which will enable them to exercise their right to a mature and responsible marriage*.
>
> So, it is more a positive thing, that when we speak of defending the social institution of marriage, the society must encourage marriage *by insuring the other conditions which will help support the basic institution or social institution of marriage* ... However, this is my personal opinion I would personally discourage divorce in our culture.[120]

However, not all discourses among the drafters were confined to the traditional notion of the family. Some exchanges also covered the existence of unmarried couples, whether for or against it. Here are a few —

> Mr. [Nolledo]. Does the provision outlaw live-in relationship? (Laughter)
>
> Ms. [Nieva]. It *certainly does not encourage this*, because if we are going to encourage all kinds of unions, then we will have problems in *society like the one of delinquent children and even major criminals, most of whom come from broken homes*. Studies of psychologists and educators have really enough empirical evidence on this. So, I think we want to save society from the ravages of antisocial young people and adults who come from homes that were not really the kind of institution and environment that promote the well-being of people.[121]

The sentiments of the Commissioners reflect the negative attitude of society towards those families outside of marriage. That the question of Commissioner Nolledo even drew laughter reflects this. Although Commissioner Nieva does not explicitly state that live-in relationships were

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120. 5 RECORD, 1987 PHIL. CONST., at 38-40 (emphases supplied). Article 217 of the Civil Code of the Philippines being referred to by Commissioner Nolledo is now contained in Article 150 of the Family Code. *See* An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 217 (1950) & FAMILY CODE, arts. 150 & 254.

121. 5 RECORD, 1987 PHIL. CONST., at 40 (emphases supplied).

not covered, she still made it clear that these set-ups were discouraged especially during their time.

In this regard, Commissioner José Luis Martin C. Gascon sheds light on the matter —

> Mr. [Gascon]. I would like to respond also to that. However, Mr. Presiding Officer, *although this provision does not encourage that, it is also a reality that there are certain people who found families without the formalities of marriage not because of anything else but primarily because of socio-economic reasons*. I was talking to Sister Christine Tan a while ago and she was mentioning to me that it is a reality that there is the poor, who cannot even go into formal marriage because of their socio-economic condition. *But this provision does not wish to discriminate them but rather it merely emphasizes that the State must create a condition whereby marriage will prosper and flourish even among the poor*. But, of course, when we speak of this it is not meant to discriminate or to antagonize those who come from the poor classes of society. That is the intention, Mr. Presiding Officer.[122]

Below are some other exchanges between the Commissioners concerning unmarried couples —

> Mr. [Tingson]. ... Back to our bachelor Commissioner, I am sure we all agree with the statement which says: "no success elsewhere could ever compensate for failure at home." Is that the reason why the Commissioner states that the institution of marriage is the foundation of the family?
>
> Mr. [Gascon]. What the Commissioner just read was with [regard] to the principle of encouraging the firmness of the family, and I personally believe that *marriage encourages a strong family although, there have been also instances where families which were not founded on marriage have been successful* ... .
>
> Mr. [Tingson]. Did I get the Commissioner right, Mr. Presiding Officer, when he said there are *happy families that are not founded on marriage?*
>
> Mr. [Gascon]. There may be, Mr. Presiding Officer. *However, as I said, marriage as an institution encourages the development of a strong and firm family*.
>
> Mr. [Tingson]. But certainly, the amendment here which says: "the institution of marriage as the foundation of the family," is a *positive suggestion that the family should be based on people who are married to each other*, man and wife, and not just living together without the sanctity of marriage.
>
> Mr. [Gascon]. Yes, Mr. Presiding Officer.[123]

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122. *Id.* (emphases supplied).

123. *Id.* at 43-44 (emphases supplied).

Here, the Commissioners were less stringent when it comes to considering families formed without marriage. At the very least, there is an acknowledgement that these families exist. Also, they used the words *encourage* and *suggestion* in depicting marriage vis-à-vis family. The discussions went on as follows —

> Mr. [Bennagen]. ... I just would like to ask a few questions. May I know the understanding of the committee on the word 'marriage,' since there seems to be a premise here that is left unstated?
>
> Ms. [Nieva]. Generally, I think the *accepted definition of marriage is the union of a man and a woman*.
>
> Mr. [Bennagen]. Is that the same thing as the *folk norm of 'nagsama sila'?*
>
> Ms. [Nieva]. *I think not. We are not defining marriage as just an agreement between the two spouses without the State's sanction*.
>
> Mr. [Bennagen]. In other words, in terms of the state's defense of the right, all marriages that are not subject to religious or legal rituals are not part of this defense by the State?
>
> Ms. [Nieva]. Mainly we are talking here of marriage as generally known, yes.
>
> Mr. [Bennagen]. *Is that forcing all spouses to undergo a certain legal or religious ritual but not folk ritual as in the concept of 'nagsama'?*
>
> Ms. [Nieva]. *No. In order to receive protection of the State, I think not*.
>
> Mr. [Bennagen]. Is the *assumption that only marriages through legal and religious rituals can be successful marriages?*
>
> Ms. [Nieva]. We are saying that, *in general, marriages are founded on the full consent of spouses*.
>
> Mr. [Bennagen]. Is it not *merely a Christian, middleclass bias?*
>
> Ms. [Nieva]. We are saying that *other cultures may have other traditional models of marriage and family life, and we respect them*.[124]

In these exchanges, we see that Commissioner Nieva takes a more tempered stance towards unmarried couples. At the very least, the attitude shifted to tolerance. However, the dialogue between the two Commissioners was confined to difference in cultural traditions.

In his book, Fr. Bernas states that *family* in the constitutional provisions is understood to be "a stable heterosexual relationship[,] whether formalized

124. *Id.* at 44-45 (emphases supplied).

by civilly recognized marriage or not."[125] He also clarifies that while marriage is "generally regarded as a union [which is] formalized by legal or religious sanction, *the protection of the state is also meant for other stable unions entered into through folk ritual or by simply living together.*"[126] There is thus basis to argue that what the Constitution protects is not only the family as based on marriage, but also those families that are formed without marriages.

Perhaps the difficulty in trying to come up with a broader definition of the family is that the concept of family has been traditionally understood as confined to the institution of marriage. However, under the 1987 Constitution, there is merit in the argument that the term *family* may be understood to have a broader meaning and not simply confined to marriage. This finds support in the following exchange between the Commissioners —

> Mr. [Villegas]. As far as the committee's opinion is concerned, I think that statement does not take any stand one way or the other about the possibility of divorce. That will be left to legislation and it will be up to the people to decide.
>
> Mr. [Ople]. The question is very simple and very clear, Madam President. Will these words disauthorize Congress to pass a divorce law in the future?
>
> Mr. [Nolledo]. The answer is no because *we do not talk of the sanctity of marriage; we talk of the sanctity of family life as a whole.*[127]

As can be deduced from the foregoing, the protection accorded by the Constitution towards family and marriage are *distinct* from one another. There is also an assertion that while marriage is indeed an inviolable institution, it does not necessarily mean that such is being forced upon everyone. In fact, the word *encourage* pertaining to marriage was not included in the final text of the Constitution, with the delegates even poking fun at Fr. Bernas —

> Ms. [Aquino]. We would like to move for the deletion of the clause 'encourage and' because it was not in the Third Reading copy and there was no intention to introduce that, otherwise that will render Fr. Bernas unconstitutional.
>
> Mr. [Bengzon]. Are we deleting 'encourage[?']

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125. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 83.

126. *Id.* at 1313-14 (citing 5 RECORD, 1987 PHIL. CONST., at 44) (emphasis supplied).

127. 4 RECORD OF THE CONSTITUTIONAL COMMISSION No. 86, at 760 (1986) (emphasis supplied).

Mr. [Rodrigo]. *Yes.*[128]

With the foregoing discussion, it may thus be reasonably argued that the concept of *family* under the Constitution can be interpreted broadly enough to include different kinds of families as to encompass even those outside marriage.

B. Definition Under International Law

Similarly, under international law, there is also no definitive or authoritative definition of the family.

1. A Contentious Resolution on the Family

On 25 June 2014, the U.N. Human Rights Council adopted a *Resolution for the Protection of the Family* (Resolution) as 2014 marked the International Year of the Family.[129] Among others, it reaffirmed the family as the natural and fundamental unit of society which should be protected by both society and the State.[130] It was "tabled by a group of 13 States, among which were China, Egypt, Russia[,] and Uganda" — 26 countries supported it, including the Philippines, and 14 countries voted against it.[131]

Though the two page-Resolution was formulated with noble purposes, it nonetheless sparked a controversy in the international community. While the Resolution did not give a definition of *family*, many felt that reference to a single type of family could be a dangerous and discriminatory precedent for those who do not fit such category.[132] Chile, Uruguay, Ireland, and France made proposals to amend the resolution in order to "recognize [the existence of] diverse forms of [ ] famil[ies] [ ] and [to] ensure that the [Resolution would comply] with international human rights standards, [particularly] the right [against discrimination.]" [133] Unfortunately, the

128. 5 RECORD, 1986 PHIL. CONST., at 862.

129. Protection of the Family, H.R.C. Res. 26/11, at 1, U.N. Doc. A/HRC/26/L20/Rev.1 (June 25, 2014).

130. *Id.* at 2.

131. The European Parliament's LGBTI Intergroup, UN Human Rights Council adopts non-inclusive 'Protection of the Family' resolution, *available at* https://lgbti-ep.eu/2014/06/27/un-human-rights-council-adopts-non-inclusive-protection-of-the-family-resolution (last accessed Aug. 15, 2020).

132. *Id.*

133. International Service for Human Rights, States silence debate on family diversity at Human Rights Council, *available at*

amendment was not considered because "Russia brought a [ ]*no action motion*[,] a procedural tactic designed to prevent the issue from [ ] being discussed [at all,] which [found support from] 22 [ ] States, [with] 20 vot[ing] against and six [(including the Philippines)] abstained."[134]

As presently worded, the Resolution goes against the principle of non-discrimination based on family status as regards those who belong to different family set-ups, such as "unmarried couples, with or without children; single-parent families; families headed by children or grandparents; joint families; extended families; kinship; families of divorced individuals; intergenerational families; [and] families that include same-sex relationships."[135]

Several human rights organizations have expressed their concerns over the said Resolution, noting that "[r]eferring to family, without [recognizing] the existence of more types of families, is to look away from reality where we find families in all forms and shapes."[136] It was also opined that "[i]t should not be up to an accidental majority of States to define what does and what does not constitute a family."[137] The Philippines, Brazil, and South Africa were also called out to "act consistently with their national frameworks, which *do* afford protection to a wide range of families."[138]

It appears that subsequent resolutions by the Human Rights Council on the protection of the family were also similarly restrictive in its concept of a family, garnering the same criticisms from international groups.[139]

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https://www.ishr.ch/news/states-silence-debate-family-diversity-human-rights-council (last accessed Aug. 15, 2020).

134. *Id.* (emphasis supplied).

135. Article 19, Joint Statement: Discussion of "protection of the family" at Human Rights Council must reflect diversity and focus on human rights, *available at* https://www.article19.org/resources/joint-statement-discussion-protection-family-human-rights-council-must-reflect-diversity-focus-human-rights (last accessed Aug. 15, 2020).

136. The European Parliament's LGBTI Intergroup, *supra* note 131.

137. *Id.*

138. International Federation for Human Rights, The UN Human Rights Council Moves Away from Decades of Legal and Societal Progress, *available at* https://www.fidh.org/International-Federation-for-Human-Rights/united-nations/human-rights-council/the-un-human-rights-council-moves-away-from-decades-of-legal-and (last accessed Aug. 15, 2020) (emphasis supplied).

139. *See* International Service for Human Rights, Protection of the Family resolution increases vulnerabilities and exacerbates inequalities, *available at* https://www.ishr.ch/news/protection-family-resolution-increases-

The sentiments of these human rights advocates are understandable. This is because the Resolution ignores the advances made in international law in redefining the family. Several international instruments before the Resolution have already acknowledged the existence of non-traditional forms of family.

In 1995, the Secretary-General of the U.N. released a *Report* regarding the observance of the International Year of the Family which was also celebrated that year.[140] Paragraph 14 of the report already acknowledged "that families assume diverse forms and functions among and within countries[.]"[141] As opposed to the 2014 Resolution on the same subject, this Report by the Secretary-General is a categorical statement and acknowledgement that there are indeed families that do not fit the traditional definition.[142]

Two years before this Report, the U.N. Committee on Economic, Social, and Cultural Rights (CESCR) has also used a liberal approach in defining the family. In its General Comment No. 4 which deals with the right to adequate housing, paragraph six thereof explains that in interpreting the definition of *himself and his family*, the concept of family must be understood in a wide sense and the enjoyment of such right should be without discrimination.[143]

There were also more recent international documents that broaden the scope of the family. In 2000, the U.N. Human Rights Committee adopted General Comment No. 28 which dealt with Article 3 of the ICCPR on the

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vulnerabilities-and-exacerbates-inequalities (last accessed Aug. 15, 2020); Joanna Manganara, Resolution on Protection of the Family – Letter to the Permanent Representative of Greece in Geneva, *available at* https://womenalliance.org/resolution-on-protection-of-the-family (last accessed Aug. 15, 2020); & Jason Mack, Explanation of Vote on Resolution on Protection of the Family, Delivered at the Human Rights Council 35th Session (June 22, 2017) (transcript *available at* https://geneva.usmission.gov/2017/06/22/40571 (last accessed Aug. 15, 2020)).

140. U.N. Sec. Gen., *Report of the United Nations on the Observance of the International Year of the Family*, at 3, U.N. Doc. A/50/370 (Sep. 6, 1995).

141. *Id.* ¶ 14.

142. *Id.* ¶ 22.

143. UN Committee on Economic, Social and Cultural Rights (CESCR), *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 6, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter General Comment No. 4].

Equality of Rights Between Men and Women.[144] Paragraph 27 gives importance in "accept[ing] the concept of the various forms of family, including unmarried couples and their children and single parents and their children[.]"[145]

In a similar vein, the U.N. Committee on the Elimination of Discrimination Against Women adopted General Recommendation No. 29 as regards Article 16 of the CEDAW which deals with the economic consequences of marriage, family relations, and their dissolution.[146] In this General Recommendation, several provisions mentioned different kinds of family set-ups other than marriage. In paragraph 6, it states that this General Recommendation "integrates [ ] social and legal developments that [ ] [took] place since the adoption of [G]eneral [R]ecommendation No. 21, such as the adoption by some State parties of laws *on registered partnerships* and/or *de facto unions*, as well as the *increase in the number of couples living in such relationships*."[147]

The Committee recognized that some States parties provide for registered partnerships which establishes rights and responsibilities between the parties and where the States may offer social and tax benefits to registered partnerships.[148] However, the Committee also acknowledged that there are *de facto* unions that are not registered or are not accorded any protection by States, particularly in certain forms of relationships (i.e., those of the same sex) which are not legally, socially, or culturally accepted.[149] At this juncture, it reiterated the provision in paragraph 13 of General Recommendation No. 21, which "acknowledges that *families take many forms* and underscores the

144. UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment No. 28].

145. *Id.* ¶ 27.

146. UN Comm. on the Elimination of Discrimination Against Women (CEDAW), *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, ¶ 4, U.N. Doc. CEDAW/C/GC/29 (Oct. 30, 2013) [hereinafter General Recommendation No. 29].

147. *Id.* ¶ 6 (emphases supplied).

148. *Id.* ¶ 22.

