

Honor Her Name: Recognizing Violence Committed Against Transgender Women in a Dating or Sexual Relationship as Violence Against Women and Their Children Under R.A. 9262

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I. INTRODUCTION

You do not have the power to accept me or tolerate me. I take that from you. You will respect me ... My community dies every day whether it's from HIV/AIDs or transphobia or homophobia. I ask you [to] consider this — that is a human being. We are all human beings.

— Dominique Jackson¹

A. *Background of the Study*

The Universal Declaration of Human Rights (UDHR) proclaims that “[a]ll human beings are born free and equal in dignity and rights.”² Despite being universal and inclusive, such declaration has not always been true to some persons. Persons with an actual or perceived sexual orientation and/or gender identity, who do not conform to societal concepts, are often victims of violence and discrimination.³ These persons are identified as lesbian, gay, bisexual, transgender, queer, intersex, and asexual + (LGBTQIA+). They are likewise generally referred

1. Dominique Jackson, Video, *Dominique Jackson at the 23rd Annual HRC National Dinner 2019*, YOUTUBE, Oct. 2, 2019, available at <https://www.youtube.com/watch?v=DhjxDgdB24U> (last accessed Jan. 31, 2024).

2. Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 1, U.N. Doc A/RES/217 (III) (Dec. 10, 1948).

3. Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity Report of the Independent Expert on Protection Against Violence and Discrimination, at 18, U.N. Doc. A/HRC/35/36 (Apr. 19, 2017).

to as persons of diverse Sexual Orientation, Gender Identity, and Expression (SOGIE).⁴

Persons of diverse SOGIE have long been subjects of targeted violence and discrimination. Due to the apparent lack of safe spaces for them,⁵ violence follows them wherever they go, whether it be inside their homes, along the streets, in schools, and offices.⁶ Fortunately, the international community has recognized that the culture of impunity against these abuses must end now.⁷ In 2016, the United Nations Human Rights Council (UNHRC) adopted a resolution establishing a Mandate for the protection against violence and discrimination based on sexual orientation or gender identity.⁸

Among the LGBTQIA+ community, transgender women are most vulnerable to violence.⁹ Violence fueled by transphobia has been observed to have a character that even exceeds the level of cruelty of other hate crimes.¹⁰ In 2014,

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4. Commission on Human Rights, Inputs on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity with Focus on Data Collection, ¶ 8, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/Data/PhilippinesCommissionHumanRights> (last accessed Jan. 31, 2024) [<https://perma.cc/7P74-SUGR>].
 5. See Jason Sigales, *Safe Spaces for LGBTQ+ Still Elusive Beyond Metro Manila, Key Cities – Open Source Map*, TINIG NG PLARIDEL, Mar. 6, 2021, available at <https://www.tinigngplaridel.net/lgbt-safe-spaces> (last accessed Jan. 31, 2024) [<https://perma.cc/Y8KW-7NT8>].
 6. See International Gay and Lesbian Human Rights Commission, *Violence: Through the Lens of Lesbians, Bisexual and Trans People in Asia*, at 174-182, available at https://outrightinternational.org/sites/default/files/2022-10/LBT_report.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/5FNS-JLRZ>].
 7. Human Rights, Sexual Orientation and Gender Identity, Human Rights Council Res. 17/19, para. 4 (1), U.N. Doc. A/HRHRC/RES/17/19 (July 14, 2011).
 8. Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Human Rights Council Res. 32/2, paras. 12 (3) & (5), U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).
 9. See Transgender Europe, *Trans Murder Monitoring 2023 Update* (2023 report of homicides of trans and gender diverse people worldwide), available at <https://transrespect.org/en/trans-murder-monitoring-2023> (last accessed Jan. 31, 2024) [<https://perma.cc/9NGP-GR74>] & Human Rights Campaign Foundation, *Fatal Violence Against the Transgender and Gender-Expansive Community in 2023*, available at <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-expansive-community-in-2023> (last accessed Jan. 31, 2024) [<https://perma.cc/6YTU-C4AN>].
 10. Office of the United Nations High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*,

the Trans Murder Monitoring (TMM) project recorded 1,509 murders of trans and gender variant people since January 2008.¹¹ Of the 1,509 deaths, 20 were from the Philippines.¹² In the U.S., at least 22 transgender women were killed in 2019, and it is the fifth year in a row that at least 20 transgender people were killed.¹³

Meanwhile, in the Philippines, while there is no comprehensive data from the government, the now-defunct Philippine LGBT Hate Crime Watch has documented around 164 cases of murdered LGBTQIA+ from 1996 to June 2012.¹⁴ Based on available records, the United Nations Development Programme (UNDP) and Commission on Human Rights (CHR) published a report in 2018 observing that the per capita of transgender women, who are murdered in the country, is particularly high.¹⁵ Aside from murder, it is undeniable that transgender people also suffer from other severe crimes.¹⁶ In 2015, the International Gay and Lesbians Human Rights Commission (IGLHRC) submitted a communication to the United Nations Commission on the Status of Women (CSW) under its Annual Communications Procedure, stating that transgender women in the Philippines

Human Rights Council, ¶ 23, U.N. Doc. A/HRC/29/23 (May 4, 2015) (citing Special Rapporteur on Violence Against Women, Its Causes and Consequences, Human Rights Council, ¶ 71-72, U.N. Doc. A/HRC/20/16 (May 23, 2012)) & Inter-American Commission on Human Rights, *An Overview of Violence Against LGBTI Persons: A Registry Documenting Acts of Violence Between January 1, 2013 and March 31, 2014, at 3, available at* <https://www.oas.org/en/iachr/lgtbi/docs/Annex-Registry-Violence-LGBTI.pdf> (last accessed Jan. 31, 2024) [<https://perma.cc/7PL7-KWTQ>].

11. Dharel Placido, *Look: Map Shows Multiple LGBT Slays in PH*, ABS-CBN NEWS, Oct. 15, 2014, *available at* <https://news.abs-cbn.com/focus/10/14/14/look-map-shows-multiple-lgbt-slays-ph> (last accessed Jan. 31, 2024) [<https://perma.cc/X23K-KQXD>].
12. *Id.*
13. Harmeet Kaur, *At Least 22 Transgender People Have Been Killed This Year. But Numbers Don't Tell the Full Story*, CNN, Nov. 18, 2019, *available at* <https://edition.cnn.com/2019/11/18/us/transgender-killings-hrc-report-trnd/index.html> (last accessed Jan. 31, 2024) [<https://perma.cc/2X4B-NJP6>].
14. Buena Bernal, *CHR Documentation of Hate Crimes Will Protect LGBT Interest*, RAPPLER, Apr. 28, 2014, *available at* <https://www.rappler.com/nation/35553-chr-document-hate-crimes-lgbts> (last accessed Jan. 31, 2024) [<https://perma.cc/D93V-ZB6B>].
15. United Nations Development Programme, *Legal Gender Recognition in the Philippines: A Legal and Policy Review*, at 16, *available at* <https://www.undp.org/philippines/publications/legal-gender-recognition-philippines-legal-and-policy-review> (last accessed Jan. 31, 2024) [<http://perma.cc/8JFV-D26S>].
16. *See id.*

experience emotional, physical, and sexual violence from their intimate partners.¹⁷ The communication observed that emotional violence is the most common form, and that it often precedes physical and sexual violence.¹⁸

Recent history narrates the many forms of violence against transgender women. In September 2019, Jessa Remiendo, a transgender woman who was out with her coworkers and her sister at the Valdevia Resort, was found dead, with her bloodied body lying on the white sand shore.¹⁹ Her neck was “almost completely cut through,” and her right eye gouged with a slash.²⁰ In September 2020, the body of 23-year-old transgender woman Donna Nierra was found floating in a river in Caloocan City.²¹ These brutal killings occurred even after the controversial case of Jennifer Laude.²²

The case of Laude is one of the most controversial cases involving the killing of a transgender woman in the Philippines. A U.S. Marine named Joseph Pemberton was found guilty of homicide for the death of Laude.²³ A rights group²⁴ lamented the appreciation of the mitigating circumstance of passion and

17. International Gay and Lesbians Human Rights Commission, Violence against Lesbians, Bisexual Women, and Trans People in the Philippines, at 5, available at <https://outrightinternational.org/sites/default/files/2022-10/Violence-against-lbt-people-Philippines.pdf> (last accessed Jan. 31, 2024) [<https://perma.cc/3XCB-ZGDL>].

18. *Id.*

19. Rambo Talabong, *Transgender Women Hacked to Death in Pangasinan*, RAPPLER, Sept. 17, 2019, available at <https://www.rappler.com/nation/240356-transgender-woman-hacked-death-pangasinan> (last accessed Jan. 31, 2024) [<https://perma.cc/9FVL-39VC>].

20. *Id.*

21. Consuelo Marquez, *Body of Transgender Woman Found Floating in Caloocan River*, INQUIRER.NET, Sept. 29, 2020, available at <https://newsinfo.inquirer.net/1341646/body-of-transgender-woman-found-floating-in-caloocan-river> (last accessed Jan. 31, 2024) [<https://perma.cc/9V8L-N87A>].

22. *People v. Pemberton*, CA-CR No. 38620, Apr. 3, 2017, at 47, available at <https://services.ca.judiciary.gov.ph/faces/pages/ResultInformation.xhtml> (last accessed Jan. 31, 2024) (On file with the Court of Appeals Case Status Inquiry System).

23. *Id.*

24. Dharel Placido, *Pemberton Verdict Lead to More Abuse vs LGTBs*, ABS-CBN NEWS, Dec. 2, 2015, available at <https://web.archive.org/web/20161113182111/https://news.abs-cbn.com/nation/12/02/15/pemberton-verdict-could-lead-to-more-abuse-vs-lgbts>.

obfuscation, as this somehow subtly accepts “*transpanic*”²⁵ as a defense.²⁶ In September 2020, after serving only less than six years of his 10-year sentence, the trial court ordered the early release of Pemberton after crediting his good conduct and time allowance.²⁷ Not even awaiting the finality of this order, however, President Duterte granted Pemberton an absolute pardon.²⁸

Despite the high number of crimes committed against transgender women, there appears to be no law penalizing violence committed against transgender women on the basis of their gender identity.²⁹ In an advisory opinion of the Department of Justice (DOJ), Secretary Raul M. Gonzales refused to answer when asked about his position on the rights of the LGBT in the Philippines and if there are existing policies on their rights even in the absence of existing legislation.³⁰ Instead of issuing his position, the Secretary opined that it was the Commission on Human Rights which is the expert in the said issue.³¹ Nonetheless, it is important to note that, while it is true that the CHR has the mandate to investigate human rights violations, it has no power to prosecute crimes.³² It is the DOJ that

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25. “The LGBTQ+ ‘panic’ defense is a legal strategy wherein defendants charged with violent crimes weaponize their victim’s real or perceived sexual orientation or gender identity/expression to reduce or evade criminal liability.” It is the more inclusive term that includes “trans panic.” The LGBTQ+ Bar, LGBTQ+ “Panic” Defense, *available at* <https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense> (last accessed Jan. 31, 2024) [<https://perma.cc/VDM9-AZ3F>].
26. *Pemberton*, CA-CR No. 38620 at 17.
27. Eimor Santos, *Court Orders Pemberton’s Early Release on ‘Good Conduct’*, CNN PHILIPPINES, Sept. 2, 2020, *available at* <https://cnnphilippines.com/news/2020/9/2/Pemberton-release-order-Laude-killing.html> (last accessed Jan. 31, 2024) [<https://perma.cc/3PGJ-FT8B>].
28. Dona Pazzibugan, et al., *Duterte Grants Pemberton Absolute Pardon Amid Outcry over Early Release*, INQUIRER.NET, Sept. 8, 2020, *available at* <https://newsinfo.inquirer.net/1332560/duterte-grants-absolute-pardon-to-pemberton> (last accessed Jan. 31, 2024) [<https://perma.cc/M9QZ-HQMT>].
29. United Nations Development Programme & U.S. Agency for International Development, *Being LGBT in Asia: The Philippines Country Report*, at 22, *available at* https://www.undp.org/sites/g/files/zskgke326/files/publications/Philippines%20Report_Final.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/TQ36-64G3>].
30. Department of Justice, *Legal Opinion on Position on Issues Surrounding Lesbian, Gay, Bisexual or Transgender (LGBT) Rights*, Legal Opinion No. 05, Series of 2009, at 1 (Jan. 16, 2009).
31. *Id.*
32. *Simon, Jr. v. Commission on Human Rights*, G.R. No. 100150, 229 SCRA 117, 125 (1994) (citing *Cariño v. Commission on Human Rights*, G.R. No. 96681, 204 SCRA 483, 492 (1991)).

is mandated to prosecute violations of penal laws.³³ It appears that there is an unwillingness on the part of the State to address issues of violence concerning persons of diverse SOGIE.