149. *Id.* ¶ 23.

obligation of equality within the family under *all systems*, '*both at law and in private*.'"[150]

2. Family in the European Perspective

In the international community, the European continent has come a long way in giving recognition to diverse forms of families. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the right to respect for private and family life —

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety[,] or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[151]

"[T]he relationship between married [spouses] and [ ] between [them] and their children [comprise the] *family life*"[152] that is protected by Article 8.[153] However, based on jurisprudence of the European Court of Human Rights (ECtHR), "Article 8 [is] also [applicable] to certain *de facto families*."[154] To illustrate, the ECtHR ruled in *Johnston v. Ireland*[155] that family life existed between a heterosexual couple that had cohabited for 15

150. *Id.* ¶ 16 (emphases supplied).

151. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8. *opened for signature* Nov. 4, 1950, 213 U.N.T.S 221. [hereinafter European Convention on Human Rights].

152. Rights of De Facto Couples, *supra* note 85, at 48 (citing Abdulaziz, Cabales and Balkandali v. The United Kingdom, Application Nos. 9214/80, 9473/81, & 9474/81, Judgment, 7 EHRR 471 (Apr. 24, 1985)) (emphasis supplied).

153. *Id.*

154. Rights of De Facto Couples, *supra* note 85, at 48 (emphasis supplied). *See also* Boughanemi v. France, Application. No. 22070/93, Judgment, 22 EHRR 228 (Apr. 24, 1996).

155. Johnston v. Ireland, Application No. 9697/82, Judgment, 9 EHRR 203 (Dec. 18, 1986).

years.[156] Below are other cases decided by the ECtHR that deal with diverse forms of families —

> In the *Marckx* case [*Marckx v. Belgium* (1979-80) 2 E.H.R.R. 330] the Court established that *family life exists between a single mother and her child*. Whether 'family life' extends to the connection between a natural father and a child depends on a number of factors. Cohabitation is usually regarded as definitive evidence of a bond amounting to family life. [*Keegan v. Ireland* (1994) 18 E.H.R.R. 342] In *Keegan* the Court found that *where people are living together outside of marriage a 'child born out of such a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it*[*.'*] It went on to state that *a bond amounting to family life as between the child and his or* [*her*] *parents continues to exist 'even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended*[*.'*]
>
> That stance was reiterated in *Kroon v. Netherlands*. [*Kroon v. Netherlands* (1994) 19 E.H.R.R. 263] In its decision, the Court stipulated that, while *'as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties*[*.'*] On the facts before it, since the couple concerned had four children together, family life had been established. Article 8 was therefore applicable to the relationship between a child and his father, 'whatever the contribution of the latter to his son's care and upbringing[.']
>
> More recently in Soderback v. Sweden [[1999] 1 F.L.R. 250. See also Boughanemi v. France (1996) 2 E.H.R.R 228] the Court held that family life could exist between a father and child where there has been no cohabitation and very limited contact between the parties.[157]

The ECtHR had also long upheld that same-sex relationships may form a family relationship —

> However, recent decisions such as that in *Karner v. Austria* [Application No. 40016/98, 24 July 2003] mark the beginning of a more stringent approach to the margin of appreciation. The Court ruled that *a gay man who lost his tenancy when his partner died was the victim of unlawful discrimination*. It held by six votes to one that there had been a violation of the victim's rights under

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156. *Id.* ¶ 56.

157. Rights of De Facto Couples, *supra* note 85, at 48 (citing Marckx v. Belgium, Application No. 6833/74, Judgment, 2 EHRR 330 (June 13, 1979); Keegan v. Ireland, Application No. No. 16969/90, Judgment, 18 EHRR 342 (May 1, 1990); Kroon v. Netherlands, Application No. 18535/91, Judgment, 19 EHRR 263 (Oct. 27, 1994); & Söderbäck v. Sweden, Application No. 24484/97, Judgment, 29 EHRR 95 (Oct. 28, 1998)) (emphases supplied). *See also Boughanemi*, 22 EHRR.

> Article 14 and Article 8, finding that 'differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification[.'] The Austrian government's rationale for the eviction of Karner was 'protection of the family in the traditional sense[.'] However, the Court indicated that the reasons advanced for sexual orientation discrimination merited stricter scrutiny than that afforded in its previous decisions:
>
> *The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it*. In cases in which the margin of appreciation afforded to Member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for [realizing] the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion.
>
> ...
>
> A similar result arises from the application of the Convention by the English and Welsh House of Lords in *Ghaidan v. Godin-Mendoza*. [[2004] UKHL 30] The House of Lords in this case ruled, when interpreted in the light of the Convention, that *the phrase 'living with the tenant as husband and wife' had to be given a construction that embraced both same-sex and opposite-sex couples*. Although the House was divided on this construction, all of the law lords were nevertheless unanimous in agreeing that the opposite conclusion would have been incompatible with the requirements of the Convention, and in particular with Article 14 read alongside Article 8.[158]

The functional approach to which the ECtHR addresses questions on whether a family will be recognized as such is a suitable basis for the rest of the international community to emulate.[159] As a result of this approach, a wider range of family forms is recognized and protected —

> The cumulative effect of the ECtHR's jurisprudence is that 'family life' exists between cohabiting parents and their children, and as between an unmarried father and his child absent cohabitation where other factors show a relationship of sufficient constancy and commitment to create de

158. Rights of De Facto Couples, *supra* note 85, 50-51 (citing Karner v. Austria, Application No. 40016/98, Judgment, 38 EHRR 24, ¶ 49 (July 24, 2003) & Ghaidan v. Godin-Mendoza, [2004] UKHL 30 (2004) (U.K.)) (emphases supplied).

159. Rights of De Facto Couples, *supra* note 85, at 51.

> facto ties. Soderback suggests, moreover, that the potential development of such ties between father and child may be adequate to establish a relationship that ought to be protected. Article 8 also embraces the connection between parents and their children born through donor insemination. According to relevant dicta in *Johnston* and *Saucedo Gomez*, the relationship between long-term heterosexual cohabitees may also amount to 'family life' where the couple do not have children. Because the court regards relations of dependency as a key determinant, 'family life' between extended family member such as grandparents and grandchildren, uncles and aunts, nephews and nieces and so on may also be protected.[160]

Due to the extensive scope given by the ECtHR in interpreting *family life*, other forms of cohabitation or personal relationships that are not recognized as constituting a family in European Member States can still enjoy protection by Article 8 since the ECtHR made it clear that family life is not confined to legally acknowledged relationships.[161] The ECtHR "is led by social, emotional[,] and biological factors rather than legal considerations when assessing whether a relationship is to be considered as '*family life*.'"[162]

C. Redefining the Family

Indeed, there is merit in the *functional approach* adopted by the ECtHR in determining the existence of family relations.[163] In a 2009 study, it was found that the Filipino youth defined family not only in terms of structure (i.e., nuclear or extended) but also in terms of other factors such as living arrangement, emotional and financial support, and close friendships; hence, it shows how Filipino adolescents valued connection, intimacy, care, and support.[164]

Likewise, studies by Filipino psychologists on traditional and non-traditional families indicated physical togetherness, emotional connection,

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160. *Id.* (citing X, Y and Z v. The United Kingdom, Application No. 21830/93, Judgment, 24 EHRR 143 (Apr. 22, 1997)) (emphases omitted).

161. Child Protection Resource, Proportionality and Article 8 of ECHR, *available at* https://childprotectionresource.online/proportionality-and-article-8-of-the-echr (last accessed Aug. 15, 2020) (citing Pretty v. The United Kingdom, Application No. 2346/02, Judgment, 35 EHRR 1 (Apr. 29, 2002)).

162. *Id.* (emphasis supplied).

163. ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY 67 (2017).

164. Maria Caridad H. Tarroja, *Revisiting the Definition and Concept of Filipino Family: A Psychological Perspective*, 43 PHIL. J. PSYCHOL. 177, 183 (2010).

parental involvement, communication, family resiliency, care and support, and intimacy as important factors that keep a family together.[165] Their studies also show that a Filipino family is described in terms of family members' closeness, sense of support, care, warmth, intimacy, and shared values and beliefs.[166] According to their findings, these elements mentioned were found to be more critical factors in defining a family as opposed to its structure and composition.[167] However, in redefining the family, the reconstruction on the basis of these factors needs to be based on empirical evidence.[168]

Undeniably, self-identification as a family is becoming more common among groups of people who love, respect, and care for each other regardless of whether they fit the traditional definition of family.[169]

Over the years, the number of non-married couples who are living together have dramatically increased, which resulted in a blurred definition of family.[170] This is especially true in more liberal countries, like the United States of America (U.S.), where those belonging to non-conventional families have actually challenged the traditional definition of family.[171] In a study conducted by the Massachusetts Mutual Life Insurance Company, it was found that "most Americans [ ] define family in *emotional terms* such as 'a group who love and care for each other' *rather than in legal or structural terms*."[172]

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165. *Id.* at 187.

166. *Id.*

167. *Id.* at 188.

168. *Id.* at 190.

169. Elizabeth Angsioco, *The changing Filipino Family*, MANILA STAND., Oct. 25, 2014, *available at* https://manilastandard.net/opinion/columns/power-point-by-elizabeth-angsioco/161239/the-changing-filipino-family.html (last accessed Aug. 15, 2020).

170. Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent on Sexual Orientation*, 33 IND. L. REV. 991, 991 (2000). *See also* In re Ray Cummings, 640 P.2d 1101, 1103 (Cal. 1982) (U.S.) (C.J. Bird, concurring opinion).

171. Habegger, *supra* note 170, at 991.

172. *Id* at 992 (citing Shoshana Bricklin, *Legislative Approaches to Support Family Diversity*, 7 TEMP. POL & CIV. RTS. L. REV. 379, 379 (1989)) (emphases supplied).

As more and more couples choose to live together without the benefit of marriage, a corresponding relaxation of attitude towards these non-conventional families by some States also developed. This can be seen in the U.S. case of *Marvin v. Marvin*.[173] It involved an oral agreement between an unmarried couple for the sharing of all the property that they have acquired in their seven-year relationship.[174] The Supreme Court of California, after inquiring into the conduct of the parties, held that the oral agreement was enforceable. In this landmark decision, the Court recognized the existence of unmarried couples who cohabit —

> [*T*]*he prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our court*[ ] *should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship* ... [T]he non[-]enforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, *pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.*
>
> ...
>
> The mores of [ ] society have indeed changed so radically in regard to cohabitation that *we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.*[175]

This is indeed a positive step towards recognition of unmarried couples and their families. Nevertheless, the Court still emphasized that "[t]he structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution."[176]

During the debate over family values in the U.S. that took place in the nineties, some conservatives claimed that there was a large *anti-family* coalition that attacked these family values.[177] However, it was argued that the perceived attack on the family is actually a "battle for inclusion within the definition of family."[178] The goal of those belonging in non-traditional

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173. Marvin v. Marvin, 557 P.2d 106 (1976) (U.S.).

174. *Id.* at 110.

175. *Id.* at 122 (emphases supplied).

176. *Id.*

177. Edward J. Juel, *Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples*, 13 B.C. THIRD WORLD L.J. 317, 317 (1993).

178. *Id.*

families is not to break down the concept of family, but rather, in a changing society, to ensure the survival of the values that a family provides.[179]

In the Philippines, recent studies on Filipino families indicate the changing family composition and structure brought about by changes in society, which have resulted in an increasing number of non-traditional families.[180] Notably, in the 2009 survey by the National Statistics Office (NSO), its questions listed down several types of Filipino families.[181] In addition to single family and extended family, the NSO included another category called "*two or more unrelated family members*" which referred to household with "two or more non-related families or two or more persons not related to each other by blood, marriage, or adoption."[182] The "NSO listing of the different types of the family [can be considered as a recognition by] the [s]tate that [ ] there are Filipino families that do not [fit] [ ] the traditional definition."[183]

Indeed, recognizing non-traditional families will not derogate the concept of family as the basic unit of society. On the contrary, it will certainly strengthen the value that society places on the family if more kinds of families are given recognition and protection. This is supported by studies which show that "what defines a Filipino family is not so much its structure but the emotional connections among [its] members, how they relate and support one another, and how they care for one another."[184]

V. LEGAL COMPROMISE FOR UNMARRIED COUPLES

Since under Philippine laws marriage is intrinsically linked to family, it becomes impossible for most non-conventional families to receive any protection or benefit from the State because they are formed outside the institution of marriage. However, in other jurisdictions, it is possible for unmarried couples to receive certain levels of recognition. Most of these arrangements resulted from the lobbying of the LGBTQI+[185] community

179. *Id.*

180. Tarroja, *supra* note 164, at 177.

181. *Id.* at 179 (emphasis supplied).

182. *Id.*

183. *Id.*

184. *Id.* at 190.

185. LGBTQI+ means all of the communities included in "LGBTTTQQIAA" or Lesbian Gay Bisexual Transgender Transsexual Two-Spirit Queer Questioning Intersex Asexual Ally + Pansexual Agender Gender Queer Bigender Gender

against whom marriage is or was deprived. However, heterosexual couples may also benefit from these arrangements.

A. In the United States

As of this writing, several jurisdictions in the U.S. have passed laws that extend the rights and benefits accorded to spouses in favor of same-sex and even opposite-sex couples who are not married. Five States allow for *civil unions*, namely Colorado, Hawaii, Illinois, Vermont, and New Jersey.[186] California, District of Columbia, Maine, Nevada, Oregon, Washington, and Wisconsin allow for *domestic partnerships* while Hawaii allows for a similar relationship known as *reciprocal beneficiaries*.[187] Notably, all of the States that allow for civil unions or domestic partnerships now also allow for same-sex marriage, either through statute or court ruling.[188]

There are certain requirements for two persons to qualify for these initiatives, among which are minimum age and mental competence, being domiciled together, period of togetherness, evidence of joint financial arrangements, and proof of commitment to a relationship of mutual caring.[189] The rights and responsibilities that may be availed under these arrangements are varied but mostly consist of those that are available to married couples.[190]

These initiatives were created in part "to carve out a kind of quasi-marital status" which allows certain persons to enjoy the benefits attached to marriage but without necessarily offending the laws on marriage.[191] Contrary

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Variant Pangender. *See* OK2BME, What Does LGBTQ+ Mean?, *available at* https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean (last accessed Aug. 15, 2020).

186. National Conference of State Legislatures, Civil Unions and Domestic Partnership Statutes, *available at* http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (last accessed Aug. 15, 2020).

187. *Id*.

188. *Id*.

189. *See* Maine Revised Statutes Annotated. tit. 22, § 2710 (2) (2010) (U.S.). *See also* An Act Establishing the Rights and Responsibilities of Domestic Partners, and Revising Parts of the Statutory Law [Domestic Partnership Act], NJ ST 26:8A-1, C.26:8A-4 (2004) (U.S.).

190. *See* Hawaii Code, vol. 12, tit. 31, ch. 572C, § 572C-1 (U.S.) & No. 91. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (U.S.).

191. Juel, *supra* note 177, at 340.

to the claims of those who criticize them, these initiatives do not attack the family but they strengthen "the concept of *family* by [expanding its] definition ... to more accurately [conform to] contemporary social realities."[192]

B. In Other Jurisdictions

Aside from the U.S., there are also several other countries that have domestic partnership, civil union, and reciprocal beneficiaries in their laws, though they differ in the specifics, provisions, and nomenclature.