In the Philippines, gender-based violence is penalized. Under Republic Act No. 9262 or the Anti-VAWC Act,³⁴ 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.³⁵

In 2013, the Court upheld the constitutionality of the law in the case of *Garcia vs. Drilon*.³⁶ The Court explained that the passage of the Anti-VAWC Act is a recognition on the part of the State that women have long suffered gender-based violence.³⁷ It is the State's fulfillment of its obligation under international law and under our Constitution to promote the equality of men and women before the law.³⁸

Much of this will be further discussed in the succeeding sections. For now, what is important to note is that the State deemed it necessary to penalize gender-based violence. With our current legal framework and the ruling of the Court in *Garcia*, however, it appears that transgender women are not covered. Thus, acts of violence committed against them, on the basis of their gender identity, remain unpunished.

The peculiar circumstances surrounding transgender women put them in a very vulnerable position. In the report of the independent expert on violence and

33. Instituting the Administrative Code [ADMIN. CODE] Executive Order No. 292, bk. IV, tit. III, ch. 1, § 3 (2) (1987).

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

35. *Id.*, § 3 (a).

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

37. *Id.* at 412-13.

38. *Id.* at 455-57.

discrimination based on sexual orientation and gender identity,³⁹ violence and discrimination committed against transgender people are rooted in the intersectionality of sexual orientation and gender identity and other issues such as racism, poverty, migration, disability, and other factors.⁴⁰ More importantly, it has to be recognized that transgender women suffer from violence, not only because they are transgender, but also because they are women. With these premises, this study aims to address the adequacy and responsiveness of the remedies available to transgender women under the Philippine legal framework and the obligations that the State needs to fulfill.

B. Statement of the Problem

Transgender women in a dating or sexual relationship are victims of gender-based violence. Since the State does not recognize them in accordance with their gender identity, however, the odious and reprehensible acts of violence committed against them are left unpunished. This is in violation of the State's obligation to end discrimination and violence committed against transgender women. Unless the State finally decides to penalize acts of violence committed against transgender women on the basis of their gender identity, transgender women are left outside the protection of the law. This is a gap in the law that the State needs to fill.

C. Objectives of the Study

This Note attempts to lay down the possible foundation that the State can use to protect transgender women from violence. To do this, this Note examines the current criminal laws and intends to expose the gap in the existing laws. At the end of this study, this Note proposes a penal law that is responsive to the violence committed against transgender women in a dating or sexual relationship.

While it is conceded that gender recognition legislation is ideal, this Note aims to establish that, for the purposes of criminal law, the change of gender marker in the birth certificate is not necessary before the State can recognize that the act committed is gender-based violence and not an ordinary crime. Thus, as of today, the State may enact measures that will address the violence committed against transgender women.

Furthermore, since gender identity is determined based on the act of self-identification of a person, this Note does not want to cause an additional burden on transgender women. Thus, it aims to provide an adequate guideline on how a

39. Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 72d Session of the General Assembly, U.N. Doc. A/72/172 (July 19, 2017) (by Vitit Muntarbhorn).

40. *Id.* ¶ 21.

transgender woman could come to court and seek protection from gender-based violence even in the absence of a law allowing her to change the gender marker on her birth certificate. In providing for the possible framework, this Note bears in mind that gender identity is not dependent on physical characteristics. Thus, no other proof other than the act of self-identification of the transgender woman shall be necessary.

II. SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION, AND TRANSGENDER WOMEN

Why [those] lengthy letters? Why not just ‘homo sapiens?’ [...] Why do we have to segregate the gays from the lesbians, from the straight guys?

— Senate President Vicente Sotto III⁴¹

The above-quoted question was raised during the delivery of Senator Risa Hontiveros' privilege speech concerning the unfortunate bathroom discrimination incident experienced by a transgender woman in Quezon City.⁴² During the said session, Senator Sotto III asked Senator Hontiveros why is there a need to classify lesbian, gay, bisexual, and transgender as such and why not only refer to them as *homo sapiens*.⁴³ More than the discrimination incident, this event highlighted the lack of knowledge of SOGIE. In fact, some people mistakenly believe that only the LGBTQIA+ community has SOGIE.⁴⁴ This is wrong.

That said, a discussion on SOGIE is integral to understanding the plight of transgender women. This section gives a brief discussion on sexual orientation, gender identity, and gender expression using the lens of social sciences. More importantly, a discussion on transgender women, along with a brief background on the treatment of the Philippines to transgender women, is explored. Lastly, the stories of several transgender women, who were victims of gender-based violence, are also shared herewith.

41. Rambo Talabong, 'Why Not Just Homo Sapiens?': Senators Confused by LGBTQ+, SOGIE, RAPPLER, Aug. 14, 2019, available at <https://www.rappler.com/nation/237763-senators-confused-by-lgbtq-sogie> (last accessed Jan. 31, 2024) [<https://perma.cc/486T-8PB3>].

42. *Id.*

43. *Id.*

44. See Rappler, Video, PAK, Check! Is the SOGIE Bill Only for the LGBTQ+ Community?, YOUTUBE, Oct. 23, 2022, available at <https://www.youtube.com/watch?v=MLBabULDipI&t=3s> (last accessed Jan. 31, 2024).

A. Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)

Everyone has his, her, or their SOGIE. In discussing SOGIE, the terms sex, gender, sexual orientation, gender identity, and gender expression are important to be defined. This section aims to illustrate how these concepts interrelate with each other. At this point, it must be borne in mind that each concept is independent of each other, and that one aspect need not be consistent with the other.

Justice Marvic Mario Victor F. Leonen, in a separate opinion, pointed out that the Court needs to understand the difference between the terms “sex” and “gender”, and not use them interchangeably.⁴⁵ On one hand, the term sex

refers to a person’s biological status and is typically categorized as male, female[,] or intersex. There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs[,] and external genitalia.”⁴⁶ On the other hand, gender “refers to the attitudes, feelings[,] and behaviors that a given culture associates with a person’s biological sex.”⁴⁷

Scholars in the social sciences have earlier conceptualized gender as “sex roles.”⁴⁸ Later on, gender has developed from “sex roles” to a constructed institutional arrangement as seen through the gender divisions and roles in all major social institutions.⁴⁹

The terms sex and gender must be differentiated from sexual orientation. Sexual orientation is not concerned with the biological makeup of a person nor is it shaped by culture. Rather, it is

[a] component of identity that includes a person’s sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities.

45. Republic v. Unabia, 892 SCRA 270, 289 (2019) (J. Leonen, separate opinion).

46. American Psychological Association, Gender and Sexual Orientation Diversity in Children and Adolescents in Schools, *available at* <https://www.apa.org/pi/lgbt/resources/diversity-schools> (last accessed Jan. 31, 2024) [<https://perma.cc/Y9VV-ZKRM>].

47. *Id.*

48. Ivy Kennelly, et al., *What Is Gender?*, 66 AM. SOCIOLOGICAL REV. 598, 600 (2001) (citing Mirra Komarovsky, *Cultural Contradictions and Sex Roles: The Masculine Case*, 78 AM. J. OF SOCIOLOGY 873, 883-84 (1973); Mirra Komarovsky, *The Concept of the Social Role Revisited*, 6 GENDER & SOC’Y 301, 301 (1992); & Helena Lopata and Barrie Thorne, *On the Term ‘Sex Roles,’* 3 SIGNS 718, 718 (1978)).

49. *Id.* (citing R.W. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS; JUDITH LORBER, PARADOXES OF GENDER (1994)).

Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.⁵⁰

In contrast with sexual orientation, gender identity does not refer to the sexual and emotional attraction of a person. Gender identity is referred to as a “person’s deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender ... that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristic.”⁵¹ Therefore, one may have a gender identity that is not consistent with his or her sex assigned at birth, but may still be attracted to a person of his or her opposite sex. For example, a person whose assigned sex at birth is male, but identifies herself as a woman. Despite this, however, she is attracted to females and not males. This does not mean that she should identify herself as a man. Her gender identity is woman and her sexual orientation is lesbian. Needless to say, one’s gender identity is fluid.⁵² This adds to the complexity of SOGIE which may be seen as a challenge insofar as legal recognition is concerned.

The last concept to be defined is gender expression. Gender expression is “the presentation of an individual, including physical appearance, clothing choice and accessories, and behaviors that express aspects of gender identity or role. Gender expression may or may not conform to a person’s gender identity.”⁵³

As illustrated, there are major differences in the definitions of sex, gender, sexual orientation, gender identity, and gender expression. It is important to nuance the definitions in order to recognize the different forms and layers of discrimination and violence that persons of diverse SOGIE experience. The recognition of these concepts likewise paves the way to a nuanced legal discussion of the issue involved in this Note. The next part of this section zooms in on the issues faced by transgender women.

B. Transgender Women

Transgender is an “umbrella term used to describe the full range of people whose gender identity and/or gender role do not conform to what is typically associated with their sex assigned at birth.”⁵⁴ The definition is broad, and it accommodates

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

51. *Id.*

52. Cordula Reimann, *Gender in Problem-Solving Workshops: A Wolf in Sheep’s Clothing?* at 7, available at https://www.files.ethz.ch/isn/10570/doc_10600_290_en.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/DY4F-WTQ5>].

53. American Psychological Association, *supra* note 50.

54. *Id.*

every individual who identifies their gender identity or gender role as not consistent with their sex assigned at birth.⁵⁵ People are more familiar with transgender women and transgender men.⁵⁶ Transgender women are those who identify themselves as women but were born to a male's body, while transgender men are those who identify themselves as men but were born to a female's body.⁵⁷

Most people, however, confuse the term transgender to refer to people who have undergone gender-affirming surgery.⁵⁸ This should not be the case. They are actually confusing it with transsexuals. Transsexual refers to “[a] transgender person who is in the process of [] or has undertaken treatment (which may include surgery and hormonal treatment) to make his or her body congruent with their preferred gender.”⁵⁹ Being transgender is not dependent on whether the person's biological makeup has been operated, or is undergoing an operation to affirm his/her gender identity. To reiterate, transgender is a gender identity and must not be mixed up with sexual orientation and/or gender expression. In fact, a transgender may be heterosexual, homosexual, or bisexual.⁶⁰

Prior to 2019, gender identity disorder is classified as a mental disorder.⁶¹ Many believed that this added to the stigma and the inaccessibility of basic human rights, such as health care, to transgender individuals.⁶² Thus, the reclassification of gender identity disorder terms of sexuality as not a “mental disorder” is believed to be a major win for transgender individuals and a step closer to the realization of their rights.⁶³ As of 2019, being transgender is no longer considered a mental

55. *See id.*

56. *See id.*

57. *See id.*

58. American Psychiatric Association, Expert Q&A: Gender Dysphoria, available at <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> (last accessed Jan. 31, 2024) [<https://perma.cc/2W5K-PCYT>].

59. United Nations Educational, Scientific and Cultural Organization, Out in the Open: Education Sector Responses to Violence Based on Sexual Orientation and Gender Identity/Expression, at 10, available at <https://unesdoc.unesco.org/ark:/48223/pf000244652> (last accessed Jan. 31, 2024) [<https://perma.cc/HB6U-RC8K>].

60. *Id.*

61. United Nations, A Major Win for Transgender Rights: UN Health Agency Drops ‘Gender Identity Disorder’, as Official Diagnosis, available at <https://news.un.org/en/story/2019/05/1039531> (last accessed Jan. 31, 2024) [<https://perma.cc/DTV5-52NV>].

62. Human Rights Watch, New Health Guidelines Propel Transgender Rights, World Health Organization Removes ‘Gender Identity Disorder’ Diagnosis, available at <https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights> (last accessed Jan. 31, 2024) [<https://perma.cc/5PFM-FWJU>].

63. United Nations, *supra* note 61.

disorder, however, it is classified as “gender incongruence.”⁶⁴ According to the World Health Organization (WHO), gender incongruence “can be described as a feeling of anguish when an individual’s identity conflicts with the sex they were assigned at birth.”⁶⁵

While the current developments are indeed welcome and must be celebrated, one must not lose sight of the fact that the failure to recognize transgenders for so long has paved the way for institutional and structural inequalities.⁶⁶ Thus, it is no surprise that the struggles transgender experience are found to be intersectional.⁶⁷ Transgenders face discrimination and violence, not only because they do not conform to their expected gender,⁶⁸ but also because they belong to other vulnerable classes in society.⁶⁹ Thus, much effort is needed to do to catch up with the long-overdue protection that transgenders are entitled to.

C. The Philippines’ Treatment of Transgender Women

Transgender women have played a significant role in society since pre-colonial Philippines.⁷⁰ They were celebrated, even.⁷¹ Prior to the colonization of the Spaniards, there were spiritual leaders in our society called *babaylan*.⁷² Records show that there were male *babaylans*, who not only wore women’s clothing, but were also portrayed to be women in order to connect with the spirits when they prayed.⁷³ Society has recognized them as “somewhat-women” and others were able to “marry” and have sexual relations with other men.⁷⁴ Due to their significant position in society, however, *babaylans* were deemed a threat to the

64. *Id.*

65. *Id.*

66. Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *supra* note 39, ¶¶ 13–28.

67. *Id.*

68. *Id.* ¶ 48.

69. Office of the High Commissioner for Human Rights, The Struggle of Trans and Gender-Diverse Persons, *available at* <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> (last accessed Jan. 31, 2024) [<https://perma.cc/5XMS-FE2A>].

70. United Nations Development Programme & U.S. Aid, *supra* note 29, at 15.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (citing J. NEIL C. GARCIA, PHILIPPINE GAY CULTURE: *BINABAE TO BAKLA, SILAHIS TO MSM*, 473 (2d ed. 2008)).

colonizers.⁷⁵ The hostile environment resulting from the Spanish Colonization eventually forced the *babaylans* to disappear.⁷⁶ Since then, the Filipino culture has long been quiet about Filipinos who do not conform to conventional sexual orientation or gender identity.⁷⁷ Worse, society did not just opt to forget; it likewise shut the door to persons of diverse SOGIE, especially transgender women.

A brief survey of our current laws will show that LGBTQIA+ are prejudiced and not protected. For instance, in the Family Code, the concealment of lesbianism and homosexuality of the other spouse may be invoked to prove fraud in obtaining the consent of the innocent spouse.⁷⁸ The same grounds may be raised to file for legal separation.⁷⁹ While it may appear that it is the act of concealment that is frowned upon, such ground is enumerated along with drug addiction and habitual alcoholism making an impression that one's sexual orientation is a vice or defect.⁸⁰

In 2019, the Philippine Congress made a revolutionary move when it enacted the Republic Act No. 11313 or the Safe Spaces Act.⁸¹ Under the said law, the following acts are unlawful:

- (a) [C]ursing, wolf-whistling, catcalling, leering and intrusive gazing, taunting, cursing, unwanted invitations, misogynistic, *transphobic*, homophobic, and sexist slurs, persistent unwanted comments on one's appearance, relentless requests for one's personal details such as name, contact[,] and social media details or destination, the use of words, gestures or actions that ridicule on the basis of sex, gender or sexual orientation, identity and/or expression[,] including sexist, homophobic, and *transphobic statements and slurs*, the persistent telling of sexual jokes, use of sexual names, comments[,] and demands, and any statement that has made an invasion on a person's personal space or threatens the person's sense of personal safety...⁸²

75. *Id.*

76. United Nations Development Programme & U.S. Agency for International Development, *supra* note 29, at 15.

77. *Id.*

78. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209, art. 46 (4) (1987).

79. *Id.* art. 55 (6).

80. *See* FAMILY CODE, art. 46 (4).

81. An Act Defining Gender-Based Sexual Harassment in Streets, Public Spaces, Online, Workplaces, and Educational or Training Institutions, Providing Protective Measures and Prescribing Penalties Therefor [Safe Spaces Act], Republic Act No. 11313 (2019).

82. *Id.* § 11 (a) (emphases supplied).

The said law is revolutionary, as it is the first time that there has been an express provision in a law providing protection to the members of the LGBTQIA+. Nonetheless, while there is so much to celebrate with the passage of the law, one should not forget the fact that LGBTQIA+ experience severe crimes other than harassment. Thus, the battle is far from over.

D. Gender-Based Violence Committed Against Transgender Women

Although violence against transgender women is prevalent in the Philippines, these cases are rarely or sometimes not properly documented.⁸³ The CHR, in its *Inputs on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity with Focus on Data Collection*, admitted that no existing mechanisms for documenting or collecting data relating to LGBTQIA+ people are in place.⁸⁴ With the absence of such a mechanism and the lack of anti-discrimination legislation, LGBTQIA+ victims of violence refrain from reporting their cases for fear of further harassment and discrimination.⁸⁵ Thus, as a result, people of diverse SOGIE fail to access justice and be afforded appropriate remedies.⁸⁶ More importantly, CHR also opined that the lack of data on the incidence of violence on persons of diverse SOGIE further their invisibility to policymakers and many government duty-bearers.⁸⁷

With this, the CHR oftentimes relies on the studies and/or reports of various non-governmental organizations.⁸⁸ In the 2015 communication of IGLHRC, three Filipina transgender women narrated how their previous intimate partners abused them.⁸⁹ Candy, Jelay, and Brigitte shared that they experienced sexual, physical, and emotional abuse.⁹⁰ Candy said that her boyfriend often beats her up, and that one time, he even attempted to rape her.⁹¹ Jelay narrated that she had been subjected to sexual violence by her previous intimate partners.⁹² Lastly, Brigitte shared that her former boyfriend stalked her after their breakup; he

83. Commission on Human Rights, *supra* note 4, ¶ 5.

84. *Id.* ¶ 3.

85. *Id.* ¶ 6.

86. *Id.*

87. *Id.*

88. *See, e.g.*, United Nations Development Programme & Commission on Human Rights of the Philippines, *supra* note 15.

89. International Gay and Lesbian Human Rights Commission, *supra* note 17.

90. *Id.* According to the IGLHRC, the communication used pseudonyms for the victims mentioned.

91. *Id.* at 7.

92. *Id.* at 8.

repeatedly called and sent e-mails and text messages to both her and her current boyfriend, and even resorted to attending the pageant she participated in, making her feel unsafe.⁹³ She also said that, as a sex worker, many of her clients raped her.⁹⁴

In a research paper published by IGLHRC, a Filipina transgender woman named Magdalene explained that she felt she was treated as a sex slave for appearing like a woman.⁹⁵ According to Magdalene, she is being punished for appearing as a woman.⁹⁶ People think that, because she identifies as a woman, she should receive sex from men whenever the latter want to.⁹⁷ These narratives do not only happen in the Philippines. The same research says intimate partner violence is prevalent in Asia.⁹⁸ The identified perpetrators of this violence are the same-sex partners, dating partners, and cisgender and/or heterosexual partners of transgender individuals.⁹⁹ Transgender women believe that the violence they experience is attributed to their female appearance.¹⁰⁰

In a study funded by the Scottish Government, the LGBT Domestic Abuse Project and the Scottish Transgender Alliance found out that transgender people suffer domestic violence in the form of physical, sexual, and emotional violence.¹⁰¹ Interestingly, one act of violence classified as emotional violence is the act of preventing the transgender person from having a fair share of money or that the

93. *Id.* at 9.

94. *Id.*

95. International Gay and Lesbian Human Rights Commission, *supra* note 6, at 179.

96. *Id.*

97. *Id.*

98. *Id.* at 32-33.

99. *Id.* at 33.

100. *Id.* at 35.

101. Amy Roch, et al., Out of sight, Out of Mind? Transgender People's Experiences of Domestic Abuse, at 12, available at https://www.scottishtrans.org/wp-content/uploads/2013/03/trans_domestic_abuse.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/67Q7-F3EG>]. Domestic violence

can be perpetrated by partners or ex-partners and can include physical abuse (assault and physical attack involving a range of [behavior]), sexual abuse (acts which degrade and humiliate and are perpetrated against the person's will, including rape), and mental and emotional abuse (such as threats, verbal abuse, racial abuse, homophobic/biphobic/transphobic abuse, withholding money and other types of controlling [behavior] such as 'outing', the threat of 'outing' or enforced isolation from family and friends).

Id. at 7.

abuser has taken money from the former.¹⁰² Shaming and threatening to out the transgender person for his/her gender identity are also identified as forms of emotional abuse.¹⁰³ Furthermore, the research observed that transgender individuals, who received abusive reactions from their partners after coming out, are likely to blame themselves rather than treat the reaction as abusive.¹⁰⁴ Lastly, the research said that the non-reporting of domestic violence against transgender people is caused by the belief that domestic violence is a private matter and the fact that transgender people are afraid that they will experience further transphobia when they seek the help of the police.¹⁰⁵ The study also attributed the refusal of transgender people to consider violence as a crime to the non-reporting of the crime.¹⁰⁶

From this discussion, it is shown that violence committed against transgender women in a dating or sexual relationship is “systemic, frequent, and severely underreported.”¹⁰⁷ Such violence has ideological roots.¹⁰⁸ The beliefs and ideologies that there are only two “genders” institutionalize the violence committed against persons of diverse SOGIE.¹⁰⁹ More importantly, as cited in the research of the International Gay and Lesbian Human Rights Commission (IGHLRC) (now known as Outright International), “transgender women ... are particularly vulnerable to violence because ... they challenge prevailing (patriarchal) notions of masculinity and femininity.”¹¹⁰ Furthermore, IGHLRC pointed out that similar to the violence committed against women, violence against transgender women is perceived as private violence, which paves the way for the State’s non-intervention.¹¹¹

To end this Section, this Note quotes the answer of Senator Risa Hontiveros to the question of Senator Sotto. She said —

[t]here would not have been a need to segregate, I agree with you, if human civilizations and societies evolved to a point where there is no discrimination,

102. *Id.* at 13.