> 'Registered partnership' is a model pioneered by the *Scandinavian countries* which reconciles marriage laws with equal protection and anti-discrimination laws, giving most but not all of the rights of heterosexual civil marriage to same-sex couples. In some cases, registered partnerships are easier to dissolve than civil marriages. In the *Netherlands* and elsewhere registered partnership is available to opposite-sex couples who do not wish to enter into full civil marriage. Non-marriage registered partnerships with limited rights are now available at the federal level in *Australia*, *Belgium*, *Brazil*, *Canada*, *Denmark (including Greenland)*, *Finland*, *France*, *Germany*, *Hungary*, *Iceland*, *Israel*, *Italy*, *New Zealand*, *Norway*, *Portugal*, *Spain and Sweden* ... *Hungary* has opened so-called 'common-law' marriage to same-sex couples, offering most marriage rights except adoption; in this arrangement partners can claim some benefits retroactively, based on evidence of past cohabitation.[193]

Evidently, most of these arrangements are present in first world countries, particularly in North America, Oceania, and Europe. However, there are also countries from other regions that recognize unions between unmarried couples.

Several countries in Latin America give recognition to unmarried couples.[194] As early as 2000, Brazil "extended de facto legal recognition to same-sex relationships by granting such couples the right to inherit each other's pension and social security benefits."[195] On 13 December 2002,

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192. *Id.* at 321 (emphasis supplied).

193. OutRight Action International, International: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws (November 2003), *available at* https://outrightinternational.org/content/international-global-summary-registered-partnership-domestic-partnership-and-marriage-laws (last accessed Aug. 15, 2020) (emphases supplied and omitted).

194. *Id.*

195. *Id.*

Buenos Aires "became the first Latin American city to [enact] laws allowing both same- and opposite-sex couples [several benefits such as] medical insurance, hospital visitation rights, and pension rights."[196] More recently, a regional court in Costa Rica upheld the right of a same-sex couple to a State welfare credit, but said decision does not extend to other same-sex couples, whose cases will be decided individually.[197] It became the first time in Central America that a civil union was recognized.[198] In April 2015, the president of Chile, Michelle Bachelet, signed into law a bill recognizing civil unions between same-sex couples.[199] According to President Bachelet, "[i]t is estimated that more than 2,000,000 people in Chile are living together. Today we give them the option of having their unions legally [recognized]."[200] Ecuador also allows same-sex civil unions.[201] Argentina, Brazil, Colombia, and Uruguay already allow same-sex marriage.[202]

In the African continent, while such laws are not enforced, there is still some degree of recognition for same- and opposite-sex couples.[203] In Namibia, "[a] permanent residency was granted to a German woman based on her same-sex relationship with a Namibian citizen. In that case a high court ruling on [25 June 1999] stated that same-sex couples have exactly the same rights as opposite-sex couples."[204] In South Africa, its Constitutional Court ruled on 17 March 2003 that "the same-sex partner of High Court [J]udge Kathy Satchwell is entitled to the benefits which apply in heterosexual relationships."[205]

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196. *Id.*

197. Max de Haldevang, Central America's first same-sex civil union recognised in Costa Rica - reports, *available at* http://uk.reuters.com/article/2015/06/03/uk-costarica-samesex-civilunion-idUKKBN0OJ2NO20150603 (last accessed Aug. 15, 2020).

198. *Id.*

199. Chile recognises same-sex civil unions, *available at* http://www.bbc.com/news/world-latin-america-32296246 (last accessed Aug. 15, 2020).

200. *Id.*

201. AQ Editors, Chilean Legislators Approve Same-Sex Civil Unions, *available at* https://www.americasquarterly.org/content/chilean-legislators-approve-same-sex-civil-unions (last accessed Aug. 15, 2020).

202. *Id.*

203. *See* OutRight Action International, *supra* note 193.

204. *Id.*

205. *Id.*

In Asia, there are currently no laws that recognize domestic partnerships, civil unions, or reciprocal beneficiaries for same- and opposite-sex couples. However, in 2019, Taiwan made history as the first country in Asia to legalize same-sex marriage — two years after its Constitutional Court ruled that its existing law decreeing marriage to be between a man and a woman was unconstitutional.[206]

In the Philippines, while there are no laws on domestic partnerships, civil unions, or reciprocal beneficiaries, a recent opinion by the Insurance Commission gave a glimmer of hope specifically for same-sex couples.[207] This was in response to a letter by the University of the Philippines College of Law Gender Law and Policy Program which detailed several instances when insurance companies refuse the designation of non-relatives as beneficiaries of the insured, resulting in the inability of members of the LGBTQI+ community to designate their domestic partners as beneficiaries of their life insurance.[208] In response, the Insurance Commission opined that since an insured who secures a life insurance policy on his or her own life may designate *any* individual as beneficiary, subject to certain exceptions, then members of the LGBTQI+ community may designate their domestic partners as beneficiaries in their life insurance.[209] This is a welcome step forward in extending benefits to those belonging to non-conventional families.

VI. A Shift Towards Recognition of the Modern Family

As seen in the foregoing discussion, more and more jurisdictions around the world have enacted legislation that would give rights, benefits, and protection to families who are not bound by blood or marriage. This is due to the growing recognition of diverse forms of families that exist today.

A. The Emergence of the Modern Family

A study on global changes in the areas of family has shown that the hold of marriage as an institution and the link between marriage and parenthood

206. Julia Hollingsworth, Taiwan legalizes same-sex marriage in historic first for Asia, *available at* https://edition.cnn.com/2019/05/17/asia/taiwan-same-sex-marriage-intl/index.html (last accessed Aug. 15, 2020).

207. Insurance Commission, Insured's Right to Designate Beneficiary, Legal Opinion No. 2020-02 (Mar. 4, 2020).

208. *Id.* at 1.

209. *Id.* at 3.

vary across the world.[210] In the last four decades, there has been a dramatic increase in cohabitation, divorce, and non-marital childbearing around the world.[211] At the same time, the meaning of marriage appears to be shifting across the globe, as it "becom[es] more of an option for adults, rather than a necessity for the survival of adults and children."[212] In this regard, cohabitation has emerged as an important precursor or alternative to marriage for a variety of reasons; some "may look for more flexibility or freedom in their relationships, or they may feel that they do not have sufficient financial or emotional resources to marry, or they may perceive marriage as a risky undertaking, or simply unnecessary once they are cohabiting."[213]

Further, a more recent study on global changes in the family shows that in recent decades, many countries around the world have witnessed a *retreat from marriage*, leading to more children being born outside marriage, either to single parents or cohabiting couples.[214] With regard to non-marital childbearing, while the lowest rates occur in Asia and the Middle East (i.e., below 7%), the Philippines has a 43% rate of births that occur outside of

210. *See* Child Trends, World Family Map 2014: Mapping Family Change and Child Well-Being Outcomes (An International Report) at 10, *available at* http://www.childtrends.org/wp-content/uploads/2014/04/WFM-2014-Final-LoRes.pdf (last accessed Aug. 15, 2020).

211. *Id.* at 14.

212. *Id.* (emphases omitted).

213. *Id.* (citing ANDREW J. CHERLIN, THE MARRIAGE – GO – ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY (2009 ed.); Michael Pollard & Kathleen Mullan Harris, Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment (A RAND Working Paper), *available at* https://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1001/RAND_WR1001.pdf (last accessed Aug. 15, 2020); STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005 ed.); WILLIAM JOSIAH GOODE, WORLD CHANGES IN DIVORCE PATTERNS (1993); & Patrick Heuveline, et al., Shifting Childrearing to Single Mothers: Results from 17 Western Countries, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3928681 (last accessed Aug. 15, 2020)).

214. Social Trends Institute, The World Family Map 2017: Mapping Family and Child Well-Being Outcomes (An International Report) at 3, *available at* http://www.socialtrendsinstitute.org/upload/2017_WorldFamilyMap_SocialTrendsInstitute_english.pdf (last accessed Aug. 15, 2020).

marriage.[215] This goes to show that a significant number of children are born into family set-ups that are outside marriage, particularly in the Philippines.

Moreover, "[d]ata shows that there has been a general downward trend in the number of marriages" in recent years.[216] The Philippine Statistics Authority found that "in a span of 10 years, the reported marriages decreased by 20.1% from 2005 and 2015."[217] While it continued to decline in 2016, the registered marriages slightly increased in 2017 and 2018.[218]

With respect to the LGBTQI+, there seems to be more and more Filipinos from same-sex relationships who are being open and public regarding their relationships due to relatively high tolerance from Philippine society.[219] In fact, in 2013, the Philippines ranked among the most gay-friendly nations in the world, with a rank of 10 out of 39.[220]

Times are indeed changing. However, this is not to say that the institution of marriage is weakening and that it should be discouraged. It is only sought to be emphasized that there are many Filipinos who do not get married, whether it is by *choice* as for some opposite-sex couples, or because they are *prevented* from doing so as for same-sex couples.

B. Unmarried Opposite-Sex Couples

While live-in relationships have been on the rise in the Philippines, people who enter into such arrangements experience social stigma. As compared to

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215. *Id.* at 30.

216. April Anne Benjamin, I don't: Why some Filipinos do not marry, *available at* https://news.abs-cbn.com/focus/02/09/17/i-dont-why-some-filipinos-do-not-marry (last accessed Aug. 15, 2020).

217. Katrina Domingo, No I do's: Statistics show fewer Filipinos getting married, *available at* https://news.abs-cbn.com/news/02/03/17/no-i-dos-statistics-show-fewer-filipinos-getting-married (last accessed Aug. 15, 2020).

218. Philippine Statistics Authority, Marriages in the Philippines, 2018, *available at* https://psa.gov.ph/content/marriages-philippines-2018 (last accessed Aug. 15, 2020).

219. OutRight Action International, Philippines, *available at* https://outrightinternational.org/region/philippines?gclid=EAIaIQobChMIvMuoi5HP6AIVDz5gCh2QjQs8EAAYASAAEgKHuvD_BwE (last accessed Aug. 15, 2020).

220. Philip C. Tubeza, *PH ranks among most gay-friendly in the world*, PHIL. DAILY. INQ., June 8, 2013, *available at* http://globalnation.inquirer.net/76977/ph-ranks-among-most-gay-friendly-in-the-world (last accessed Aug. 15, 2020).

married couples, the relationships established by unmarried couples are not entirely protected. Nevertheless, the law provides some form of recognition.

For instance, Title IV, Chapter 7 of the Family Code lays down the rules for the property regime of unions without marriage.[221] Article 147[222] covers instances where the parties are both capacitated or are under no legal impediment to marry each other, otherwise Article 148[223] will govern. Even

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221. FAMILY CODE, arts. 147-48.

222. *Id.* art. 147.

> Art. 147. When a man and a woman who are capacitated to marry each other, *live exclusively with each other as husband and wife without the benefit of marriage* or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.
>
> In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares. For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the former's efforts consisted in the care and maintenance of the family and of the household.
>
> Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.
>
> When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation.

Id. (emphases supplied).

223. *Id.* art. 148.

> Art. 148. In cases of *cohabitation not falling under the preceding Article*, only the properties acquired by both of the parties through their actual joint contribution of money, property, or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding

though these provisions only deal with property relations, it is at least an affirmation that a significant portion of the population enter into such relationships — enough for legislators to afford them protection for their properties.

In a similar vein, Republic Act No. 9262 or the Anti-VAWC Law also recognizes the existence of relationships outside marriage and affords protection for women in those kinds of relationship, similar to protection afforded married women —

> SECTION 3. *Definition of Terms*. – As used in this Act, (a) '*Violence against women and their children*' refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, *or against a woman with whom the person has or had a sexual or dating relationship*, *or with whom he has a common child*, or against her child whether legitimate or illegitimate, *within or without the family abode*, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment[,] or arbitrary deprivation of liberty.[224]

Given the aforementioned, it is safe to conclude that the legislators are not blind to the fact that there are unmarried couples in society who deserve to be protected under the laws. As to what kind of recognition these couples would receive, the previous discussion will be helpful at this juncture.

> shares are presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit.
>
> If one of the parties is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her shall be forfeited in the manner provided in the last paragraph of the preceding Article.
>
> The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith.

Id. (emphases supplied).

224. 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, § 3 (a) (2004) (emphases supplied).

C. Same-Sex Couples

As for same-sex couples, while there is a growing acceptance for the LGBTQI+ in current society, there is still a long way to go in ensuring that they are given meaningful recognition and equal rights in our laws.

1. A History of Prejudice

Although Philippine law "does not [criminalize] same-sex acts[,] ... homosexuality is [still] policed by various social institutions" and at times even by the State.[225] In the Family Code, for example, Article 45 enumerates the instances when a marriage may be annulled, among which is the consent of either party was obtained by fraud.[226] Article 46 thereof specifies the circumstances which constitute fraud, which includes "*Concealment* of drug addiction, habitual alcoholism[,] or *homosexuality or lesbianism* existing at the time of the marriage."[227] More than concealment of homosexuality or lesbianism as a ground for annulment, the fact that these were lumped together with drug addiction and habitual alcoholism reflect the negative attitude of Philippine society towards the LGBTQI+, especially at the time when the Family Code was drafted.

Even in jurisprudence, this negative attitude may be seen from several decisions of the Supreme Court. The following is an excerpt from a 2013 study conducted by GALANG,[228] a non-governmental organization devoted to promoting LGBTQI+ rights, as regards homosexuality in the Philippines —

> Several of the criminal cases that surfaced in the keyword search revealed proceedings in which, even when specific crimes had nothing to do with gender or sexuality, accused persons were variably characteri[z]ed as the 'tomboy' member of a kidnapping syndicate (*People v. Uyboco*), the

225. GALANG, Policy Audit: Social Protection Policies and Urban Poor LBTs in the Philippines (Evidence Report No. 21 under Sexuality, Poverty and Law) at 7, *available at* https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/2892/ER21Policy_Audit_Social_Protection_Policies_and_Urban_Poor_LBTs_in_the_Philippines.pdf?sequence=7 (last accessed Aug. 15, 2020).

226. FAMILY CODE, art. 45.

227. *Id.* art. 46 (emphasis supplied). *See also* FAMILY CODE, art. 55. The grounds of legal separation, among which is respondent's lesbianism or homosexuality, is listed herein.

228. *See* GALANG Philippines Inc., Who We Are, *available at* http://www.galangphilippines.org/about/who-we-are (last accessed Aug. 15, 2020).

> 'tomboy' drug-pusher (*People v. Villahermosa*), the 'busty' lesbian lookout in a murder (*People v. Mosquerra*), and the drunk and crazy lesbian arsonist who burned her house down when her girlfriend broke up with her (*People v. Gil*). Interestingly, in rape cases that have been elevated to the Supreme Court, the issue of lesbianism seems to factor in many defen[s]e arguments that seek to impugn the character of the victim/survivor or of the witnesses. The keyword search also uncovered instances of defen[s]e counsel in rape cases casting aspersions on the witnesses by alleging homosexual conduct. In one case, the victim/survivor's father defended himself against the rape charges by saying that his wife falsely accused him because she wanted to leave him for her lesbian lover (*People v. Ramos*). In another, the accused claimed that the witnesses, two female household helpers who had allegedly seen the rape of their 10-year-old ward, were lesbian lovers, and were framing him because of a personal grudge (*People v. Gamboa*).
>
> One accused man argued that the rape victim/survivor 'had a relationship with a tomboy and lacerations in her vagina were caused by this tomboy through fingering' (*People v. Payot, Jr*). Another accused rapist defended himself with the claim that he and his wife, the victim's aunt, had taken the child in because of her strained relationship with her mother, who had chosen to live with a lesbian lover (*People v. Valdesancho*), as if to imply that the accused should instead be rewarded for saving a child from her mother's 'depraved lifestyle'. In one case, the Supreme Court affirmed and cited a lower court decision that found a man guilty of raping and impregnating a tomboy criminology student during a drinking session, but not without implying in the same breath that lesbians tend not to have a pleasing physical appearance and that only pretty women can be raped. The decision read in part:
>
> Admittedly, the complainant is a 'tomboy'. Her appearance is most revealing. She is not exactly ugly. These considerations notwithstanding, and perusing the background leading to the incidents in question, it cannot be disputed that the two accused were at the time of the incident, drunk. Such being their state, it is not-improbable to say that the physical appearance of the woman would not bar these persons from the commission of the offense (People v. Balbuena ...)[.][229]

229. GALANG Philippines Inc., *supra* note 225, at 11 (citing People v. Uyboco, 640 SCRA 146, 151 (2011); People v. Villahermosa, 650 SCRA 256, 263 (2011); People v. Mosquerra, 362 SCRA 441, 446 (2001); People v. Gil, 569 SCRA 142, 145 (2008); People v. Ramos, 345 SCRA 685, 689 (2000); People v. Joaquin, Jr., 225 SCRA 179, 185 (1993); People v. Payot, Jr., 559 SCRA 609, 615 (2008); People v. Valdesancho, 358 SCRA 300, 305 (2001); & People v. Balbuena, 129 SCRA 10, 20 (1984)) (emphases supplied).