103. *Id.* at 15.

104. *Id.* at 17.

105. *Id.* at 27.

106. Roch, et al., *supra* note 101, at 27.

107. International Gay and Lesbian Human Rights Commission, *supra* note 6, at 23.

108. *Id.* at 25.

109. *Id.*

110. *Id.* at 26.

111. *Id.* at 23.

and there's equality among all, regardless of identity, regardless of expression. But[,] that's not what's happening.¹¹²

Indeed, the status quo does not afford transgender women the rights that cisgender men and women enjoy. Since discrimination still exists, this necessitates the State to act in order to fulfill its promise of equal recognition before the eyes of the law.¹¹³ This section attempts to provide a holistic discussion on SOGIE and the context of the plight of transgender women in the Philippines. Having learned these, it is now then proper to look at the developments both in international and domestic law as regards the protection of transgender women from discrimination and violence. The next part of this Note discusses the legal bases and framework in international law with regard to the rights of transgender women.

III. RIGHTS OF TRANSGENDER WOMEN UNDER INTERNATIONAL LAW

Human rights end as norms and laws, but they begin as human hurts, hopes, and needs felt in innumerable daily lives. The task of human rights movements is to turn those needs into viable claims, then into standards that bind. Their task also is to remind institutions when they are failing, by taking them back to the needs where the norms began.

Scott Long¹¹⁴

As of writing, there is no international treaty expressly giving protection to LGBTQIA+.¹¹⁵ Nonetheless, there is a growing trend in international law to protect LGBTQIA+ using international human rights instruments.¹¹⁶ Such trend finds support in the recognition that human rights are universal and that LGBTQIA+ rights are human rights.¹¹⁷

For a more coherent discussion of the international instruments, this section discusses them in the following order: the International Convention on Civil and

112. Dharel Placido, *Puzzled over Lengthy LGBTQI Term, Sotto asks: 'Why Not Just Homo Sapiens?'*, ABS-CBN NEWS, Aug. 14, 2019, available at <https://news.abs-cbn.com/news/08/14/19/puzzled-over-lengthy-lgbtqi-term-sotto-asks-why-not-just-homo-sapiens> (last accessed Jan. 31, 2024) [<https://perma.cc/Z3FT-ZBJC>].

113. PHIL. CONST. art. III, § 1.

114. Scott Long, *Two Novembers: Movements, Rights, and the Yogyakarta Principles*, in WORLD REPORT 47 (Human Rights Watch ed., 2008).

115. Melanize Bejzyk, *Developments on LGBTI Rights at the United Nations*, 110 PROCEEDINGS OF THE ASIL ANNUAL MEETING 25, 25 (2016).

116. *Id.*

117. Dimitrina Petrova, *The Use of Equality and Anti-Discrimination Law in Advancing LGBT Rights*, in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH 18 (Corinne Lennox & Matthew Waites eds. 2013).

Political Rights (ICCPR),¹¹⁸ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹¹⁹ and the Yogyakarta Principles.¹²⁰ In recent years, the United Nations has been more aggressive in addressing the issues concerning transgender women. Thus, this section consults different reports, resolutions, comments, and recommendations on SOGIE of the United Nations and its bodies.

Aside from international human rights instruments, this section also provides for a survey of laws and jurisprudence in various jurisdictions concerning the rights of transgender women. Owing to the lack of a specific binding instrument, the following approaches and measures are useful in answering the legal issue involved in this Note. Moreover, it aims to present possible guidelines that may be used in our jurisdiction in the recognition and protection of transgender women.

A. International Covenant on Civil and Political Rights (ICCPR)

One of the fundamental international human rights instruments is the ICCPR. It is regarded as one of the instruments forming the International Bill of Human Rights.¹²¹ The United Nations General Assembly (UNGA) adopted the said instrument on 16 December 1966, and it entered into force on 23 March 1976.¹²² ICCPR provides for the standards that States must observe with regard to the civil and political rights of individuals.

Under the instrument,

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, [color], sex, language, religion, political[,] or other opinion, national or social origin, property, birth[,] or other status.¹²³

118. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

119. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

120. Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, *adopted* Nov. 9, 2006, available at <https://www.refworld.org/docid/48244e602.html> (last accessed Jan. 31, 2024) [<https://perma.cc/Y735-S362>] [hereinafter Yogyakarta Principles].

121. *Echegaray v. Secretary of Justice*, 297 SCRA 754, 805 (1998).

122. *Id.* at 806.

123. ICCPR, *supra* note 118, art. 26.

The non-discrimination on the basis of sex has been interpreted to include sexual orientation.¹²⁴ This was the pronouncement of the Human Rights Committee (HRC) in the case of *Toonen vs. Australia*.¹²⁵ In the said case, the HRC found that the provisions on the Criminal Code of the State of Tasmania, penalizing sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private, to be violative of the non-discrimination clause of the ICCPR.¹²⁶ Interestingly, in answering whether sexual orientation falls under the ground of “other status,” the HRC actually ruled that sexual orientation is included in the term sex.¹²⁷

While sexual orientation and gender identity are two different concepts, this Note submits that discrimination based on sex can also be extended to discrimination on the basis of gender identity. This is consistent with the trend in international law interpreting human rights instruments to be dynamic and adapting to the current circumstances.¹²⁸ Moreover, the HRC almost always discusses gender identity alongside sexual orientation.¹²⁹ Thus, any form of discrimination against transgender women on the basis of their gender identity may be found to be in violation of the non-discrimination clause under the ICCPR.

Moreover, under Article 2 (3) of the ICCPR, each State Party undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative[,] or legislative authorities,

124. *Toonen v. Australia*, Human Rights Committee Commc’n No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992, (Mar. 31, 1994).

125. *Id.*

126. *Id.*

127. *Id.*

128. United Nations Human Rights Office of the High Commissioner, Human Rights Handbook for Parliamentarians N° 26, at 45, available at <https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf> (last accessed Jan. 31, 2024) [<https://perma.cc/FA7M-K4BE>].

129. Helen Nolan, *United Nations Treaty Bodies: References to Sexual Gender Identity, Gender Expression and Sex Characteristics 2014* (Geneva: ILGA, Sept. 2016), at 21, available at https://ilga.org/wp-content/uploads/2024/01/2014_UN_Treaty_Bodies_SOGIEI_References_clean.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/HU6J-JEA5>] (This work is Published by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)).

or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

- (c) To ensure that the competent authorities shall enforce such remedies when granted.¹³⁰

In the second paragraph of the same article, States Parties are likewise mandated to adopt legislative measures that will give effect to the rights enshrined in the said instrument.¹³¹ The Philippines is a signatory to ICCPR.¹³² As such, the instrument is binding in our jurisdiction and may be enforced before the courts of law.¹³³ With the obligations under the said instrument and with the interpretation of the HRC on the provision concerning sex as a prohibited ground for discrimination, the Philippines must ensure that the rights of transgender women under ICCPR are respected and the obligations are fulfilled. This includes the protection of transgender women from violence.

B. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

One of the most celebrated international human rights instruments is the CEDAW. In 1979, the international community attempted to break the glass ceiling by passing the CEDAW. The said instrument aims to eliminate both direct and indirect discrimination faced by women.¹³⁴ Moreover, under the CEDAW, States are mandated to ensure the equality of men and women before the law.¹³⁵ Since the mandate of the States is to ensure *de facto* equality, any temporary special measures aimed to achieve the end shall not be deemed considered discrimination.¹³⁶ More importantly, States are mandated to change the social and cultural patterns of society towards men and women in order to eliminate any prejudice, customs, and practices that discriminate against women.¹³⁷

130. ICCPR, *supra* note 118, art. 2 (3).

131. *Id.* art. 2 (2).

132. Secretary of Defense v. Manalo, G.R. No. 180906, 568 SCRA 1, 54 (2008).

133. Republic v. Sandiganbayan, G.R. No. 104768, 407 SCRA 10, 86 (2003).

134. General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, Committee on the Elimination of Discrimination against Women, ¶ 16, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28].

135. CEDAW, *supra* note 119, art. 3.

136. *Id.* art. 4 (1).

137. *Id.* art 5 (a).

While the convention only mentions discrimination, the Committee on the Elimination of Discrimination Against Women issued a general recommendation, stating that gender-based violence is a form of discrimination against women.¹³⁸ Gender-based violence has been defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”¹³⁹ Thus, States are mandated to eliminate all forms of gender-based violence, which includes the prosecution of crimes deemed as gender-based violence.¹⁴⁰

In General Comment No. 28, the Committee emphasized that the general obligations of the State must be complied having in mind the intersectionality of the struggles of women.¹⁴¹ The Committee mentioned that discrimination against women on the basis of their sex is linked with other factors such as sexual orientation and gender identity.¹⁴² Therefore, States are likewise obliged to eliminate any forms of discrimination and violence on the basis of the women’s sexual orientation and gender identity.

While the CEDAW instrument itself fails to expressly mention transgender women, the CEDAW Committee has interpreted the instrument to include transgender women in its coverage.¹⁴³ In General Recommendation 32, the CEDAW Committee has reaffirmed its stand that discrimination against women includes gender-based violence.¹⁴⁴ As such, violence committed against transgender women is gender-based violence, which is prohibited by the CEDAW.¹⁴⁵ Moreover, in its concluding observations, the CEDAW Committee

138. General Recommendation No. 19 (Eleventh Session): Violence Against Women, Committee Eliminating Discrimination Against Women, ¶ 1, U.N. Doc. A/47/38 (Jan. 30, 1992).

139. *Id.* ¶ 6.

140. *Id.* ¶ 24.

141. CEDAW General Recommendation No. 28, *supra* note 134, ¶ 18.

142. *Id.*

143. *Id.*

144. General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, Committee on the Elimination of Discrimination Against Women, ¶ 22, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014)

145. *Id.*

has consistently held that gender-based violence committed against transgender women is covered under the CEDAW.¹⁴⁶

The Philippine Senate has ratified the CEDAW.¹⁴⁷ In fact, in *Garcia vs. Drilon*, the Court has recognized that the passage of the Anti-Violence Against Women and Children Act is a compliance with the obligations of the State under the CEDAW.¹⁴⁸ Particularly, the Court has recognized that under the CEDAW, States are mandated to eliminate gender-based violence and change the behavior of society towards women.¹⁴⁹ Furthermore, the State is mandated to enact temporary measures to achieve *de facto* equality between men and women.¹⁵⁰

With the current interpretation of the CEDAW Committee on the instrument, it is submitted that the Philippines must similarly recognize that transgender women are covered by the CEDAW. As such, the obligations of the State under the said instrument must be extended to transgender women. Under the said instrument, transgender women must be free from gender-based violence. More importantly, the extension of the coverage of the CEDAW to transgender women mandates the State to lift the status of transgender women in society and ensure that they will enjoy *de facto* equality. This Note submits, however, that the struggles of transgender women are not all square with women. Thus, the *de facto* equality of transgender women must be nuanced to that of women. More of this will be discussed in the succeeding section of this Note.

C. Yogyakarta Principles

Acknowledging that the response of the international community to human rights violations based on SOGIE is fragmented and inconsistent, a coalition of human rights organizations has come together to draft a document that embodies a set of international legal principles on the application of international human rights instruments to violations of human rights based on SOGIE.¹⁵¹ In 2006, a panel of international human rights experts finalized the document in an assembly held in

146. See Helen Nolan, *United Nations Treaty Bodies: References to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics 2015* (Geneva: ILGA, Sept. 2016), at 61, available at https://ilga.org/wp-content/uploads/2024/01/2015_UN_Treaty_Bodies_SOGIEI_References.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/U2X7-X4EX>] & United Nations Human Rights Office of the High Commissioner, *supra* note 128.