3. Changing Attitude Towards Homosexuality

It is undeniable that the LGBTQI+ are among the marginalized sectors of society, whether in the Philippines or in other countries. However, as with other political struggles, it seems that as generations pass, society's attitude towards the LGBTQI+ community is slowly becoming more favorable. In recent years, while the struggle remains, an unprecedented advancement of LGBTQI+ rights is also seen across the world.

In the U.S., for example, the case of *United States v. Windsor*[230] was decided in 2013. At issue therein was the validity of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act to define *marriage* and *spouse* as excluding same-sex partners. Ultimately, the U.S. Supreme Court declared DOMA as unconstitutional —

> *The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State*. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. *The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity*.[231]

Just two years after *Windsor*, the U.S. Supreme Court promulgated another landmark decision which greatly impacted those in same-sex relationships. In *Obergefell v. Hodges*,[232] 14 same-sex couples and two men whose same-sex partners were already deceased filed suits in the respective Federal District Courts in their home states, arguing that "state officials violate[d] the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another state given full recognition."[233] The U.S. Supreme Court held that "The Fourteenth Amendment requires a state to license a marriage between two people of the

230. U.S. v. Windsor, 133 S.Ct. 2675 (2013) (U.S.).

231. *Id.* at 2695-96 (emphases supplied).

232. Obergefell v. Hodges, 576 U.S. 644, June 26, 2015, *available at* https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (last accessed Aug. 15, 2020).

233. *Id.* at 1.

same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-[s]tate."[234]

The respondents in *Obergefell* claimed that it would "demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex [since in their view (and as viewed by many all over the world),] [m]arriage ... is by its nature a gender-differentiated union of man and woman."[235] As for petitioners, they acknowledge this history but contend that it cannot end there — "[f]ar from seeking to devalue marriage, [they] seek it for themselves because of their respect[ ]—[ ]and need[ ]—[ ]for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[236]

In this regard, the U.S. Supreme Court noted that the history of marriage is one of both continuity and change as it has not stood in isolation from developments in law and society.[237] Moreover, the "developments in the institution of marriage over the past centuries were not mere superficial changes[;] [r]ather, they worked deep transformations in its structure,

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234. *Id.*

235. *Id.* at 4.

236. *Id.*

237. *Id.*at 6. The U.S. Supreme Court held —

> The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution — even as confined to opposite-sex relations — has evolved over time.
>
> For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. *See* N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. *See* 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. *See* Brief for Historians of Marriage et al. as Amici Curiae 16–19.

Id. (emphases supplied).

affecting aspects of marriage [that were] long viewed ... as essential."[238] Hence, "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[239] With this knowledge comes the recognition that excluding same-sex couples from the right to marry imposes a stigma and injury prohibited by the Constitution.[240] Below are some excerpts from the eloquently-penned decision —

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. *But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied*. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.
>
> ...
>
> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than [they once] were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. *It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves*. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. *They ask for equal dignity in the eyes of the law*. The Constitution grants them that right.
>
> The judgment of the Court of Appeals for the Sixth Circuit is reversed.[241]

Also, in 2015, the ECtHR promulgated a landmark decision concerning the right of homosexual couples to be recognized in the laws of their member States. In the case of *Oliary and Others v. Italy*,[242] three homosexual couples claimed that

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238. *Obergefell*, 576 U.S. at 7.

239. *Id.* at 17.

240. *Id.* at 17-18.

241. *Id.* at 19 & 28 (emphases supplied).

242. Oliary and Others v. Italy, Application Nos. 18766/11 and 36030/11, Judgment, (Eur. Ct. H.R. July 21, 2015).

> under Italian legislation they do not have the possibility to get married or enter into any other type of civil union.
>
> The Court considered that the legal protection currently available to same-sex couples in Italy [—] as was shown by the applicants' situation [—] did not only fail to provide for the core needs relevant to a couple in a stable committed relationship, but it was also not sufficiently reliable.[243]

The ECtHR reiterated its previous ruling that "same-sex couples are just as capable as different-sex couples of entering into stable [ ] and committed relationships and that they are in a [relatively] similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."[244] The ECtHR also recognized that the "applicants ... , who are unable to marry, have [also] been unable to have access to a specific legal framework [ ] such as civil unions or registered partnerships[.]"[245] Thus, the ECtHR held that "in the absence of marriage, same-sex couples [ ] have a particular interest in obtaining the option of entering into a form of civil union or registered partnership ... [as] the most appropriate way ... [to] have their relationship legally [recognized] and which would guarantee them the relevant protection."[246] Additionally, the ECtHR gave importance to the international movement towards legal recognition of same-sex couples in recent times.[247]

Indeed, despite existing hindrances to the full realization of their rights, there have been significant advancements in the LGBTQI+ movement across the globe in the past few years. Since the Netherlands became the first country to legalize same-sex marriage in 2001, there are now a total of 30 countries that have legalized same-sex marriage in North and South America, Europe, Oceania, Africa, and Asia.[248]

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243. European Court of Human Rights, Italy should introduce possibility of legal recognition for same-sex couples (Press Release — Chamber Judgments) at 1, *available at* http://hudoc.echr.coe.int/eng-press?i=003-5136611-6342261 (last accessed Aug. 15, 2020).

244. *Oliary and Others*, Application Nos. 18766/11 and 36030/11, ¶ 165.

245. *Id.* ¶ 167.

246. *Id.* ¶ 174.

247. *Id.* ¶ 178.

248. These countries are: Northern Ireland (2019), Ecuador (2019), Taiwan (2019), Austria (2019), Australia (2017), Malta (2017), Germany (2017), Colombia (2016), United States (2015), Greenland (2015), Ireland (2015), Finland (2015), Luxembourg (2014), Scotland (2014), England and Wales (2013), Brazil (2013), France (2013), New Zealand (2013), Uruguay (2013), Denmark (2012),

In the Philippines, the Supreme Court recently had occasion in the case of *Falcis v. Civil Registrar General*[249] to rule on the validity of the definition of marriage under the Family Code as between a man and a woman.[250] While the petition was ultimately dismissed, it should be noted that the grounds for dismissal were mainly procedural (i.e., no actual case or controversy, lack of standing, improper remedy, violation of doctrine of hierarchy of courts, failure to comply with court directives, and other inadequacies of the petition).[251] It may be easy to consider this as a blow to the same-sex marriage movement in the country. However, the dismissal does not foreclose a new petition raising the issue of same-sex marriage before the Court as *Falcis* was not decided on the merits. The decision did not foreclose the legality of same-sex marriage, whether it be through legislative or judicial fiat, as the Court "unanimously [chose] the path of caution."[252] The Court recognized that the LGBTQI+ community have suffered enough marginalization and discrimination in society; hence, it chose to be careful not to add to these burdens through the swift hand of judicial review.[253] In any case, the Court made some important pronouncements about this cause.

The Court in *Falcis* explicitly declared that same-sex couples "certainly deserve legal recognition in some way."[254] Also, the Court observed that "[f]rom its plain text, the Constitution does not define or restrict marriage on the basis of sex, gender, sexual orientation, or gender identity or expression."[255] As such, "the Constitution is capable of accommodating a contemporaneous understanding of sexual orientation, gender identity and expression, and sex characteristics[.]"[256] However, the Court also ruled that

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Argentina (2010), Portugal (2010), Iceland (2010), Sweden (2009), Norway (2008), South Africa (2006), Spain (2005), Canada (2005), Belgium (2003), and the Netherlands (2001). *See* Pew Research Center, Same-Sex Marriage Around the World, *available at* https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world (last accessed Aug. 15, 2020).

249. Jesus Nicardo M. Falcis, III, v. Civil Registrar General, G.R. No. 217910, Sept. 3, 2019, *available at* http://sc.judiciary.gov.ph/8227 (last accessed Aug. 15, 2020).

250. *Id.* at 3.

251. *Id.* at 46, 90, 92, 98, & 104.

252. *Id.* at 2.

253. *Id.*

254. *Id.* at 3.

255. *Falcis*, G.R. No. 217910, at 14.

256. *Id.* at 15.

"[t]his is not the case that presents the clearest actual factual backdrop to make the precise reasoned judgment our Constitution requires."[257] In the end, the Court sympathized with the petitioner and declared that it "underst[ood] the desire of same-sex couples to seek, not moral judgment based on discrimination from any of our laws, but rather, a balanced recognition of their true, authentic, and responsive choices."[258]

Thus, despite the dismissal of the petition, the pronouncements of the Supreme Court were clear in recognizing the marginalization of the LGBTQI+ community and the need for legal recognition of their relationships. With this alone, the decision can be considered as a win for the LGBTQI+ cause.

VII. MORALS LEGISLATION

The exclusion of those belonging in non-conventional families from the coverage of social protection laws is evidently rooted in the fact that they are formed outside of marriage. This is because the laws define *dependents* and *beneficiaries* in terms of blood or marital relations.

Since Philippine society is quite conservative when it comes to marital relations, this has been translated into laws wherein marriage is given the highest protection among all kinds of relationships. Consequently, those who enter into marriage-like relationships face cultural and social backlash from society. Moreover, they are denied protection from the laws.

It cannot be denied that unmarried couples (most evidently same-sex couples) in marriage-like arrangements are traditionally viewed as engaging in immoral activities. It may thus be justifiably asked whether their exclusion is rooted in the fact that society views these relationships as *immoral*. If such, then these laws may be considered as legislating morality.

A. Mill's Harm Principle

The idea of morals legislation is deduced from the *harm principle* of British political philosopher John Stuart Mill.[259] In his essay entitled *On Liberty*, Mill gave the parameters of the sphere of individual liberty —

257. *Id.* at 107.

258. *Id.*

259. John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L. J. 1 (2009-2010).

> The object of this essay is to assert one very simple principle ... This principle is that ... *the only purpose for which power can be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.* He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, it would be wise or even right ... The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself his independence is, of right, absolute. *Over himself, over his own body and mind, the individual is sovereign.*[260]

Based on Mill's *harm principle*, the only legitimate and justifiable way that a State may limit the liberty of a person is in "prevention of harm to third parties."[261] In this regard, the term *morals legislation* is used to designate laws that prohibit a wide range of activities such as "consensual homosexual relations, abortion, adultery, fornication, prostitution, bestiality, bigamy, adult incest, sadomasochism, gambling, the use of illegal drugs, euthanasia, and assisted suicide, to name a few."[262] Using the *harm principle* of Mill as a framework, the right to privacy "would immunize from constitutional attack all such laws, at least to the extent that they do not directly harm third parties."[263] The right to privacy will be discussed afterwards.

B. The Case of Estrada v. Escritor

The landmark case of *Estrada v. Escritor*[264] is informative in discussing the dynamics of morality in legislation. In this case, Estrada wrote a letter-complaint to the presiding judge of Branch 253, RTC of Las Piñas requesting investigation of rumors that Escritor, who is the court interpreter in the same court, is living with a man not her husband with whom she has a child of eighteen to twenty years old.[265] These charges were filed because Estrada believes that Escritor is "committing an immoral act that tarnishes the image of the court, thus she should not be allowed to remain employed

260. *Id.* at 2 (citing JOHN STUART MILL, ON LIBERTY 68 (1859)) (emphases supplied).

261. Hill, *supra* note 259, at 3.

262. *Id.*

263. *Id.* at 4.

264. Estrada v. Escritor, 408 SCRA 1 (2003).

265. *Id.* at 50.

therein as it might appear that the court condones her act."[266] In response, Escritor testified that

> when she entered the judiciary in 1999, she was already a widow, her husband having died in 1998. She admitted that she has been living with Luciano Quilapio, Jr. without the benefit of marriage for twenty years and that they have a son. But as a member of the religious sect known as the Jehovah's Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement is in conformity with their religious beliefs. In fact, after ten years of living together, she executed on July 28, 1991 a 'Declaration of Pledging Faithfulness.' ... Escritor's partner, Quilapio, executed a similar pledge on the same day. Both pledges were executed in Atimonan, Quezon and signed by three witnesses. At the time Escritor executed her pledge, her husband was still alive but living with another woman. Quilapio was likewise married at that time but had been separated in fact from his wife.[267]

Notwithstanding this, an administrative case was still filed against Escritor for gross and immoral conduct.[268] While the case was primarily decided on the issue of religious freedom, the discussion about morality in the law is useful in this discussion.

In its most basic sense, the Court adopted the view of the famed Greek philosopher Socrates that morality is "how we ought to live and why."[269] The Court also cited the British High Court judge and legal philosopher Lord Devlin, who posited that "a society is held together by a community of ideas, made up not only of political ideas but also of ideas about the manner its members should behave and govern their lives. The latter are their morals; they constitute the public morality."[270]

Morality and legislation are not irreconcilable. In fact, the Court said that the laws enacted become expressions of public morality and, quoting Justice Oliver Wendell Holmes, "'the law is the witness and deposit of our moral life.' 'In a liberal democracy, the law reflects social morality over a period of time.'"[271] However, the Court cautioned that law is not all morality —

266. *Id.*

267. *Id.* at 51–52.

268. *Id.* at 62.

269. *Id.* at 173.

270. *Estrada*, 408 SCRA at 173.

271. *Id.* at 175.

> *Law* deals with the minimum standards of human conduct while *morality* is concerned with the maximum. A person who regulates his conduct with the sole object of avoiding punishment under the law does not meet the higher moral standards set by society for him to be called a morally upright person. Law also serves as 'a helpful starting point for thinking about a proper or ideal public morality for a society' in pursuit of moral progress.[272]

C. The Harm in Legislating Morality

Indeed, morals legislation is not prohibited. However, a clear limitation to morals legislation is that the public morality expressed in the law should be secular as opposed to religious.[273] As such, when the government proscribes an *immoral* conduct, the reason should be "because it is 'detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society[,]' and not because the conduct is proscribed by the beliefs of one religion or the other."[274] However, the limitation is not confined to religious objection alone.

The basic idea of morals legislation is that "it involves laws which regulate or prohibit private acts on grounds that the majority believes them to be immoral."[275] This is palpable in laws that criminalize homosexual acts or sodomy laws. The disapproval against homosexuals is not only on religious grounds —

> *Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'* Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.'[276]

Certainly, the State has an interest in shaping and expressing a certain degree of public morality through legislation. In doing so, however, it may

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272. *Id.*at 175-78 (emphases supplied).

273. *Id.* at 179.

274. *Id.* at 181.

275. Hill, *supra* note 259, at 8.

276. Lawrence v. Texas, 539 U.S. 558, 584 (2003) (emphases supplied).

not "merely reflect 'a bare ... desire to harm a politically unpopular group[.]"[277]

D. Recognition of the Non-conventional Family: Justice Bellosillo's Concurring Opinion in Estrada v. Escritor

For this discussion, the Concurring Opinion of Associate Justice Josue N. Bellosillo is most relevant. He took a more liberal stance in recognizing the set-up of Escritor, Quilapio, and their child as a family. According to him, if the Court were to uphold the complaint, it "might be dissolving a strong and peaceful family of more than two [ ] decades and, in the extreme case, deprive respondent of livelihood from which to feed herself and her family."[278] Justice Bellosillo warned that if the Court would rule as such, it "will be breaking up an otherwise ideal union of two [ ] individuals who have managed to stay together as husband and wife for more than [20] years and at peace with the world and will adversely affect their son born of their union."[279]

Justice Bellosillo also opined that morality should not be so rigidly viewed so as to create a situation that unduly prejudices persons who simply do not conform to the exacting standards of society —

> Moreover, there is simply *nothing disgraceful and immoral in respondent's decision to pursue her happiness, and perhaps security, after her lawful husband abandoned her for another woman*. She did not forsake any child nor desert her household. It was her philandering husband who left her for another woman. To paraphrase Judge Learned Hand, Soledad was not obligated to live in complete celibacy [or] otherwise forfeit her claim to good moral character. There ought to be a better order of moral priorities to avoid the perceived fixation on sex where a person may have impeccable sexual standards[ ]—[ ]or indeed be celibate[ ]—[ ]and yet steal. To be sure, there are matters that are best left to the conscience and the moral beliefs of an individual, and matters of which public law may take cognizance. Obviously, while the latter pertains to matters affecting society and public life, *not every 'irregular union' constitutes immorality that is actionable under administrative law*.[280]

277. Hill, *supra* note 259, at 65 (citing U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

278. *Estrada*, 408 SCRA at 199 (J. Bellosillo, concurring opinion).

279. *Id.*

280. *Id.* (emphases supplied).

Justice Bellosillo also noted that "although some years back[,] society decried solo parenthood and *de facto* separated couples as an affront to the conventional wisdom of a model family, recent social justice legislation has compassionately redefined the concept of family to include single mothers and their children regardless of the mother's civil status[.]"[281] Further, he opined that the genuineness of a family should not be confined to rigid criteria — "[t]he quality or authenticity of a family ... does not lie in its legal status alone[;] ... [r]ather, it lies in the relationship between [its members]."[282] Accordingly, "[t]here is no cogent reason to justify any action that will disrupt or break apart the peaceful existence of the family founded by Escritor and her other half."[283]

In finding that Escritor is not administratively liable, Justice Bellosillo stressed that the Court "cannot describe the concern and love she has for so long exhibited as a willful, flagrant[,] and shameless conduct"[284] and while the Court does not encourage such a union, it "cannot on the other hand totally ignore a fact of life."[285]

Justice Bellosillo made an appeal to see the human side of the case especially since Escritor's position is not one which has caused scandal to anyone truly concerned with public morality and there are indeed non-conventional family set-ups that exist in the country who should hardly be seen as leading immoral lives.[286] According to him, "it is more attuned to the interest of society and public service that [Escritor] be able to fulfill her obligation of maternal support and care for her son and true family than for us to tear apart an otherwise ideal union of two loving and respectable individuals."[287] He then went on to state —

> While this Court is aware of the not-so-easy and clear-cut task of determining whether certain improper conduct would constitute disgraceful immorality and warrant administrative discipline, to be sure, in this particular case we are wholly convinced that respondent in living with her present partner to foster a wholesome family was impelled by only the

281. *Id.* at 200 (emphasis supplied).

282. *Id.* (citing Rina Jimenez-David, *Welcome Relief for Couples, Courts*, PHIL. DAILY INQ., Jan. 19, 2003).

283. *Estrada*, 408 SCRA at 201 (J. Bellosillo, concurring opinion).

284. *Id.*

285. *Id.* 202.

286. *Id.* at 204.

287. *Id.* at 205.

> honest and decent intention to overcome her previous marital misfortune and to take anew her natural place in a pleasant and wholesome community. Without fear of contradiction, *it would be violating godly laws of charity and love and, to say the least, embracing cruelty and hypocrisy, if we should require respondent to abandon her faithful spouse and loving son, or penalize her for treasuring the unity of her family as she would keep her work, for the punctilious satisfaction of a blind world.*[288]

Citing a case wherein a Muslim judge in a polygamous marriage was not found to be immoral on that ground, Justice Bellosillo emphasized that non-traditional forms of family should not be automatically labeled as immoral, albeit the discussion focused on religious grounds.[289] He opined that immorality cannot be deduced "from the [ ]*unusual*[ ] setup in [Escritor's] family[.]"[290] According to him, Section 3, Article XV of the Constitution, which provides that "[t]he State shall defend ... [t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood[,]"[291] is broad enough to "include *de facto* family relations since it would be absurd to deny the free exercise of religious convictions by virtue of the existence or non-existence of marriage."[292]

While the discussions in this case are confined to such family set-ups that contain legal impediments (i.e., bigamy and polygamy), the statements about morality and the recognition of the non-conventional family may well be applied to two persons who are not married and are in marriage-like situations but who do not suffer from any legal impediment from marriage.

The Separate Concurring Opinion of Justice Bellosillo is not only relevant because of his pronouncements on the non-traditional family. While the *ponencia* in *Escritor* focused on religious freedom, Justice Bellosillo asserted in his concurrence another constitutional right in which respondent would have found protection — the right to privacy.[293] In considering the right to privacy, he opined that the Court "can make a difference not only for those who object out of religious scruples but also for those who choose to live a

288. *Id.* (emphasis supplied).

289. *Estrada*, 408 SCRA at 219-20 (J. Bellosillo, concurring opinion).

290. *Id.* at 207 (emphasis supplied).

291. *Id.* (citing PHIL. CONST. art. XV, § 3).

292. *Estrada*, 408 SCRA at 207.

293. *Id.* (J. Bellosillo, concurring opinion).

meaningful life even if it means sometimes breaking 'oppressive' and 'antiquated' application of laws[.]"[294]

VIII. LIBERTY, PRIVACY, AUTONOMY: A CONVERGENCE OF RIGHTS

As previously discussed, Mill's *harm principle* basically means that "the only legitimate justification for the [S]tate to limit the liberty of the person is the prevention of harm to third parties."[295] The harm principle is not only used in understanding morals legislation. It is also regarded as influential in shaping "constitutional ideals, [particularly on] the modern right to privacy."[296] In this regard, the most significant value of the harm principle as understood in privacy rights is that "it rejects, as inconsistent with the principles of a free society, laws which prohibit private or 'self-regarding' acts on grounds that the majority believes the activity to be morally objectionable."[297]

A. The Right to Liberty and the Right to Privacy

The right to liberty does not only include the physical liberty of the person. In the case of *Meyer v. Nebraska*,[298] the U.S. Supreme Court ruled in this wise —

> While this court has not attempted to define with exactness the liberty thus guaranteed [in the due process clause], the term has received much consideration and some of the included things have been definitely stated. Without doubt, *it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men*.[299]

Moreover, in the landmark case of *Morfe v. Mutuc*,[300] the Philippine Supreme Court stated that

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294. *Id.* at 208 (emphasis omitted).

295. Hill, *supra* note 259, at 3.

296. *Id.*

297. *Id.*

298. Meyer v. Nebraska, 262 U.S. 390 (1923).

299. *Id.* at 399 (emphases supplied).

300. Morfe v. Mutuc, 22 SCRA 424 (1968).

> [*liberty*] *cannot be dwarfed into mere freedom from physical restraint of the person of the citizen*, but is deemed to embrace the right of man to enjoy the [facilities] with which he has been endowed by his Creator, subject only to such restraint as are necessary for the common welfare.[301]

The right to liberty is a broad and encompassing right. As can be seen above, one aspect of the *liberty* protected by the due process clause is the right of personal privacy.[302]

1. Privacy Under Domestic Law

The only explicit mention of the privacy right in the Constitution can be found in Section 3 (1) of the Bill of Rights — "[t]he privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law."[303] This does not mean, however, that the privacy right protected by the Constitution is limited to communication and correspondence — rather, the underlying theme of the entire Bill of Rights *is* the right to privacy.[304] The Philippine constitutional and statutory law "does include a right to privacy[, but it is] left to case law ... to [map] out [its] scope and content" as applied in various situations.[305] The case of *Ople v. Torres*[306] identified the other privacy rights protected in the Constitution and these can be found in the following provisions of the Bill of Rights: the due process clause (Section 1), the right against unreasonable searches and seizures (Section 2), the right to choose a person's abode and the right to travel (Section 6), the right to form associations (Section 8), and the right against self-incrimination (Section 17). *Ople* then ventured beyond Constitutional law and identified the privacy rights in statutory law.[307]

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301. *Id.* at 439-40 (citing Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919) (emphases supplied)).

302. *See* Ejercito v. Sandiganbayan, 509 SCRA 190, 260 (2006).

303. PHIL. CONST. art. III, § 3 (1).

304. Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78, 82 (2008) (citing IRENE R. CORTÉS, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY (1970)).

305. Tan, *supra* note 304, at 108 (citing Ayer Productions Pty. Ltd. v. Capulong, 160 SCRA 861, 870 (1988)).

306. Ople v. Torres, 293 SCRA 141 (1998).

307. Tan, *supra* note 304, at 109 (citing *Ople*, 293 SCRA at 157). *Ople* further examined Philippine law from a broader perspective —

2. Privacy Under International Law

In the case of *In re Habeas Corpus of Camilo L. Sabio*,[308] the Supreme Court recognized that the right to privacy can also be anchored in international law —

> The meticulous regard we accord to these zones [of privacy] arises not only from our conviction that the right to privacy is a 'constitutional right' and 'the right most valued by civilized men,' *but also from our adherence to the Universal Declaration of Human Rights* which mandates that, 'no one shall be subjected to arbitrary interference with his privacy' and 'everyone has the right to the protection of the law against such interference or attacks.'[309]

The right to privacy is also contained in Article 17 of the ICCPR.[310] Other than the UDHR and ICCPR, various international instruments also recognize the right to privacy such as the CRC, ICRMW, the European Convention for the Protection of Human Rights, the American Convention

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> Zones of privacy are likewise recognized and protected in our laws. The *Civil Code* provides that '[e]very person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons' and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. *The Revised Penal Code* makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in *special laws* like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act and the Intellectual Property Code. The Rules of Court on privileged communication likewise recognize the privacy of certain information.

Ople, 293 SCRA at 157 (emphases supplied).

308. Sabio v. Gordon, 504 SCRA 705 (2006).

309. Tan, *supra* note 304, at 133 (citing *Sabio*, 504 SCRA at 736) (emphasis supplied).

310. ICCPR, *supra* note 33, art. 17. Article 17 of the ICCPR provides —

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his [honor] and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.

Id.

on Human Rights, and the American Declaration on the Rights and Duties of Mankind.[311]

B. Privacy as Autonomy: Decisional Privacy

The right to privacy comes in various concepts — "the right to be let alone [is] the *most comprehensive of rights* and the right most valued by civilized men."[312] In his article on the right to privacy, Atty. Oscar Franklin Tan illustrated the convergence of various privacy values in both constitutional and civil law, one of which concerns *privacy as autonomy*, which under the Constitution involves substantive due process, and in the Civil Code and other statutory laws involve infliction of distress.[313] This will be the focus of the following discussion.

1. American Jurisprudence on Decisional Privacy

In *Whalen v. Roe*,[314] the U.S. Supreme Court divided the right of privacy into two: *decisional privacy* which is the "interest in independence in making certain kinds of important decisions;"[315] and *informational privacy*, which is "the individual interest in avoiding disclosure of personal matters."[316] The following cases illustrate the concept of decisional privacy.

The first case in the U.S. Supreme Court to recognize the privacy right is *Griswold v. Connecticut*,[317] wherein the Court struck down a law which made it a crime to use "any drug, medicinal article[,] or instrument for the purpose of preventing conception"[318] for violating the right to privacy of married persons.[319] The interpretation of the Court in *Griswold* was "grounded on an associational conception of privacy specifically limited to *marital* association."[320] A few years later, the landmark case of *Loving v.*

311. Tan, *supra* note 304, at 134.

312. *Id.* at 109 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (J. Brandeis, dissenting opinion)) (emphasis supplied).

313. Tan, *supra* note 304, at 87.

314. Whalen v. Roe, 429 U.S. 589 (1977).

315. *Id.* at 599-600.

316. *Id.* at 599.

317. Griswold v. Connecticut, 381 U.S. 479 (1965).

318 *Id.* at 480.

319 *Id.*

320. Hill, *supra* note 259, at 20.

Virginia[321] declared as unconstitutional, based on due process grounds, a statute that forbade interracial marriage.[322]

The next landmark case to discuss privacy rights is *Eisenstadt v. Baird*[323] wherein the Court struck down a law that prohibited the distribution of contraception to *unmarried* persons.[324] In this case, Justice Brennan wrote that "[i]f the right of privacy means anything, it is the right *of the individual*, married or single, to be free from unwarranted governmental intrusion into matters so *fundamentally affecting a person* as the decision whether to bear or beget a child."[325] The Court in *Eisenstadt* went beyond *Griswold's* emphasis on the privacy of the bedroom and broadened the protection of privacy for autonomy-related decisions.[326] It is said that the language of *Eisenstadt* was precisely that of the decisional privacy later described in *Whalen*.[327]

Just one year after *Eisenstadt*, the U.S. Supreme Court decided the "most important privacy right decision" in a case involving abortion rights.[328] In *Roe v. Wade*,[329] the concepts of right to privacy and substantive due process were reconciled —

> This *right of privacy*, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, *is broad enough* to encompass a woman's decision whether or not to terminate her pregnancy.[330]

It is said that *Roe* is an extension of *Griswold* and *Eisenstadt*, in the sense that "[t]o the extent the Constitution insulates from State interference the decision 'whether to bear or beget a child,' abortion laws fall under the same principle as anti-contraception laws."[331] As compared to contraception rights

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321. Loving v. Virginia, 388 U.S. 1 (1967).

322. *Id.* at 2.

323. Eisenstadt v. Baird, 405 U.S. 438 (1972).

324. *Id.* at 443.

325. *Id.* at 453 (emphases supplied).

326. Hill, *supra* note 259, at 22.

327. Tan, *supra* note 304, at 93.

328. Hill, *supra* note 259, at 25.

329. Roe v. Wade, 410 U.S. 113 (1973).

330. *Id.* at 153 (emphases supplied).

331. Hill, *supra* note 259, at 25.

however, abortion rights better highlight the importance of a general right of bodily integrity.[332]

The *Griswold* and *Eisenstadt* doctrines were further broadened in *Carey v. Population Services*,[333] which declared as unconstitutional a law prohibiting the distribution of contraceptives to minors.[334] According to the decision, "among the decisions that an individual may make *without unjustified government interference are personal decisions* relating to marriage, procreation, contraception, *family relationships*, and child rearing and education."[335] This marks the first time that the U.S. Supreme Court explicitly linked privacy to personal autonomy.[336] In the same year, the case of *Moore v. East Cleveland*[337] was decided, which involved a local ordinance prohibiting a grandmother from living with her son and two grandchildren.[338] According to the Court, the limitation of occupation of houses to single *families* as it defined families must be struck down, stating that due process protected a "private realm of family life which the State cannot enter."[339] This protects the right of privacy in relation to the right of association which would include a right of 'unrelated' persons to live together.[340]

Then, the Court in *Zablocki v. Redhail*[341] cited *Griswold* in establishing that "the right to marry is part of the fundamental 'right or privacy' implicit in the Fourteenth Amendment's Due Process Clause."[342]

Finally, the Court in 2003 decided the landmark case of *Lawrence v. Texas*[343] involving a statute criminalizing homosexual acts.[344] This case "reiterated *Eisenstadt's* emphasis on how privacy inheres in an individual, and extended the decisional privacy's aegis from childbirth, heterosexual

332. *Id.*

333. Carey v. Population Services, 431 U.S. 678 (1977).

334. *Id.* at 685-86.