147. *Garcia*, 699 SCRA at 357 (2013).

148. *Id.*

149. *Id.*

150. CEDAW, *supra* note 119, art. 4 (1).

151. Yogyakarta Principles, *supra* note 120, at 7.

Yogyakarta, Indonesia.¹⁵² This set of principles is known as the Yogyakarta Principles.¹⁵³ It contained twenty-nine (29) principles.¹⁵⁴ In 2017, however, consistent with its declaration in 2006, i.e., that its principles shall be subject to regular revision to reflect the developments in the law and experience of persons of diverse SOGIE; nine more principles and state obligations were added in the Yogyakarta Principles.¹⁵⁵

While the Yogyakarta Principles is neither a treaty nor a convention, it contains principles derived from international human rights treaties such as the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁵⁶ the CEDAW, and the Covenant on the Rights of the Child (CRC) and the interpretation of the different bodies within the United Nations to the mentioned treaties.¹⁵⁷ As such, “[t]he Principles they developed are not aspirational. They are the straightforward application of existing human rights law to the lives of people whose sexual orientation and gender identity are the lightning rod for discrimination.”¹⁵⁸

152. *Id.*

153. *Id.*

154. *Id.*

155. The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, *adopted* Nov. 10, 2017, *available at* https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/B87J-9K7S>] [hereinafter Yogyakarta Principles Plus 10].

156. International Covenant on Social, Economic, and Political Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

157. University of Nottingham Human Rights Law Centre, Jurisprudential Annotations to the Yogyakarta Principles, n. 3, *available at* <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/Jurisprudential-Annotations.pdf> (last accessed Jan. 31, 2024) [<https://perma.cc/V5KA-AMMU>].

158. Paula Ettelbrick, Esq. & Alia Trabucco Zerán, The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007-June 2010, at 10, *available at* https://www.asiapacificforum.net/media/resource_file/Yogyakarta_Principles_Impact_Human_Rights_Law.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/U5Q9-WECZ>].

I. Enforceability of the Yogyakarta Principles

Being soft law, notwithstanding, various bodies of the UN and courts in different jurisdictions used Yogyakarta Principles as a legal basis.¹⁵⁹

In 2010, the Court, in *Ang Ladlad LGBT Party vs. COMELEC*, held that it was not prepared to recognize that the Yogyakarta Principles reflect binding obligations.¹⁶⁰ While the Court granted the petition of the *Ang Ladlad LGBT Party*, the Court rejected the argument that the Yogyakarta Principles are binding in our jurisdiction.¹⁶¹ It went further and held,

[a]t this time, we are not prepared to declare that these Yogyakarta Principles contain norms that are obligatory on the Philippines. There are declarations and obligations outlined in said [p]rinciples which are not reflective of the current state of international law, and do not find basis in any of the sources of international law enumerated under Article 38 (1) of the Statute of the International Court of Justice. Petitioner has not undertaken any objective and rigorous analysis of these alleged principles of international law to ascertain their true status.

We also hasten to add that not everything that society — or a certain segment of society — wants or demands is automatically a human right. This is not an arbitrary human intervention that may be added to or subtracted from at will. It is unfortunate that much of what passes for human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims that international law obliges states to sanction these innovations. This has the effect of diluting real human rights, and is a result of the notion that if “wants” are couched in “rights” language, then they are no longer controversial.

Using even the most liberal of lenses, these Yogyakarta Principles, consisting of a declaration formulated by various international law professors, are — at best —

159. See, e.g., Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights General Comment No. 20, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (citing Yogyakarta Principles, *supra* note 120); United Nations High Commissioner for Refugees, UNCHR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, *available at* <https://www.refworld.org/docid/48abd5660.html> (last accessed Jan. 31, 2024) [<https://perma.cc/UG5D-RJBJ>]; & Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 48, U.N. Doc. A/64/211 (Aug. 3, 2009) (by Martin Scheinin) (citing Yogyakarta Principles, *supra* note 120).

160. *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, 618 SCRA 32, 78 (2010).

161. *Id.*

de lege ferenda — and do not constitute binding obligations on the Philippines. Indeed, so much of contemporary international law is characterized by the “soft law” nomenclature, i.e., international law is full of principles that promote international cooperation, harmony, and respect for human rights, most of which amount to no more than well-meaning desires, without the support of either State practice or *opinio juris*.¹⁶²

This Note submits, however, that these pronouncements must be re-examined in light of the developments in international law concerning the rights of people of diverse SOGIE. In fact, as mentioned earlier, the Yogyakarta Principles has even been expanded in 2017 to account for the developments in international law and the experiences of people of diverse SOGIE.¹⁶³ Likewise, the Yogyakarta Principles has been incorporated into some of the bills introduced and passed in the National Legislatures of Argentina, Brazil, Canada, Uruguay, and Mexico.¹⁶⁴ Meanwhile, the Judiciaries of Nepal¹⁶⁵ and India¹⁶⁶ have recognized Yogyakarta Principles in upholding the rights of people of diverse SOGIE.¹⁶⁷ These developments tell us that, with the right opportunity, the Philippine Judiciary must re-examine its 2010 pronouncement as regards the enforceability of Yogyakarta Principles.

2. The Rights of Transgender Women Under the Yogyakarta Principles

Having established the nature and relevance of the Yogyakarta Principles, it is now apt to look at how international human rights treaties may be contextualized to the rights of persons of diverse SOGIE. In particular, this Note examines the rights of transgender women relating to access to justice and freedom from violence under the Yogyakarta Principles. Principle 1 of the Yogyakarta Principles provides that “[a]ll human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”¹⁶⁸ This principle is taken from the preamble and

162. *Id.* at 78–79 (emphasis supplied).

163. Yogyakarta Principles Plus 10, *supra* note 155.

164. Ettelbrick & Zeran, *supra* note 158, at 12.

165. See *Blue Diamond Society v. Nepal Government*, Writ No. 917 of the Year 2064 (BS) (2007) (Nepal). (An English translation of the case may be viewed in Sexual Policy Watch, Supreme Court’s Translation of the decision on LGBTI rights ruling on writ by Blue Diamond Society, available at <https://sxpolitics.org/938/938> [<https://perma.cc/SB8V-CQYL>]).

166. See *National Legal Services Authority v. Union of India and Others*, AIR 2014 SC 1863 (2012) (India) (An unreported copy of the case is available at <https://main.sci.gov.in/jonew/judis/41411.pdf>) (last accessed Jan. 31, 2024).

167. *Id.* & *Blue Diamond Society*, Writ No. 917.

168. Yogyakarta Principles, *supra* note 120, princ. 1.

Article 1 of the UDHR.¹⁶⁹ In line with this principle, the Yogyakarta Principles mandates the State to, among others:

- (a) Embody the principles of the universality, interrelatedness, interdependence[,] and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical [realization] of the universal enjoyment of all human rights; [and]
- (b) Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights[.]¹⁷⁰

This corresponding State obligation takes its foundation from the obligations of the core international human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the ICCPR, the ICESCR, the CEDAW, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), and the CRC.¹⁷¹ The Philippines, being a signatory to these instruments, is therefore compelled to follow the standard set forth in the Yogyakarta Principles. It must enact measures recognizing the intersectionality of the struggles of transgender women for the latter to fully enjoy their human rights.

Moreover, it is equally recognized that a person's sexual orientation and gender identity are integral to one's dignity and freedom.¹⁷² Hence, the State is mandated, among others, "to take all necessary legislative, administrative and other measures to fully respect and legally [recognize] each person's self-defined gender identity".¹⁷³ This obligation is likewise embodied in the core human rights treaties mentioned in Principle 1.¹⁷⁴

Perhaps one of the most important principles under the Yogyakarta Principles is Principle 5, or the right to security of the person. The principle provides that "everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group."¹⁷⁵ In line with this, States shall:

- (a) *take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence[,] and related harassment, based on*

169. University of Nottingham Human Rights Law Centre, *supra* note 157, n. 2.

170. Yogyakarta Principles, *supra* note 120, princ. 1 (A) & (B).

171. University of Nottingham Human Rights Law Centre, *supra* note 157, n. 3.

172. Yogyakarta Principles, *supra* note 120, princ. 3.

173. *Id.* princ. 3 (B).

174. University of Nottingham Human Rights Law Centre, *supra* note 157, n. 11.

175. Yogyakarta Principles, *supra* note 120, princ. 5.

*the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family[.]*¹⁷⁶

Here, the phrase affording security of the person regardless of sexual orientation or gender identity is taken from, among others, Article 3 of the UDHR, Article 9 of the ICCPR, and the Concluding Observations of the Human Rights Committee on El Salvador.¹⁷⁷ On the other hand, the phrase the right to protection from violence or bodily harm, whether inflicted by government officials or by any individual or group finds its support from Article 5 (b) of the CERD and Article 19 of the CRC.¹⁷⁸ Again, the bases of the mentioned principle are binding in our jurisdiction. As such, the principle itself provides for a standard on how to apply these binding instruments in the context of persons of diverse SOGIE.

The last relevant principle is the thirtieth principle which provides for the right to state protection. It states that “[e]veryone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination[,] and other harm, whether by government officials or by any individual or group.”¹⁷⁹

With this principle, States are mandated to:

- (A) Exercise due diligence to prevent, investigate, prosecute, punish[,] and provide remedies for discrimination, violence[,] and other harm, whether committed by State or non-State actors;
- (B) Take appropriate and effective measures to eradicate all forms of violence, discrimination[,] and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression[,] or sex characteristics, whether by public or private actors[.]¹⁸⁰

Principle 30 is similar to Article 5 (b) of CERD.¹⁸¹ Therefore, the same standard should be followed in our jurisdiction. The Philippines has the obligation

176. *Id.* princ. 5 (C) (emphasis supplied).

177. University of Nottingham Human Rights Law Centre, *supra* note 157, n. 3.

178. *Id.*

179. Yogyakarta Principles Plus 10, *supra* note 155, princ. 30.

180. *Id.*

181. Art. 5 of the CERD provides that,

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

to provide transgender women protection from violence, discrimination, and other harm. Appropriate and effective measures to eradicate all forms of violence, discrimination, and other harm must be in place in order to comply with the said principle.

D. Laws and Jurisprudence in Foreign Jurisdictions Concerning Transgender Women

This part of the section provides for the different laws and jurisprudence in different jurisdictions concerning the rights of transgender women. They serve as a guide or standard on how such measures may be applied in our jurisdiction. Moreover, the jurisprudence provided here is not treated as precedent but rather serves as evidence of the trend in international law with regard to the treatment of transgender women.

1. Domestic Violence and Hate Crimes

Domestic violence and hate crimes happen not only in the Philippines, but also in other parts of the world. For this section, this Note presents various forms of domestic violence and hate crimes penalized in other jurisdictions. The purpose of this is to examine the various forms of domestic violence and hate crimes that may come into the discussion.

a. United States

The Violence Against Women Act (VAWA) was enacted into law in the U.S. in 1994.¹⁸² It was a response to the prevalence of violence committed against women and the shift of treatment of intimate violence from a private affair to a public crime.¹⁸³ The VAWA was reauthorized four times: in 2000, 2005, 2013, and

distinction as to race, [color], or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group[,], or institution.

International Convention on the Elimination of Racial Discrimination, art. 5, *adopted* Dec. 21, 1965, 660 U.N.T.S. 1.