335. *Id.* at 684-85 (emphases supplied).

336. Hill, *supra* note 259, at 24.

337. Moore v. East Cleveland, 431 U.S. 494 (1977).

338. *Id.* at 494.

339. *Id.* at 499.

340. Hill, *supra* note 259, at 28.

341. Zablocki v. Redhail, 434 U.S. 374 (1978).

342. *Id.* at 384 (citing *Griswold*, 381 U.S. at 485).

343. Lawrence v. Texas, 539 U.S. 558 (2003).

344. *Id.* at 558.

intimacy, contraception, and abortion to homosexual relationships[.]"[345] According to the decision —

> [t]he case does involve two adults ... . The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[346]

All these decisions emphasize that decisional privacy is embraced in the due process clause, which prevents the State from intruding into certain personal decisions that are fundamental to human experience, extending beyond the aspects of sexuality and family life.[347]

2. Philippine Jurisprudence on Decisional Privacy

The first explicit recognition of the constitutional right to privacy in Philippine case law is in the 1968 case of *Morfe v. Mutuc*. This case involved the constitutionality of the provision in the Anti-Graft and Corrupt Practices Act requiring periodic submission by public officers of statements of assets and liabilities.[348] The law was questioned on the grounds of, among others, violation of due process and unlawful invasion of the right to privacy, which is inherent in the right against unreasonable search and seizure and the right against self-incrimination.[349] While *Morfe* was decided nine years before *Whalen*, it can be said that both cases used the same framework — although in *Morfe*, decisional privacy was termed as part of *liberty* and informational privacy as merely *privacy*.[350] In *Morfe*, the Court said that due process is the proper challenge to a State-imposed infringement of one's liberty.[351]

There are other cases in the Philippines which have touched on the notion of decisional privacy. As already mentioned, Justice Bellosillo's Concurring Opinion in *Estrada v. Escritor*[352] highlighted that individual liberty was the proper value to be protected, even beyond the religious

345. Tan, *supra* note 304, at 96 (emphasis supplied).

346. *Id.* (citing *Lawrence*, 539 U.S. at 578).

347. Tan, *supra* note 304, at 97.

348. *Morfe*, 22 SCRA at 432.

349. *Id.* at 429.

350. Tan, *supra* note 304, at 89.

351. *Id.* at 98.

352. *Estrada*, 408 SCRA at 192 (J. Bellosillo, concurring opinion).

freedom which the majority upheld.[353] Another case wherein decisional privacy was essentially applied is *Ilusorio v. Bildner*[354] wherein the Court denied an estranged wife's petition for habeas corpus to obtain custody of her 86-year old husband and declined to grant visitation rights. Since the husband was of sound and alert mind, the Court said that

> the crucial choices revolve on his residence and the people he opts to see or live with. The choices he made may not appeal to some of his family members but these are choices which exclusively belong to Potenciano. He made it clear before the Court of Appeals that he was not prevented from leaving his house or seeing people. With that declaration, and absent any true restraint on his liberty, we have no reason to reverse the findings of the Court of Appeals.
>
> With his full mental capacity coupled with the right of choice, Potenciano Ilusorio may not be the subject of visitation rights against his free choice. Otherwise, we will deprive him of his right to privacy. Needless to say, this will run against his fundamental constitutional right.[355]

The mention of the *right of choice* in the Court's decision pertains to decisional privacy.[356]

In recent jurisprudence, the term *decisional privacy* has been explicitly mentioned in *Disini, Jr. v. Secretary of Justice*[357] and *Vivares v. St. Theresa's College*,[358] however, its mention was merely *obiter dicta* as the concept of decisional privacy was not utilized therein to decide the case.

Perhaps one of the most significant recognitions of the concept of decisional privacy in recent jurisprudence is in the case of *Spouses Imbong v. Ochoa*[359] which dealt with the constitutionality of the Reproductive Health Law.[360] The Court made the following pronouncements therein —

> Decision-making involving a reproductive health procedure is a private matter which belongs to the couple, not just one of them. Any decision they would reach would affect their future as a family because the size of

353. *Id.* at 207.

354. Ilusorio v. Bildner, 332 SCRA 169 (2000).

355. *Id.* at 176.

356. Tan, *supra* note 304, at 102.

357. Disini, Jr. v. Secretary of Justice, 716 SCRA 237 (2014) & Disini, Jr. v. Secretary of Justice, 723 SCRA 109 (2014).

358. Vivares v. St. Theresa's College, 737 SCRA 92 (2014).

359. Imbong v. Ochoa Jr., 721 SCRA 146 (2014).

360. *Id.* at 260.

> the family or the number of their children significantly matters. The decision whether or not to undergo the procedure belongs exclusively to, and shared by, both spouses as one cohesive unit as they chart their own destiny. It is a constitutionally guaranteed private right. Unless it prejudices the State, which has not shown any compelling interest, the State should see to it that they chart their destiny together as one family.
>
> ...
>
> The right to chart their own destiny together falls within the protected zone of marital privacy and such state intervention would encroach into the zones of spousal privacy guaranteed by the Constitution.[361]

Another significant case which recognizes the concept of decisional privacy is *Falcis*, which is more relevant to the present discussion —

> Our freedom to choose the way we structure our intimate relationships with our chosen significant other in a large sense defines us as human beings. Even opposite-sex couples continually adjust the day-to-day terms of their partnership as their relationships mature. It is in the sanctuary of their spaces that we authentically evolve, become better human beings, and thus contribute meaningfully within our society. After all, the companionship and understanding that we inevitably discover with the person we choose to spend the rest of our lives with provide the foundation for an ethic of care that enriches a democracy.[362]

From these cases, it can be concluded that whether it is termed as *liberty* or *privacy*, the foundations and elements of decisional privacy are present in Philippine case law.

C. Other Facets of Liberty and Privacy

As already established, the right to liberty is a broad and encompassing right and the right to privacy takes several forms. Below are some examples of the variations of these rights as applied in the plight of the non-traditional family.

1. Right to Found a Family

While it is submitted that the right to found a family inheres in both homosexual and heterosexual individuals, this discussion will focus on same-sex relationships because such is less pronounced in law.

In 2006, human rights experts from 25 countries unanimously adopted the Yogyakarta Principles on the Application of International Human Rights

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361. *Id.* at 349-50.

362. *Falcis*, G.R. No. 217910, at 107.

Law in relation to Sexual Orientation and Gender Identity.[363] Otherwise known as the Yogyakarta Principles, this deals with a wide "range of human rights standards and their application to issues about sexual orientation and gender identity."[364] While not necessarily a binding instrument in itself, the Yogyakarta Principles "affirm binding international legal standards with which [ ] States must comply."[365]

One of the pertinent principles in the Yogyakarta Principles is The Right to Social Security and to Other Social Protection Measures (Principle 13), which declares that States must ensure "equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures[.]"[366] Another principle is The Right to Found a Family (Principle 24) which declares that States must "[e]nsure that laws and policies [recognize] the diversity of family forms, including those not defined by descent or marriage"[367] and "ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits[.]"[368] Principle 24 also directs States to "ensure that any obligation, entitlement, privilege, obligation[,] or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners[.]"[369]

From the latter principle, it is clear that States must respect the rights of homosexual couples to found a family and they may not be discriminated upon on the basis of their sexual orientation or gender identity.

363. The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to sexual orientation and gender identity at 7, *available* at http://data.unaids.org/pub/Manual/2007/070517_yogyakarta_principles_en.pdf (last accessed Aug. 15, 2020) [hereinafter The Yogyakarta Principles].

364. *Id.*

365. About the Yogyakarta Principles, *available at* http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles (last accessed Aug. 15, 2020).

366. The Yogyakarta Principles, *supra* note 363, at 19.

367. *Id.* at 27.

368. *Id.* at 27-28.

369. *Id.* at 28.

2. Right to Not Get Married

This discussion will focus on the experience of opposite-sex couples because for same-sex couples, there is still a legal impediment for them to get married.[370]

Without doubt, the right to marry is considered as a fundamental right in both national and international law. However, the right *not* to get married is not as pronounced in law. This does not mean that such right does not exist. The issue of having a right not to get married becomes relevant for unmarried opposite-sex couples. This can be seen, for example, in debates surrounding Domestic Partnership Registrations and Civil Unions. As mentioned earlier, these two initiatives were primarily created to cater to same-sex couples who otherwise could not obtain the benefits under State laws due to the prohibition on marriage. Opposite-sex couples were excluded or were included only if they were above 62 years old (for the U.S. model) and met the other criteria.[371] The main reason for the exclusion of opposite-sex couples is that they could enjoy the benefits provided by law to married couples by simply getting married. However, this Author disagrees with such premise.

While the law indeed protects the right to marry, it is arguable that the right *not* to get married is as fundamental. The case of *Shaw v. Stein*,[372] decided by the Saskatchewan Court of Queen's Bench, illustrates this.[373] In that case, the Family Property Act was amended to deem individuals who had cohabited for two years to be *spouses* and thus creating new rights and obligations for cohabiting parties, which include the right to claim half of equity in the family home.[374] The parties in this case cohabited for six years in a home registered solely in respondent's name and purchased with sale proceeds of his former home.[375] The respondent filed a notice of constitutional question, claiming that the amendments infringed his right to life, liberty, and security of the person under s.7 of Canada's Charter of Rights and Freedoms.[376] As regards the right to liberty, respondent asserts

370. *See* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016).

371. *See* Domestic Partnership Act.

372. Shaw v. Stein, 248 Sask. R. 23 (2004) (Can.).

373. *Id.*

374. *Id.* ¶ 5.

375. *Id.*

376. *Id.* ¶ 9.

that this goes beyond physical restraint and includes the right to sphere of personal autonomy which covers the right not to marry.[377] One justice who concurred in the decision wrote —

> *Married status can only be acquired through the* expression of a clear, free and personal choice, without which the marriage may be annulled. As I wrote in Miron v. Trudel, [1995] 2 S.C.R. 418, at para. 46:
>
> The decision to marry includes the acceptance of various legal consequences incident to the institution of marriage, including the obligation of mutual support between spouses and the support and raising of children of the marriage. In my view, freedom of choice and the contractual nature of marriage are crucial to understanding why distinctions premised on marital status are not necessarily discriminatory: where individuals choose not to marry, *it would undermine the choice they have made if the state were to impose upon them the very same burdens and benefits which it imposes upon married persons*. The authors Michael D. A. Freeman and Christina M. Lyon, in Cohabitation without Marriage (1983), at p. 191, make just these points: "...marriage is a voluntary institution in which the parties express their willingness to commit themselves to each other for life. Whether they are completely cogni[z]ant of all the legal effects of such a commitment is immaterial; the commitment is made, nevertheless, and marital rights and obligations inevitably follow. *Cohabiting couples do not make that same commitment, and rights and duties akin to marriage should not as a result follow. The danger with imposing the incidents of marriage on a cohabiting couple is that it constitutes a denial of a fundamental freedom*."
>
> And further at para. 201, Gonthier's judgment sets out:
>
> It is by choice that married couples are subject to the obligations of marriage. When couples undertake such a life project, they commit to respect the consequences and obligations flowing from their choice. The choice to be subject to such obligations and to undertake a life-long commitment underlies and legitimates the system of benefits and obligations attached to marriage generally, and, in particular, those relating to matrimonial assets. To accept the respondent Walsh's argument [—] thereby extending the presumption of equal division of matrimonial assets to common law couples [—] *would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system*. In effect, to presume that common law couples want to be bound by the same obligations as married couples is *contrary to*

377. *Id.* ¶ 5.

> *their choice to live in a common law relationship without the obligations of marriage.*[378]

In relation to this, one commentator stressed that "'[f]reedom of choice is not a one-way street where the only decision deserving protection is one that is socially preferred by those in power.'"[379] Another author also states the following in defense of the inclusion of opposite-sex couples in domestic partnership registrations —

> Although many view opposite-sex couples who live together, choosing to cohabit rather than marry, as casual and less committed in their relationships and thus undeserving of any of the rights and benefits that are associated with marriage, *legitimate reasons do exist for not marrying*. Some people object to the religious implications that are invariably linked to marriage or believe that traditional marriage promotes oppressive gender roles that are not egalitarian ... Moreover, the added costs of marriage and the money, time, and emotional upheaval attendant to divorce proceedings are enough to dissuade many from saying, 'I do.' Whatever the reason for not desiring marriage, *a heterosexual couple that chooses not to wed should not be penalized for this decision: a 'get married or get lost' attitude is intolerable.*[380]

Ultimately, these all boil down to what is known as "the right to decide if, when[,] and whom to marry."[381] The State obligation to guarantee this right is found in several human rights instruments,[382] i.e., the UDHR,[383] ICCPR,[384] ICESCR,[385] International Convention on the Elimination of All Forms of Racial Discrimination,[386] CEDAW,[387] and the Convention on

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378. *Shaw*, 248 Sask. R. ¶¶ 20 & 21 (citing Miron v. Trudel, 2 S.C.R. 418, ¶¶ 46 & 201) (emphases supplied).

379. Habegger, *supra* note 170, at 1011 (citing Thomas F. Coleman, *Domestic Partners Plan: 1 Step Forward, 2 Back*, CHI. DAILY L. BULL., Mar. 17, 1997, at 5).

380. Habegger, *supra* note 170, at 1011-12 (emphases supplied).

381. Rea A. Chiongson, The Right to Decide If, When, and Whom to Marry: Obligations of the state under CEDAW and other international human rights instruments (IWRAW Asia Pacific Occasional Papers Series No. 6) at 1, *available at* https://www.iwraw-ap.org/wp-content/uploads/2018/08/OPS_6-THE-RIGHT-TO-DECIDE-IFWHEN-WHOM-TO-MARRY.pdf (last accessed Aug. 15, 2020).

382. *Id.* at 22-33.

383. *See* UDHR, *supra* note 32, art. 16.

384. *See* ICCPR, *supra* note 34, art. 23 (in relation to article 3 of the ICCPR).

385. *See* ICESCR, *supra* note 50, arts. 3 & 10.

386. *See* ICERD, *supra* note 38.

Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.[388] It should be emphasized that the "*if*" component of the right means that a person may or may not exercise this right and either decision should be respected by the State. At this juncture, it bears reiterating from previous discussion that the word "*encourage*" pertaining to marriage was not included in the final text of the Constitution.[389]

Evidently, opposite-sex couples are fundamentally different from same-sex couples. For one thing, the former are allowed under our laws to enter into marriage while the latter are currently prohibited. However, in the context of accommodating families not bound by marriage, this should not mean that opposite-sex couples should be excluded from receiving benefits from the State simply because they choose not to marry — which is an exercise of their personal autonomy. It is submitted that the decision to not get married is as fundamental as the decision to get married, and the State should not interfere with such exercise of personal autonomy, keeping in mind that these decisions on intimate matters are central to the right to privacy. These couples should not be discriminated upon because of their decision to not get married.

In considering the inclusion of opposite-sex couples in the coverage of domestic partnership laws, the aim of these laws must be considered —

> If the goal, when drafting such a policy, is to create a second-tier [situation] where homosexuals, presumably happy to be given rights and benefits at all, are to be placed indefinitely, then heterosexual couples should indeed be left out of the equation. However, *if the goal is to recognize and support the wide diversity in the composition of families today, then the only real solution is to include heterosexual couples in the mix*.[390]

It should be emphasized that these laws (i.e., domestic partnership registration) granting benefits to unmarried couples were not drafted merely to provide a secondary recognition of same-sex couples. The aim of these laws is, and should be, the recognition and protection of diverse forms of families that exist today. All types of families, whether consisting of same- or

387. *See* CEDAW, *supra* note 32, art. 16, ¶¶ 1 & 2.

388. *See* Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages art. 1, ¶ 1, *entry into force* Dec. 9, 1964, 521 U.N.T.S. 231.

389. 5 RECORD, 1987 PHIL. CONST., at 862.

390. Habegger, *supra* note 170, at 1014 (emphasis supplied).

opposite-sex couples, deserve the same recognition and protection under the laws.

D. Examining the Definition of Beneficiaries and Dependents in Light of Privacy Rights

As established from the foregoing discussions, non-conventional families have the right to found and establish a family. Further, the protection that the Constitution affords to the family is not limited to the traditional family but it encompasses various other kinds of families. Furthermore, family relationship is one of the fundamental aspects of each person's life, which is considered as a sphere of privacy that the government may not unjustifiably intrude in. As the Court stated in *Falcis*, "[o]ur freedom to choose the way we structure our intimate relationships with our chosen significant other in a large sense defines us as human beings."[391] Thus, whoever a person chooses to establish a family with is a decision that goes into the core of his or her right to privacy. As such, the State must respect this choice. However, in examining the social protection laws, it seems that the State has put an undue burden to non-traditional families by excluding them in its coverage.

The list of beneficiaries and dependents in the social protection laws are premised on marital and blood relations (with the exception of the adopted child). An examination of these enumerations would lead one to deduce that these were patterned after the list of persons whom one is legally obligated to support. Below are the pertinent provisions of the Family Code:

Article 195 provides —

> Art. 195. Subject to the provisions of the succeeding articles, the following are obliged to support each other to the whole extent set forth in the preceding article:
>
> (1) The spouses;
>
> (2) Legitimate ascendants and descendants;
>
> (3) Parents and their legitimate children and the legitimate and illegitimate children of the latter;
>
> (4) Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and
>
> (5) Legitimate brothers and sisters, whether of full or half-blood[.][392]

391. *Falcis*, G.R. No. 217910, at 107.

392. FAMILY CODE, art. 195.

Article 194 provides —

> Art. 194. Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family.
>
> The education of the person entitled to be supported referred to in the preceding paragraph shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority. Transportation shall include expenses in going to and from school, or to and from place of work.[393]

A perusal of the above-mentioned provisions would show the similarities with the list of beneficiaries and dependents under social protection laws, in a sense that it follows the spouse-child-parent framework. To a certain extent, this is understandable considering the rationale of social protection laws —

> If all people are wise and provident, there would be little need for social security. However, most workers never save enough to care for themselves after retirement *or for their families in case of sickness*, *accident*, *or death*. In modern societies, individual and private methods of providing security are usually inadequate. Social security takes care of risks which the employee, *their families*, or even their employers cannot meet for their own private resources.[394]

Of course, these social protection laws are meant to protect not only the worker but also his or her family. It may be said to constitute a different kind of *support* when contingencies arise. After all, when contingencies such as sickness, death, or unemployment occur, the family members are the ones who bear its brunt. Then, it is rightfully so that the family members (spouse-child-parent) are the ones who can be designated as beneficiaries or dependents of the member.

Nevertheless, when this is applied to non-conventional families, the application of the law becomes unfair and unduly restrictive. Here is an excerpt from an interview conducted by GALANG with a lesbian woman: "[*f*]*rom the very beginning*, *I wanted to put her as my beneficiary. I applied only in* 2011. *I was told that I could not put my partner as my beneficiary because she was just my live-in partner. Besides*, *she was also a woman just like me*."[395]

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393. *Id.* art. 194.

394. GUTIERREZ JR., *supra* note 90, at 3 (emphases supplied).

395. GALANG, *supra* note 225, at 18 (emphasis supplied).

Evidently, members belonging to non-conventional families are not able to enjoy the protection in social legislation that other members have towards their families. It is a clear restriction of their choice, not only as regards the designation of dependents and beneficiaries, but also as regards their choice in their family relationships. It must be emphasized that SSS/GSIS, PhilHealth, and Pag-IBIG membership and contributions are generally mandatory and a bona fide member becomes entitled to its benefits after compliance with certain requirements.

However, to illustrate, even if a gay person religiously pays his contributions to the system, when a contingency arises such as sickness or death, there is no way for his partner to get the benefits that he worked hard for because in the eyes of the law, his partner is merely a stranger undeserving of protection and the security is reserved only for family members. With this, it is clear that the limited definition of *beneficiaries* and *dependents* in social protection laws infringes on the right to privacy of members who belong to non-conventional families.

While the social protection laws may indeed put limitations as to who can be dependents and beneficiaries, the classification must still be based on substantial distinctions and must be germane to the purpose of the law. However, it is submitted that these social protection laws offend the equal protection guarantee of the Constitution because they rest on an invalid classification.

IX. EXAMINING SOCIAL PROTECTION LAWS IN LIGHT OF THE EQUAL PROTECTION CLAUSE

The Constitutional mandate of promoting social justice in all phases of national development is a clear directive for the State to take positive steps in achieving greater equality.[396] In the field of social justice, as in all other aspects of society, laws must be consistent with the guarantee of equal protection. As the Supreme Court ruled, "no person or class of persons shall be [deprived of that] same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances."[397]

396. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 139.

397. Tolentino v. Board of Accountancy, et al. 90 Phil. 83, 90 (1951) (citing Missouri v. Lewis, 101 U.S. 22, 31 (1879)).

A. Equal Protection Clause: An Overview

It can be said that the essence of equal protection is already embraced in the concept of due process, "as every unfair discrimination offends the requirements of justice and fair play."[398] Nonetheless, it has been articulated separately from the due process clause to give it more emphasis and significance. As the Supreme Court held, "[a]rbitrariness in general may be challenged on the basis of the due process clause. But if the particular act assailed partakes of an unwarranted partiality or prejudice, the sharper weapon to cut it down is the equal protection clause."[399] Moreover, it can be observed that the equal protection clause, like the due process clause, is also couched in indefinite language presumably to better adapt to societal changes.

Nevertheless, the guaranty of equal protection of the laws is not a guaranty of equality in the application of the laws upon all persons.[400] It does not require the universal application of the laws to all persons or things without distinction; rather, it simply requires equality among equals as determined by a *reasonable* classification.[401]

B. Classifications

As mentioned, the equal protection clause does not prohibit the government from classifying. To reiterate, the following are the requisites for a valid classification, as held in *People v. Cayat*: "(1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class."[402]

In *Biraogo v. The Philippine Truth Commission of 2010*,[403] the Supreme Court expounded on the meaning of valid classification under the equal protection clause —

> For a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class. 'The classification will be regarded as invalid if all the members of the class are

398. Philippine Judges Association v. Prado, 227 SCRA. 703, 711 (1993).

399. *Id.*

400. Victoriano v. Elizalde Rope Workers' Union, 59 SCRA 54, 77 (1974).

401. Biraogo v. Philippine Truth Commission of 2010, 637 SCRA 78, 168 (2010).

402. *Cayat*, 68 Phil. at 18.

403. *Biraogo*, 637 SCRA.

> not similarly treated, both as to rights conferred and obligations imposed. It is not necessary that the classification be made with absolute symmetry, in the sense that the members of the class should possess the same characteristics in equal degree. Substantial similarity will suffice; and as long as this is achieved, all those covered by the classification are to be treated equally. The mere fact that an individual belonging to a class differs from the other members, as long as that class is substantially distinguishable from all others, does not justify the non-application of the law to him.'
>
> The classification must not be based on existing circumstances only, or so constituted as to preclude addition to the number included in the class. It must be of such a nature as to embrace all those who may thereafter be in similar circumstances and conditions. It must not leave out or 'underinclude' those that should otherwise fall into a certain classification.[404]

C. Levels of Judicial Scrutiny

In determining the reasonableness of a classification, "jurisprudence has developed three ... test[s.]"[405] "The most demanding [among the three] is the *strict scrutiny test* which requires the government to show that the challenged classification serves a compelling State interest and that the classification is necessary to serve that interest."[406] This is "used in cases [which] involve[e] classifications based on race, national origin, religion, alienage, denial of the right to vote, interstate migration, access to courts, and other rights recognized as fundamental."[407] Another test is the *intermediate or middle-tier scrutiny test* wherein the government must "show that the challenged classification serves an important State interest and that the classification is at least substantially related to serving that interest."[408] "This is applied to suspect classifications such as gender or illegitimacy."[409] "The most liberal [and the most used] is the *minimum or rational basis scrutiny* ... [wherein] the government need only show that the challenged classification is rationally related to serving a legitimate State interest."[410] This is applied to all subjects other than those that fall under the previous

404. *Id.* at 168-69.

405. BERNAS, THE 1987 CONSTITUTION, *supra* note 2, at 139.

406. *Id.* at 139-40 (emphases omitted).

407. *Id.* at 140.

408. *Id.* (emphases omitted).

409. *Id.*

410. *Id.* (emphasis omitted).

tests. These three tests have originated from American jurisprudence which will be utilized in the following discussion.

1. Rational Basis Scrutiny

The most commonly used test is the minimum rationality which merely requires that the classification be reasonable. This test requires only that there be a legitimate government interest and that there is a reasonable connection between it and the means employed to achieve the same.[411] Thus, the rational basis test has been described as adopting a "deferential" attitude towards legislative classifications, and this "deference" stems from the acknowledgment that classification is often an unavoidable element of legislation which, under the principle of separation of powers, is primarily the prerogative of the legislature.[412]

2. Intermediate Scrutiny

The intermediate scrutiny standard was first applied by the U.S. Supreme Court in 1976 and it arose out of necessity.[413] Since the two-tier approach of rational basis test and strict scrutiny may be too rigid as applied to all cases, the American Court has developed a third tier of equal protection review falling between the two mentioned tests, i.e. the intermediate or heightened scrutiny.[414]

The U.S. Supreme Court has applied the Intermediate Scrutiny in statutes that impose classification based on gender and illegitimacy.[415] These fall under what is termed as a "quasi-suspect class."[416] Classifications based on these grounds are presumed unconstitutional as such classifications generally provide no sensible ground for differential treatment and the grounds relied upon are "beyond the individual's control and bear[ ] no relation to the individual's ability to participate in and contribute to

411. Zomer Development Co. Inc. v. Special Twentieth Division of the Court of Appeals, G.R. 194461, January 7, 2020, at 16, *available at* http://sc.judiciary.gov.ph/12196 (last accessed Aug. 15, 2020).

412. Central Bank Association, Inc. v. Bangko Sentral ng Pilipinas, 446 SCRA 299, 370 (2004).

413. *See* Craig v. Boren, 429 U.S. 190 (1976).

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

415. *Id.*

416. Ang Ladlad LGBT Party v. Commission on Elections, 618 SCRA 32, 87 (2010) (C.J. Puno, concurring opinion).

society."[417] Similar to strict scrutiny, the burden of justifying the validity of the classification rests on the government; hence, the government must show that the statute "serves an important purpose and that the discriminatory means employed is substantially related to the achievement of those objectives."[418]

3. Strict Scrutiny

The most exacting among the tests is the strict scrutiny test which requires the government to show that the challenged classification serves a compelling State interest and that the classification is necessary to serve that interest. According to jurisprudence, the strict scrutiny test is applied when the challenged statute either classifies on the basis of an inherently suspect characteristic or infringes fundamental constitutional rights.[419] In such case, the presumption of constitutionality is reversed and the government has the burden of demonstrating that "its classification has been narrowly tailored to further compelling governmental interests" and, failing to do so, the law will be struck down as unconstitutional.[420]

The U.S. Supreme Court identifies a suspect class as

> a class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[421]

In various cases, the U.S. Supreme Court has ruled that suspect classifications that are subjected to strict scrutiny include those based on race or national origin,[422] alieanage,[423]and religion.[424]

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417. *Central Bank Association, Inc.*, 446 SCRA at 504 (J. Carpio-Morales, dissenting opinion).

418. *Id.*

419. *Biraogo*, 637 SCRA 78, 357 (2010) (J. Brion, concurring opinion).

420. *Id.* at 358.

421. *Central Bank Association, Inc.*, 446 SCRA at 491 (J. Carpio-Morales, dissenting opinion) (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973)).

422. *Central Bank Association, Inc.*, 446 SCRA at 492 (J. Carpio-Morales, dissenting opinion) (citing Grutter v Bollinger, 539 U.S. 306, 326 (2003)).

423. *Central Bank Association, Inc.*, 446 SCRA at 492 (J. Carpio-Morales, dissenting opinion) (citing In re Griffiths, 413 U.S. 717, 721-24 (1973)).

From the foregoing, it can be seen that the difference between intermediate scrutiny and strict scrutiny is quite narrow as their distinction hinges on whether a class is suspect or quasi-suspect. In his Concurring Opinion in the landmark case of *Ang Ladlad LGBT Party v. COMELEC,*[425] Chief Justice Reynato S. Puno discussed the nuances in determining whether a classification involves a suspect or quasi-suspect class so as to warrant the more heightened analysis through intermediate or strict scrutiny —

> Instead of adopting a rigid formula to determine whether certain legislative classifications warrant more demanding constitutional analysis, the United States Supreme Court has looked to four factors, thus:
>
> (1) The history of invidious discrimination against the class burdened by the legislation;
>
> (2) Whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society;
>
> (3) Whether the distinguishing characteristic is immutable or beyond the class members' control; and
>
> (4) The political power of the subject class.
>
> These factors, it must be emphasized, are *not* constitutive essential elements of a suspect or quasi-suspect class, as to individually demand a certain weight. The U.S. Supreme Court has applied the four factors in a flexible manner; it has neither required, nor even discussed, every factor in every case. Indeed, no single talisman can define those groups likely to be the target of classifications offensive to the equal protection clause and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide.
>
> In any event, the first two factors — history of intentional discrimination and relationship of classifying characteristic to a person's ability to contribute — have always been present when heightened scrutiny has been applied. They have been critical to the analysis and could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class. However, the last two factors — immutability of the characteristic and political powerlessness of the group — are considered simply to supplement the analysis as a means to discern whether a need for heightened scrutiny exists.[426]

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424. *Central Bank Association, Inc.*, 446 SCRA at 492 (J. Carpio-Morales, dissenting opinion) (citing Larson v. Valente, 456 U.S. 228, 246 (1982)).

425. Ang Ladlad LGBT Party v. Commission on Elections, 618 SCRA 32 (2010).

426. *Id.* at 95-98 (C.J. Puno, concurring opinion).

Through this framework, Chief Justice Puno opined that the proper test to apply was not the rational basis test which the majority opinion utilized, but the heightened or intermediate scrutiny as the classification therein involved a quasi-suspect class. According to him,

> [t]he discrimination that [the LGBT community has] suffered has been so pervasive and severe — even though their sexual orientation has no bearing at all on their ability to contribute to or perform in society — that it is highly unlikely that legislative enactments alone will suffice to eliminate the discrimination.[427]

In any case, whether the classification involves a suspect class or a quasi-suspect class, the burden is on the government to justify the classification on the basis of a compelling or important State interest.

On this note, it should be emphasized that the application of the strict scrutiny review is not limited to statutes which target a suspect class; it is also applied to statutes which infringe upon constitutionally protected rights.[428] Essentially, these fundamental rights are those guaranteed, whether expressly or impliedly, by the Constitution. The U.S. Supreme Court has ruled that the following fundamental rights give rise to strict scrutiny: the right of procreation;[429] the right to marry;[430] the right to exercise the freedoms under the First Amendment such as free speech, political expression, press, and assembly;[431] the right to travel;[432] and the right to vote.[433]

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427. *Id.* at 104.