182. Emily S. Rueb & Niraj Chokshi, *The Violence Against Women Act Is Turning 25. Here's How It Has Ignited Debate*, N. Y. TIMES, Apr. 4, 2019, *available at* <https://www.nytimes.com/2019/04/04/us/violence-against-women-act-reauthorization.html> (last accessed Jan. 31, 2024) [<https://perma.cc/CXF5-7F9P>].

183. LISA N. SACCO & EMILY J. HANSON, CONG. RES. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND

2022.¹⁸⁴ The VAWA penalizes domestic violence, dating violence, sexual assault, and stalking.¹⁸⁵ Domestic violence covers sexual assault, simple or aggravated assault, and homicide.¹⁸⁶ Perpetrators of domestic violence could be the spouse, ex-spouse, boyfriends or girlfriends, and ex-boyfriends or ex-girlfriends.¹⁸⁷ Dating violence includes those committed by a person “who is or has been in a social relationship of a romantic or intimate nature with the victim.”¹⁸⁸ In 2013, the said law granted persons of diverse SOGIE to access the services available to victims of gender-based violence.¹⁸⁹

In 2009, the U.S. Congress passed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA).¹⁹⁰ The said law included gender and gender identity in the definition of hate crimes.¹⁹¹ Under the said law,

[w]hoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person —

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if —

REAUTHORIZATION I (2019) (citing Kimberley D. Bailey, *Lost in Translation: Domestic Violence, the Personal is Political, and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 (2010) & Murray Straus & Richard Gelles, *Societal Change and Change in Family Violence from 1975 to 1985*, J. OF MARRIAGE AND FAMILY, Volume no. 48, Issue No. 3 (1986)). See An Act to Reauthorize the Violence Against Women Act of 1994 [Violence Against Women Reauthorization Act of 2013], Pub. L. No. 113-4, 127 Stat. 54 (2013) (U.S.).

184. Rueb & Chokshi, *supra* note 182 & EMILY J. HANSON, CONG. RES. SERV., R47570, VIOLENCE AGAINST WOMEN ACT REAUTHORIZATION ACT OF 2022 I (2023).

185. SACCO & HANSON, *supra* note 183, at 1.

186. *Id.*

187. *Id.* n. 7.

188. *Id.* (citing 34 U.S.C. § 12291 (a) (11)).

189. An Act to Reauthorize the Violence Against Women Act of 1994 [Violence Against Women Reauthorization Act of 2013], Pub. L. No. 113-4, tit. V, 127 Stat. 54 (2013) (U.S.).

190. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 118-84, 123 Stat. 2835 (2009) (U.S.).

191. Hate Crime Acts, 18 U.S.C. § 249 (a) (2) (A) (2018).

- (i) death results from the offense; or
- (ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.¹⁹²

As can be gleaned from the cited provision, hate crime is penalized when there is bodily injury or attempts to cause bodily injury, using the specified means, to any person because of the actual or perceived gender, sexual orientation, and gender expression of such person.¹⁹³ The penalty is aggravated when death results from the offense or if in the commission of the offense, kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill are likewise committed.¹⁹⁴ Moreover, the law makes the crime imprescriptible if death occurs as a result.¹⁹⁵ On the other hand, if no death occurs in the commission of the crime, the prosecution must be commenced not later than seven years from the commission of the crime.¹⁹⁶

b. Croatia

In 2011, the Croatian Parliament passed its new Criminal Code.¹⁹⁷ In the new law, the Parliament classified all criminal offenses committed under the said law as hate crimes if it is “committed because of race, color, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person.”¹⁹⁸ Such provision seems to be more encompassing since any offense under the criminal code may be categorized as a hate crime so long as it is committed out of hatred of a person on account of the latter’s sex or sexual orientation.

c. Belgium

In the case of Belgium, a law was passed in 2003 that aggravates the penalties of some of the crimes penalized under its penal code if, in the commission of the

192. *Id.* § 249 (a) (2).

193. *Id.*

194. *Id.* § 249 (a) (2) (ii).

195. *Id.* § 249 (d) (2).

196. 18 U.S.C. § 249 (d) (1).

197. Criminal Code, Narodne Novine 125/2011 (2498) (2011) (Croat.).

198. *Id.* art. 87 (20), translated in Office for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights, Criminal Code of the Republic of Croatia (1997, As Amended 2011) (Excerpts Related to Hate Crimes Laws) (English), available at <https://legislationline.org/taxonomy/term/12380> (last accessed Jan. 31, 2024) [<https://perma.cc/34RN-ECET>].

crime or offense, the perpetrator is motivated by bias or hatred against the victim's sex and sexual orientation.¹⁹⁹ Moreover, the said law also penalized any act that incites discrimination, hatred, or violence against a person, a group, a community, or the members of it on the grounds of sex and sexual orientation among others in the circumstances given in Article 444 of the Penal Code.²⁰⁰ Article 444 of the Penal Code provides for the places wherein, as well as other means by which, slanderous remarks, punishable under the said Code, may be made.²⁰¹

2. Gender Recognition

This part of the Note shows three domestic laws illustrating different frameworks of gender recognition. The laws cited in this Note are: a) the Gender Recognition Act of 2004 of the United Kingdom; b) the Alteration of Sex Description and Sex Status Act of 2003 of South Africa; and c) the Gender Recognition Act of 2017 of the State of California, U.S. These three laws are cited because of the different frameworks they provide.

a. United Kingdom

In 2004, the United Kingdom adopted the Gender Recognition Act of 2004.²⁰² Under the said law any person who is at least 18 years of age may apply for a gender recognition certificate.²⁰³ A person may apply for such certification if the person is either: a) living in the other gender, or b) having his/her gender changed under the law of a country or territory outside the United Kingdom.²⁰⁴ If the

199. Wet Ter Bestrijding Van Discriminatie en tot Wijziging Van We Wet van 15 Februari 1993 tot Oprichting van een Centrum voor Gelijkheid van Kansen en voor Racismebestrijding [Act of February 25 2023 Pertaining to the Combat of Discrimination] M.B., Mar. 17,2003, arts. 7 14, *available at* https://www.ejustice.just.fgov.be/cgi/article.pl?language=nl&sum_date=2024-07-29&pd_search=2003-03-17&numac_search=2003012105&page=3&lg_txt=N&caller=list&2003012105=28&view_numac=&htit=van+discriminatie&choix1=en&choix2=en&fr=f&nl=n&du=d&trier=afkondiging (last accessed Jan. 31, 2024) (Belg.), *translated in* Unia, Act of February 25 2023 Pertaining to the Combat of Discrimination, *available at* <https://www.unia.be/en/law-recommendations/legislation/act-of-february-25-2003-pertaining-to-the-combat-of-discrimination> (last accessed Jan. 31, 2024) [<https://perma.cc/ACN8-U6V8>].

200. *Id.* art. 6 § 1.

201. Code Pénal [C. PÉN.], art. 444 (1876) (Belg.).

202. An Act to Make Provision for and in Connection with Change of Gender [Gender Recognition Act 2004], 2004 c. 7 (2004) (U.K.).

203. *Id.* § 1 (1).

204. *Id.*

ground is based on living in the other gender, such application has to be determined by the Gender Recognition Panel.²⁰⁵

Furthermore, if the applicant has undergone, is undergoing, or is planning to undergo treatment to modify the sexual characteristics,²⁰⁶ the gender recognition certificate shall not be issued, unless at least one of the reports required includes details of it.²⁰⁷ Finally, a full gender recognition certificate shall only be issued if the applicant is not married.²⁰⁸ Otherwise, an interim gender recognition certification shall be issued until the applicant's marriage has been annulled.²⁰⁹ Note that, when the applicant has already obtained a change of gender in a foreign jurisdiction, the only requirement is to prove that it was done in accordance with the law of such country and that such country is an approved country or territory.²¹⁰

b. South Africa

In 2003, South Africa passed into law the Act No. 49 or the Alteration of Sex Description and Sex Status Act of 2003.²¹¹ Under the said law,

[a]ny person [—] whose sexual characteristics have been altered by surgical or medical treatment[,] or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed [—] may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.²¹²

In his/her/their application, the applicant must present two reports. The first report must contain the medical treatment and procedures done which resulted in gender reassignment.²¹³ Such a report must be prepared by the medical practitioner who carried out the procedure, or any medical practitioner with experience in the carrying out of such procedures and the application of such

205. *Id.* § 1 (3).

206. *Id.* § 1 (1).

207. *Id.* § 3.

208. Gender Recognition Act 2004, § 4 (2).

209. *Id.* § 4 (3).

210. *Id.* § 2.

211. Act To Provide for the Alteration of the Sex Description of Certain Individuals in Certain Circumstances; and to Amend the Births and Deaths Registration Act, 1992, as a Consequence; and to Provide for Matters Incidental Thereto [Alteration of Sex Description and Sex Status Act of 2003], Act No. 49 (2003) (S. Afr.).

212. *Id.* § 2 (1).

213. *Id.* § 2 (2) (b).

treatment.²¹⁴ On the other hand, the second report must be prepared by a medical practitioner, other than the one referred to in the first report.²¹⁵ Such medical practitioner must examine the applicant and establish his or her sexual characteristics.²¹⁶

c. State of California, U.S.

A liberal remedy is available in the State of California, U.S. Under California's Gender Recognition Act of 2017,²¹⁷ an affidavit of the applicant is sufficient to change the gender marker in his, her, or their birth certificate and court records.²¹⁸ The affidavit must be attested, under penalty of perjury, that the request to change the legal gender is only to conform with the person's gender identity (female, male, or nonbinary) and is not made for fraudulent purposes.²¹⁹ It is important to note, however, that these remedies are only limited to documents issued in the State of California.

The three laws provide us with a possible framework for gender recognition. In the United Kingdom, while gender-affirming surgery is not needed, the applicant must show that he/she/they has/have been diagnosed with gender dysphoria and is living with the acquired gender.²²⁰ In South Africa, gender-affirming surgery is a prerequisite for gender recognition.²²¹ Lastly, in the State of California, an affidavit under penalty of perjury and made not for fraudulent purposes is sufficient for gender recognition.²²²

²¹⁴ *Id.*

²¹⁵ *Id.* § 2 (2) (c).

²¹⁶ *Id.*

²¹⁷ An Act to Amend, Repeal, and Add Sections 1277 and 1278 of, and to Add Section 1277.5 to, the Code of Civil Procedure, to Amend Sections 103426 and 103440 of, to Amend the Heading of Article 7 (Commencing with Section 103425) of Chapter 11 of Part 1 of Division 102 of, and to Amend, Repeal, and Add Sections 103425 and 103430 of, the Health and Safety Code, and to Amend Section 13005 of, and to Amend, Repeal, and Add Section 12800 of the Vehicle Code, Relating to Gender Identity [Gender Recognition Act], Cal. S.B. No. 179 (2017) (U.S.).

²¹⁸ *Id.* § 11 and § 13.

²¹⁹ *Id.* § 11.

²²⁰ Gender Recognition Act of 2004, § 2 (1).

²²¹ Alteration of Sex Description and Sex Status Act of 2003, § 2 (2).

²²² Gender Recognition Act, § 11.

E. Jurisprudence on the Rights of Transgender Women

While it is acknowledged that foreign jurisprudence may only be considered persuasive and not binding, these may aid the Court with regard to the trend in international law when it comes to the rights of LGBTQIA+.