428. *Central Bank Association, Inc.*, 446 SCRA at 495 (J. Carpio-Morales, dissenting opinion).

429. *Id.* at 496 (citing Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).

430. *Central Bank Association, Inc.*, 446 SCRA at 496 (J. Carpio-Morales, dissenting opinion) (citing Loving v. Commonwealth of Virginia, 388 U.S. 1, 12 (1967)).

431. *Central Bank Association, Inc.*, 446 SCRA at 496-97 (J. Carpio-Morales, dissenting opinion) (citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990)).

432. *Central Bank Association, Inc.*, 446 SCRA at 497 (J. Carpio-Morales, dissenting opinion) (citing Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903-904 (1986)).

433. *Central Bank Association, Inc.*, 446 SCRA at 498 (J. Carpio-Morales, dissenting opinion) (citing Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)).

D. Classification Under Social Protection Laws

In the list of beneficiaries and dependents under the social protection laws cited in this Article, it becomes apparent that there is a classification which hinges on marriage and blood relations. By the use of the terms *spouse* and *legitimate*, *legitimated*, *legally adopted*, *and illegitimate child*, these laws effectively exclude unmarried couples, whether of the same or opposite sex, and their families from the protection of the laws.

1. Fundamental Rights

It is submitted that in evaluating the constitutionality of this classification, the strict scrutiny test should be used. Involved in this classification are fundamental rights, i.e., the right to found a family, the right (not) to marry (in connection to the right to personal autonomy), the right to liberty, the right to privacy, and the right to social justice. As discussed earlier, when fundamental rights are disturbed by the distribution of benefits or burdens by classifications under the law, the strict or heightened scrutiny must be applied by the court.

2. Applying the Strict Scrutiny Test

The use of the strict judicial scrutiny is illustrated in the case of *Central Bank Employee Association*, *Inc. v. Bangko Sentral ng Pilipinas*.[434] In this case, the Court found that the disputed provision in the charter of the *Bangko Sentral ng Pilipinas* (regarding salary standardization for rank-and-file employees) contained a suspect classification based on salary grade.[435] As such, the Court employed the strict scrutiny test in determining the constitutionality of the provision and it was in this case that the Court explained the philosophy behind such a test —

> 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.[436]

434. *Central Bank Association, Inc.*, 446 SCRA.

435. *Id.* at 490-91.

436. *Id.* at 386-87.

The Supreme Court stated further —

> Under most circumstances, the Court will exercise judicial restraint in deciding questions of constitutionality, recognizing the broad discretion given to Congress in exercising its legislative power. Judicial scrutiny would be based on the 'rational basis' test, and the legislative discretion would be given deferential treatment. *But if the challenge to the statute is premised on the denial of a fundamental right, or the perpetuation of prejudice against persons favored by the Constitution with special protection, judicial scrutiny ought to be more strict*.[437]

Since it was already established that fundamental rights are involved, the classification must therefore be justified by a compelling State interest and it must have been arrived at by using the least restrictive means to protect such interest.

In this regard, it may be argued that the protection and promotion of marriage as an inviolable institution is a compelling State interest in itself. However, the compelling State interest referred to in equal protection cases must necessarily be connected to the laws themselves. As applied to social protection laws, there is no compelling State interest in classifying dependents and beneficiaries on the basis of blood or marriage. Excluding unmarried couples from benefitting under these laws does not further any State interest in protecting marriage.

3. An Invalid Classification

To reiterate, not all classifications are prohibited. As long as the classification meets the four requirements of reasonableness laid out in *Cayat*,[438] then it shall be upheld. Nevertheless, it is submitted that that these were not met by the classification in the social protection laws. Specifically, the two requisites not met are: that it must be based on substantial distinctions and that it is germane to the purpose of the law. These requisites complement each other; hence, they must be evaluated together.

Indeed, substantial distinctions exist between the traditional and the modern family. Obviously, the former is bound by marriage while the latter is not. Also, the composition of the two is different. However, these substantial distinctions should not be evaluated in isolation. When this

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437. *Id*. at 389-90 (emphases supplied).

438. *Cayat*, 68 Phil. at 18. The four requirements of reasonableness are: "(1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class." *Id*.

requisite is related to the second one, on whether such is germane to the purpose of the law, then the invalidity of the classification becomes apparent.

Social protection laws are those that seek to reduce poverty and vulnerability to risks and enhance the social status and rights of all persons, especially the marginalized, by promoting and protecting livelihood and employment, protecting against hazards and sudden loss of income, and improving people's capacity to manage risk.[439] Classifying the beneficiaries and dependents into traditional and non-traditional families does not have any relation to the objective of the laws. As previously discussed, the main principles of social legislation are non-discrimination and universality. For obvious reasons, invalid classifications go against these principles.

In assessing the reasonableness of the classifications in social protection laws, the case of *Bartolome v. Social Security System*[440] is illustrative. In that case, John Colcol was enrolled under the government's Employees' Compensation Program (ECP) at the time of his death due to a work-related accident.[441] John died without a spouse or a child hence "Bernardina Bartolome, his biological mother and, allegedly, the sole remaining beneficiary, filed a claim for death benefits ... with the [SSS.]"[442] This claim was denied by the SSS because she is no longer considered as the parent of John Colcol as the latter was supposedly legally adopted by Cornelio Colcol, Bernardina's grandfather (note, however, that when the adoptive parent died less than three years after the adoption decree, John was still a minor).[443] The SSS reasoned that the adoption divested her of the status as the legitimate parent of John, hence she is no longer considered as a beneficiary.[444] According to the SSS, the "dependent parent" mentioned in the law refers to the "*legitimate* parent."[445] The Supreme Court ruled that such interpretation by the Employees' Compensation Commission, as reflected in its Amended Rules, is an unauthorized administrative legislation.[446] According to the Court,

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439. *See* An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710, § 4 (m) (2009).

440. Bartolome v. Social Security System, 740 SCRA 78 (2014).

441. *Id.* at 81-82.

442. *Id.* at 82.

443. *Id.*

444. *Id.*

445. *Id.* at 89 (emphasis supplied).

446. *Bartolome*, 740 SCRA at 89.

> [t]he phrase 'dependent parents' should, therefore, include all parents, whether legitimate or illegitimate and whether by nature or by adoption. When the law does not distinguish, one should not distinguish. Plainly, 'dependent parents' are parents, whether legitimate or illegitimate, biological or by adoption, who are in need of support or assistance.
>
> Moreover, the same Article 167 (j), as couched, clearly shows that Congress did not intend to limit the phrase 'dependent parents' to solely legitimate parents.[447]

Even more than it being an unauthorized administrative legislation, the Court also ruled that the Amended Rules contravene the equal protection clause —

> In the instant case, there is no compelling reasonable basis to discriminate against illegitimate parents. Simply put, the above cited rule promulgated by the ECC that limits the claim of benefits to the legitimate parents miserably failed the test of reasonableness since the classification is not germane to the law being implemented. We see no pressing government concern or interest that requires protection so as to warrant balancing the rights of unmarried parents on one hand and the rationale behind the law on the other. On the contrary, the SSS can better fulfill its mandate, and the policy of PD 626 — that employees and their dependents may promptly secure adequate benefits in the event of work-connected disability or death — will be better served if Article 167 (j) of the Labor Code is not so narrowly interpreted.
>
> There being no justification for limiting secondary parent beneficiaries to the legitimate ones, there can be no other course of action to take other than to strike down as unconstitutional the phrase 'illegitimate' as appearing in Rule XV, Section 1 (c) (l) of the Amended Rules on Employees' Compensation.[448]

The rationale of the Court may well be applied in the case of unmarried couples and their non-conventional family.

Considering all the foregoing, there appears to be no justifiable reason in excluding non-conventional families from the coverage of social protection laws and from its full and meaningful enjoyment. Even persons from non-marital unions experience the contingencies that the social protection laws seek to address, such as death, sickness, medical needs, and housing assistance. To reiterate, the recognition of unmarried couples and their non-conventional families is not an attack on marriage or the family — rather, it

447. *Id.* at 90.

448. *Id.* at 92.

strengthens the concept of all kinds of families that exist in society today. Hence, any purported State interest in protecting the institution of marriage becomes irrelevant. Since no compelling State interest exists in classifying dependents and beneficiaries on grounds affecting fundamental rights, then the classification under social protection laws must be struck down.

X. CONCLUSION

In the list of beneficiaries and dependents under the social protection laws subject of this Article, it becomes apparent that there is a classification which hinges on marriage. By the use of the terms *spouse* and *legitimate*, *legitimated*, *legally adopted*, *and illegitimate child*, these laws effectively exclude unmarried couples, whether of the same or opposite sex, and their families from the protection of the laws.

It is submitted that this classification is invalid for not meeting the requirements provided by jurisprudence (i.e., it does not rest on substantial distinctions and it is not germane to the purpose of the law). These two requisites must be considered together and not in isolation.

It may be argued that being married is a substantial distinction, thereby validating the classification under the laws. However, when viewed through the purpose of the law, this distinction becomes arbitrary. As earlier mentioned, social legislation is composed of laws that seek to promote the common good, generally by giving protection and assistance, especially to the weaker members of society. In particular, social protection laws seek to reduce poverty and vulnerability to risks and enhance the social status and rights of all persons, especially the marginalized. When examined through the purpose of these laws, it thus becomes clear that distinguishing between families based on marriage and families not based on marriage is unreasonable. All families experience sickness, illness, death, and most families need assistance when it comes to medical and housing needs — regardless of whether or not they are bound by marriage. Laws should not arbitrarily distinguish as to who among society are deserving of its protection.

Moreover, since fundamental rights are involved (i.e., the right to found a family, the right to liberty, the right to privacy), the classification must be rooted in a compelling State interest to withstand strict judicial scrutiny. However, the classification in these social protection laws does not satisfy this test. Hence, the classification must be struck down.

In giving highest priority to social justice, the framers of the Constitution recognized the reality that

> in a situation of extreme mass poverty, political rights, no matter how strongly guaranteed by the Constitution, become largely rights enjoyed by the upper and middle classes and are a myth for the underprivileged. Without the improvement of economic conditions, there can be no real enhancement of the political rights of all the people.[449]

The right to social security is a human right and is thus meant to be enjoyed by everyone. This right includes the "*right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage*, whether obtained publicly or privately, as well as the *right to equal enjoyment of adequate protection from social risks and contingencies*."[450] Furthermore, social security, through its redistributive character, "plays an important role in poverty reduction and alleviation, *preventing social exclusion and promoting social inclusion*." [451] However, when the very laws that are supposed to address the social injustices perpetuate discrimination, then the State violates its obligation to respect, protect, and fulfill the right to social security of these persons.

By distinguishing families on who can properly benefit from social protection laws, the State violates the equal protection guarantee of the Constitution. As held by the Supreme Court —

> [T]he quest for a better and more 'equal' world calls for *the use of equal protection as a tool of effective judicial intervention*.
>
> > Equality is one ideal which cries out for bold attention and action in the Constitution.
> >
> > ...
>
> Our present Constitution has gone further in guaranteeing vital social and economic rights to marginalized groups of society, including labor. *Under the policy of social justice, the law bends over backwards to accommodate the interests of the working class on the humane justification that those with less privilege in life should have more in law.* ... Social justice calls for the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated.[452]

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449. Karen V. Jimeno, *Labor Laws as Secundum Rationem and Secundum Caritatem: Applying Social Justice without Causing an Injustice*, 81 PHIL. L.J. 732, 734 (2006) (citing JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 470 (1988 ed.)).

450. General Comment No. 19, *supra* note 36, ¶ 9 (emphases supplied).

451. *Id.* ¶ 3 (emphasis supplied).

452. *Central Bank Association, Inc.*, 446 SCRA.

The social justice mandate of the Constitution is clear; thus, the State must begin to recognize the existence of a growing number of non-conventional families.

As for same-sex couples, there is no question that the social protection laws are discriminatory against them. Being prevented from getting married, these couples have no way of enjoying the benefits provided by social protection laws because of the use of the word *spouse*. Consequently, their families suffer greater discrimination and stigmatization than what they are already experiencing in society.

As regards opposite-sex couples who are not married (but who are not under any legal impediment to marry), they should also be recognized as legitimate relationships that deserve protection under social legislation. The reality is that there are opposite-sex couples who choose not to marry but who nonetheless live in a set-up where they consider themselves as family. Recognizing these couples will not be an attack on the institution of marriage because they have a right *not* to marry. Also, while our laws protect marriage as an inviolable social institution, there is no compulsion for people to get married. After all, the word "*encourage*" pertaining to marriage was removed in the final text of the Constitution.[453] Indeed, there are legitimate reasons for people not to get married and the State should not exclude them from social protection laws merely for exercising such right. Moreover, the recognition that will be provided in social protection laws is only a small part of the benefits enjoyed by married couples and it should not be likened to a set-up which discourages marriage.

It is also important to recognize the right of the member to choose his or her beneficiary and dependents as an aspect of one's privacy. The protection that the Constitution gives to the family is not limited to the traditional family alone but it encompasses other kinds of families.[454] In addition, various human rights instruments have affirmed every person's right to found a family.[455] This reflects the principle that family relations is one of the fundamental aspects of a person's life; hence, it belongs to a sphere of privacy that the government may not unjustifiably intrude in. Whoever a person chooses to establish a family with is a decision that goes into the core of his or her right to privacy and the State must respect such choice. The State should not burden this choice by narrowly defining

453. 5 RECORD, 1987 PHIL. CONST., at 862.

454. *See* PHIL. CONST. art. XV.

455. *See* UDHR, *supra* note 33, art. 16 (1) & ICCPR, *supra* note 34, art. 23.

beneficiaries and dependents under social protection laws and thus excluding them from its coverage.

The State should recognize and accept that more and more people are part of unions that do not depend on marriage but who nonetheless consider themselves as family. After all, under the Constitution, "the protection of the state is also meant for other stable unions [formed] even by simply living together."[456] It would also not be the first instance of State recognition of non-traditional families. In case law, for example, the Court already recognized as family a union created through a "Declaration of Pledging Faithfulness" by both parties, despite them being married to other persons.[457] The Court also declined to consider as immoral a Muslim judge who has two wives, in accordance with Muslim laws.[458] Even in legislation, non-traditional family set-ups have already been recognized —

> Although some years back society decried solo parenthood and *de facto* separated couples as an affront to the conventional wisdom of a model family, recent *social justice legislation has compassionately redefined the concept of family* to include single mothers and their children regardless of the mother's civil status, otherwise no single parent would be employed by the government service, and that would be discriminatory, if not to say, unconstitutional.[459]

Perhaps a good way for the State to be able to comply with its obligations vis-à-vis the non-traditional family is for it to adopt a functional approach, similar to what the ECtHR is doing — that is, evaluating social, emotional, and biological factors rather than legal considerations when assessing whether a relationship is to be considered as *family life*.[460]

Social protection laws should begin to reflect the existence of diverse kinds of relationships and should not merely assume that all people conform to the conventional definition of a family. For it is only in recognition that the State can truly attain its mandate of achieving equality and promoting social justice for *all*.

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456. BERNAS, *supra* note 2, at 104.

457. *Estrada*, 408 SCRA at 51.

458. Sulu Islamic Association of Masjid Lambayong v. Malik, 226 SCRA 193, 198 (1993).

459. *Estrada*, 408 SCRA at 199 (J. Bellosillo, concurring opinion) (emphases supplied).

460. Child Protection Resource, *supra* note 161.