I. United States

In *Gerald Lynn Bostock vs. Clayton County Georgia*,²²³ the U.S. Supreme Court ruled that the dismissal of an employee because of his/her homosexuality or transgender status is prohibited under the Civil Rights Act, which disallows discrimination on the basis of sex.²²⁴ The case involves three cases involving the same legal question — whether or not the word “sex” under the Civil Rights Act of 1964 contemplates sexual orientation and gender identity.²²⁵ Two gay men and a transgender woman claim that their employers violated the said law.²²⁶ The U.S. Supreme Court used the “but-for” test and ruled that sexual orientation and gender identity are included in the word “sex” under the said law.²²⁷ In so ruling, the Court held that “[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex.”²²⁸

While the Court in that case relied solely on the rules of statutory construction and jurisprudence in reaching its decision, it is interesting to note how the Court recognized that the discrimination committed against transgender women is discrimination based on sex.²²⁹ The Court illustrated the situation as follows —

take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.²³⁰

As illustrated above, in determining whether the transgender woman was discriminated against, the point of reference of the Court is whether the same act would have been committed against a cisgender female. This is an important

223. *Gerald Lynn Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1754 (2020) (U.S.).

224. *Id.* at 1742.

225. *Id.* at 1739.

226. *Id.* at 1738.

227. *Id.* at 1747.

228. *Id.* at 1744.

229. *Bostock*, 140 S.Ct. at 1740-41.

230. *Id.* at 1741.

pronouncement. With this, it can be inferred that for the purposes of equal protection, cisgender, and transgender women must be placed in a similar position to determine whether there has been a violation of the equal protection clause.

Furthermore, another significant pronouncement in this case is the ruling of the Court with regard to the argument of the respondent that sexual orientation and gender identity could have not been intended by Congress to be included under the Civil Rights Act when it enacted it in 1964.²³¹ The Court held that

Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.’ And as we have seen, no ambiguity exists about how Title VII’s terms apply to the facts before us. To be sure, the statute’s application in these cases reaches “beyond the principal evil” legislators may have intended or expected to address. *But ‘the fact that [a statute] has been applied in situations not expressly anticipated by Congress’ does not demonstrate ambiguity; instead, it simply ‘demonstrates [the] breadth’ of a legislative command. And ‘it is ultimately the provisions of’ those legislative commands ‘rather than the principal concerns of our legislators by which we are governed.’*²³²

Thus, the U.S. Supreme Court held that it does not matter whether Congress intended sexual orientation and gender identity to be included in the word sex.²³³ The broad scope of the provision of the law affords the Court to have such a sweeping definition, which can accommodate its application to situations that may not have been contemplated by Congress.²³⁴

Another landmark case in the U.S. is the case of *Obergefell vs. Hodges*.²³⁵ The U.S. Supreme Court finally settled that the non-recognition of same-sex marriage is a violation of the due process and equal protection clauses under the U.S. Constitution.²³⁶ The Fourteenth Amendment of the Constitution provides that “no State shall deprive any person of life, liberty, property, without due process of law.”²³⁷ The Court held that this provision does not only apply to fundamental liberties under the Bill of Rights, but also extends to liberties that concern “personal choices central to individual dignity and autonomy, including intimate

231. *Id.* at 1746.

232. *Id.* at 1749 (citing *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011) (U.S.); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (U.S.); & *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (U.S.)) (emphasis supplied).

233. *Bostock*, 140 S.Ct. at 1751.

234. *Id.*

235. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (U.S.).

236. *Id.* at 2604.

237. *Id.* at 2597 (citing U.S. CONST. amend. XIV).

choices that define personal identity and beliefs.”²³⁸ These additional liberties are left to the judicial duty of interpreting the U.S. Constitution, and such duty has not been reduced to any formula.²³⁹

In recognizing that the right of the LGBTQIA+ community is enshrined under the due process clause, the Court held that —

*The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.*²⁴⁰

With this in mind, the Court held that the deprivation of the LGBTQIA+ of their freedom to marry is repugnant under the Due Process Clause.²⁴¹ The Court recognized that while it is true that the limitation on the right to marry between opposite sex has long appeared to be natural and just, such does not remain true today.²⁴² The central meaning of the fundamental right to marry is now inconsistent with the earlier view.²⁴³ Thus, it behooved the Court to now declare that such limitation violates the U.S. Constitution.²⁴⁴

The respondent’s contention is that history tells us that marriage is exclusive to opposite sex and the Court must just leave it at that.²⁴⁵ The Court did not accept this argument. In fact, the Court cited how jurisprudence shows the development on the scope of the right to marry.²⁴⁶ The Court even went further by saying —

[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.²⁴⁷

238. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (U.S.) & *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (U.S.)).

239. *Id.* at 2598.

240. *Id.*

241. *Obergefell*, 135 S.Ct. at 2591.

242. *Id.* at 2590.

243. *Id.* at 2602.

244. *Id.*

245. *Id.* at 4.

246. *Id.* at 18.

247. *Obergefell*, 135 S.Ct. at 2602.

Furthermore, the Court emphasized that the full promise of liberty does not end from decriminalizing homosexual conduct.²⁴⁸ The State must still protect and uphold other liberties of the LGBTQIA+.²⁴⁹

On the issue of equal protection clause, the Court held that, in its interpretation of the provision, the Court “has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”²⁵⁰ The Court held that the limitation of marriage to male and female provides no valid classification in the enjoyment of the freedom to marry.²⁵¹ As such, the State must recognize same-sex marriages.²⁵²

Lastly, perhaps it also worth highlighting how the Court rejected the argument that same-sex couples should just wait for legislation allowing same-sex marriage; after all, such decision shall be subjected to exhausted debate in the halls of Congress.²⁵³ According to the Court, this is not necessary. The Court held that there have been numerous debates and discourse on the matter and deemed it necessary that it is the chambers of the Court that has the power to rule on the matter as “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”²⁵⁴

There are two lessons that can be taken from these cases. *First*, the U.S. Supreme Court has adopted the view that courts have to interpret the due process and equal protection clauses of the U.S. Constitution in light of the changes in society. *Second*, in interpreting statutes, the Court has adopted the rule on the breadth of legislative command, which provides that the application of the laws must be based on its plain text, regardless of whether such application has been envisioned by the Congress when they enacted the concerned statute.

In sum, this section can thus be summarized into three points. *First*, international human rights law recognizes transgender women and afford them the right to life and live with dignity. *Second*, there is a growing trend in other jurisdictions of recognizing the mandate of the State to protect transgender women from discrimination and violence. *Lastly*, there seems to be a consistent view that coverage of current laws is extended to transgender women even if the legislatures

248. *Id.* at 2600.

249. *Id.*

250. *Id.* at 2603.

251. *Id.*

252. *Id.* at 2604.

253. *Obergefell*, 135 S.Ct. at 2605.

254. *Id.* at 2606 (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) (U.S.)).

did not anticipate such application when they enacted the concerned laws. The next part of this Note explores the development of the rights of transgender women under Philippine law.

IV. RIGHTS OF TRANSGENDER WOMEN UNDER PHILIPPINE LAW

*The nature of injustice is that we may not always see it in our own times.*²⁵⁵

A. 1987 Philippine Constitution

The due process and equal protection clauses are found in the Constitution. Under Article III, Section 1 of the Constitution, “[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.”²⁵⁶ During the American regime, our jurisprudence teaches us that while the wording of our Bill of Rights is slightly different from the Fourteenth Amendment of the U.S. Constitution, the interpretation and application of the Fourteenth Amendment are to be given effect in our jurisdiction.²⁵⁷ To date, Philippine Supreme Court still consults American jurisprudence when due process and equal protection clauses are being invoked.

According to Father Joaquin G. Bernas, S.J., “the right to life is not just protection of the right to be alive or to the security of one’s limb against physical harm. It is also the right to a good life.”²⁵⁸ Meanwhile, the Philippine Supreme Court has adopted the view of the U.S. Supreme Court on the expansive interpretation of the right to liberty.²⁵⁹ According to the Court, the right to liberty is not merely the right to exist and be free from arbitrary personal restraint or servitude.²⁶⁰ It includes the “right of the man to enjoy the faculties to which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.”²⁶¹ Moreover, it

includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any avocation, and for that purpose, to enter into all contracts which

255. *Obergefell*. 135 S.Ct. at 2598.

256. PHIL. CONST. art. III, § 1.

257. *Smith, Bell & Company v. Natividad*, 40 Phil. 136, 144-45 (1919) (citing *Kepner v. U.S.*, 195 U.S. 100 (1904) (U.S.); *Serra v. Mortiga*, 204 U.S. 470 (1907) (U.S.); & *U.S. v. Bull*, 15 Phil. 7 (1910)).

258. JOAQUIN G. BERNAS, *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 110 (2009 ed.).

259. *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660, 705 (1919).

260. *Id.*

261. *Id.*

maybe proper, necessary, and essential to his carrying out these purposes. to a successful conclusion.²⁶²

Such view is still the prevailing rule in the U.S., as illustrated in *Obergefell* where the Court held that the right to marry of LGBTQIA+ is protected under the due process clause of the Fourteenth Amendment.²⁶³

The language of the provision is clear. There can be no doubt that transgender women are afforded these rights. Following the pronouncement of the U.S. Supreme Court that liberty is not limited to physical restraint but also the freedom to enjoy one's faculties, the inaction of the State to penalize violence committed against transgender women on account of their gender identity is in violation of the right to liberty of transgender women. Moreover, following Father Bernas' view, the right to life of transgender women is also violated when the State fails to protect them from violence as this hinders them from enjoying their right to a good life. Living a life with constant fear of violence is definitely not a good life.

Furthermore, the due process clause of the Constitution does not only pertain to procedural due process but also substantive due process.²⁶⁴ This Note, however, is only concerned with substantive due process. In this regard, it has been held that the State has the right to interfere in the affairs of the public when public interest requires it.²⁶⁵ The determination on what measures are necessary for the protection of the public solely belongs to the discretion of the State.²⁶⁶ In order to do this without violating substantive due process, however, the following requisites must be complied with: "first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."²⁶⁷

Here, should the State decide to enact a statute which will penalize acts of violence committed against transgender women on the basis of their gender identity, such act complies with the substantive due process. As illustrated in the earlier part of this Note, the violence committed against transgender women are widespread, rampant, and systematic. Therefore, a measure that will address this is necessary. The interference is justified. Moreover, penalizing the said acts of violence are reasonably necessary in order to stop the culture of violence

262. *Id.*

263. *Obergefell*, 135 S.Ct. at 2604.

264. BERNAS, *supra* note 258, at 118.

265. *United States v. Toribio* 15 Phil 85, 98 (1910) (citing *Lawton v. Steele*, 152 U.S. 133, 136 (1984) (U.S.); *Barbier v. Connolly*, 113 U.S. 27 (1885) (U.S.); & *Kidd v. Pearson*, 128 U.S. 1 (1888) (U.S.)).

266. *Id.*

267. *Id.* (citing *Lawton v. Steele*, 152 U.S., at 136).

perpetrated against transgender women on the basis of their gender identity. Such act cannot be deemed oppressive for no individual has the right to demean and injure others.

As for the equal protection clause of our Constitution, the Supreme Court held “that no person or class of persons shall be deprived of the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.”²⁶⁸ With this definition, it is of no doubt that the Constitution does not prohibit the State to classify when circumstances show that there are factual differences that the law must recognize.²⁶⁹ The Constitution permits reasonable classification.²⁷⁰ The Supreme Court ruled that for there to be a reasonable classification, the classification must:

- (1) rest on substantial distinctions;
- (2) be germane to the purpose of the law;
- (3) not be limited to existing conditions only; and
- (4) apply equally to all members of the same class.²⁷¹

Moreover, recent jurisprudence developed three tests in determining the reasonableness of classification.²⁷² These tests are: strict scrutiny test, intermediate or middle-tier scrutiny test, and the rational scrutiny test.²⁷³ In cases that involved suspect classifications — like gender — the intermediate test is used.²⁷⁴ Such test permits classification if the government can show that the classification serves an important State interest and that the classification is at least substantially related to serving that interest.²⁷⁵

It is submitted that the enactment of a statute protecting transgender women from violence will surpass judicial scrutiny. It satisfies the requisites for a valid classification. In the earlier portions of this Note, the situation of transgender women was illustrated. The non-recognition of their gender identity makes them invisible in the law and as a result the violence committed against them based on

268. *Tolentino v. Board of Accountancy*, 90 Phil. 83, 90 (1951) (citing *Missouri v. Lewis*, 101 U.S. 22, 31 (1880) (U.S.)).

269. BERNAS, *supra* note 258, at 139.

270. *Id.*

271. *People v. Cayat*, 68 Phil. 12, 18 (1939) (citing *Borgnis v. Falk Co.*, 133 N.W. 209, 216 (Wis. 1911) (U.S.); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911) (U.S.); *Rubi*, 39 Phil. at 707; & *People v. Vera*, 65 Phil. 56, 125–26).

272. BERNAS, *supra* note 258, at 139.

273. *Id.* at 139–40.

274. *Id.* at 140.

275. *Id.*

their gender identity remains unpunished. This predicament calls on the State to make classification when it comes to the violence committed against them. It is not the same with ordinary crimes that are inflicted against other people. For the crime committed against them is motivated by prejudice. Such classification is also germane to the purpose of the law and applies not only to the existing conditions but to future conditions as well. Moreover, it applies to all transgender women in an intimate relationship whether they have undergone post-operative gender-affirming surgery or not. Furthermore, such classification does not also offend the intermediate test. Protection of transgender women from violence is of no doubt an important state interest. Such classification is at least substantially related to serving the state interest. Thus, this Note argues that due to their position in society, the State can validly favor transgender women in intimate relationships. It has the right and obligation to protect transgender women from violence.

Equally interesting is the question posed by Father Bernas. With the inclusion of the word “equality” in the Preamble²⁷⁶ and the insertion of an article on Social Justice²⁷⁷ under the 1987 Constitution, he dared ask, “*does the equal protection clause merely prohibit the state from institutionalizing inequality or does it command the state to take positive measures to eradicate inequalities that have arisen not necessarily through state action?*”²⁷⁸ In raising this question, he made the position that Philippine Constitutional law need not take cue from American developments in law before it takes bolder steps towards equalization.²⁷⁹

Moreover, according to Father Bernas, Article XIII of the 1987 Constitution provides for the affirmative actions that the State must take in order to achieve greater equality.²⁸⁰ Likewise, Father Bernas mentioned that this article of the Constitution is the embodiment of the principle that “those who have less in life should have more in law.”²⁸¹ Unlike the rights under the Bill of Rights of the Constitution, however, the rights under Article XIII are not self-enforcing; thus, Congress has to pass legislation that will give effect to these provisions.²⁸²

As can be gleaned from the discussion on the aforementioned article, it is the duty of Congress to enact legislation that protect and enhance the right of people to human dignity. From this duty, it is clear that in the situation of transgender women the promise of this Constitutional provision is yet to be fulfilled. Until the State decides to penalize acts of violence committed against transgender women

276. PHIL. CONST. pmb1.

277. PHIL. CONST. art. XIII.

278. BERNAS, *supra* note 258, at 165 (emphasis supplied).

279. *Id.* at 166.

280. *Id.*

281. BERNAS, *supra* note 258, at 1237.

282. *Id.* at 1238.

on the basis of their gender identity, the State denies them of their dignity — for to deny them of this right is to deny them of their being.

It was cited in the earlier section that the DOJ refused to issue an opinion on its stand regarding the rights of LGBTQIA+.²⁸³ Instead, the DOJ Secretary opined that it is the CHR which is the office that can answer the query.²⁸⁴ The CHR is a constitutionally created body.²⁸⁵ Its function, among others, is to investigate human rights violations involving civil and political rights.²⁸⁶ The Congress may authorize the CHR, however, to investigate other forms of human rights violations other than those involving civil and political rights.²⁸⁷

It is important to note that the CHR has power to investigate but it has no power to prosecute.²⁸⁸ When it comes to prosecution, it has to rely on the DOJ.²⁸⁹ Acting on its mandate as the Gender and Development Ombud, the CHR, in its Gender Ombud Guidelines, included complaints of discrimination and violence committed against people of diverse SOGIE.²⁹⁰ The guidelines likewise provides that the CHR will investigate complaints of discrimination filed by transgender women.²⁹¹ In order to pursue this mandate, the CHR is guided by the Constitution, Magna Carta of Women, relevant laws, nine key treaties, and the Yogyakarta Principles.²⁹²

Under the Gender Ombud Guidelines, the dispositive portion of the investigation of the CHR is limited to recommend the sanctions under administrative law, civil service, or other appropriate laws to the Civil Service Commission and/or Department of Interior and Local Government.²⁹³ Should the CHR find criminal and/or civil charges are proper, the same shall be recommended.²⁹⁴ Lastly, the CHR can also include in its findings any policy

283. Department of Justice, *supra* note 30.

284. *Id.*

285. PHIL. CONST. art. XIII, § 17 (1).

286. PHIL. CONST. art. XIII, § 18 (1).

287. PHIL. CONST. art. XIII, § 19.

288. PHIL. CONST. art. XIII, § 18.

289. BERNAS, *supra* note 258, at 1275.

290. COMMISSION ON HUMAN RIGHTS, CHR GENDER OMBUD GUIDELINES (2016) [hereinafter GENDER OMBUD. GUIDELINES].

291. *Id.*

292. *Id.*

293. *Id.* at 31.

294. *Id.*

recommendation to Congress.²⁹⁵ Therefore, while the CHR can entertain complaints of discrimination and violence against transgender women, it has no power to prosecute the same. It is still subject to the discretion of the enforcement agency.

B. Domestic Laws

I. Magna Carta of Women

In 2008, the Philippine Congress enacted the Magna Carta of Women.²⁹⁶ The law aims to promote substantive equality of men and women before the law.²⁹⁷ In pursuing this goal, the law mandates the State to address both *de facto* and *de jure* equality.²⁹⁸ Interestingly, the law does not define what a woman is.²⁹⁹ That said, reading the law in its entirety gives an impression that it is only limited to women whose sex assigned at birth is female.

Nevertheless, the law is worth discussing in this Note. Under the law, gender and sexual orientation-based discrimination could amount to a violation of the law.³⁰⁰ It is also noteworthy that, in laying down the rights of women in sports under Section 14, the law mentioned that every woman shall enjoy all benefits regardless of sex, gender identity, and other similar factors.³⁰¹

The mention of gender identity seems to provide for a room for transgender women. Ideal and proper as it may seem, however, it is to the mind of the Author that asserting that transgender women are covered under the Magna Carta of Women could probably do more harm than good. Scattered in the provisions of the law are steps that the State should take in order to ensure equality before the law between men and women. This includes gender quota in certain offices.³⁰² Status quo tells us that women and transgender women suffer different levels of inequality.³⁰³ If it will be asserted that transgender women are covered under the

295. *Id.* at 32.

296. An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710 (2008).

297. *Id.* §§ 2 & 5.

298. *Id.* § 5. *See also id.* § 4 (e).

299. *Id.* § 4.

300. *See id.* § 3, para. 4.

301. The Magna Carta of Women, § 14, para. 1.

302. *Id.*, §§ 9 (a) & 11.

303. *See, e.g.,* United Nations Development Programme, Lesbian, Bisexual and Transgender Women's Economic Development, *available at* <https://www.undp.org/sites/g/files/zskgke326/files/migration/ph/UNDP-LBT->

Magna Carta of Women, then it is not far-fetched to say that the State may not properly respond to the inequality experienced by women and transgender women.

Thus, it is submitted that the mention of gender identity in the law refers to transgender man. Nonetheless, while transgender women may not claim protection under the Magna Carta of Women, the law provides for a positive climate for a similar legislation for transgender women. The concept of gender identity is slowly gaining recognition under our laws.

Furthermore, as mentioned earlier, the Magna Carta of Women designated the CHR as the Gender Ombud and instructed the CHR to monitor the compliance of the State, investigate violations of the said law, and establish guidelines and mechanism that will facilitate the access of legal remedies to women.³⁰⁴ With this mandate, the CHR promulgated the Gender Ombud Guidelines. Interestingly, while the law did not expressly mention the application of the Magna Carta of Women to transgender women, the CHR included the coverage of the Gender Ombud Guidelines to transgender women.³⁰⁵ In its *Inputs on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity with Focus on Data Collection*, the CHR as the Gender Ombud uses its own guidelines for data collection.³⁰⁶ The data collection for violence against transgender women, however, is lumped with persons of diverse SOGIE. Moreover, the questions regarding violence committed against transgender are couched in a general term. This Note submits that this guideline is inadequate to collect data relating to violence committed against transgender women in a dating or sexual relationship.

2. Safe Spaces Act

Transgender women have the right to be free from gender-based sexual harassment.³⁰⁷ Under the Safe Spaces Act, gender-based sexual harassment and public spaces sexual harassment includes, among others, transphobic and homophobic slurs.³⁰⁸ These slurs may be performed in “buildings, schools, churches, restaurants, malls, public washrooms, bars, internet shops, public

Factsheet-FINAL.pdf (last accessed Jan. 31, 2024) [<https://perma.cc/K5S4-D7AK>] & Meredith Worthen, *This Is My TERF! Lesbian Feminists and the Stigmatization of Trans Women*, 26 (5) *SEXUALITY AND CULTURE* 1782, 1783-84 (2022).

304. *Id.* § 39 (a)-(c).

305. GENDER OMBUD. GUIDELINES, *supra* note 290, at 4.

306. Commission on Human Rights, *supra* note 4, ¶¶ 13-16.

307. Safe Spaces Act, § 3 (f).

308. *Id.* § 4.

markets, transportation terminals[,] or public utility vehicles.”³⁰⁹ On the other hand, gender-based online sexual harassment are the transphobic and homophobic remarks and comments given online whether publicly or through private messages.³¹⁰

With this law, transgender women now enjoy the freedom from gender-based sexual harassment may it be in public space or online. Indeed, this is a huge step for transgender women’s rights. Moreover, aside from finally protecting transgender women from this kind of harassment, this law is a proof that the State may penalize acts of discrimination and violence committed against transgender women on the basis of their gender identity even in the absence of a gender recognition law. The passage of the law appears to be a go signal for other legislations that will address the current gaps in the law with regard to the rights of transgender women.

C. Jurisprudence

In recent years, more persons of diverse SOGIE have come to court to take refuge. Unfortunately, the Court has not always been welcoming to persons of diverse SOGIE. Our jurisprudence has its own share in the development of the rights of people with diverse SOGIE. This part of the Note aims to explore the rights that are already recognized and critique the appreciation of the Court in each case.

When it comes to gender recognition, there are two different stories that have reached the Supreme Court. These are the stories of a transgender woman in the case of *Silverio*³¹¹ and the case of an intersex man in the case of *Cagandahan*.³¹² These cases concern the same issue but were decided differently by the Supreme Court.

In the former, *Silverio* was not allowed to correct her sex in her birth certificate because the Court found no valid ground for it. Using the rule on statutory construction, the Court held that the word “sex” only refers to biological characteristics determined at birth.³¹³ Moreover, the Court ruled that sex must be interpreted consistent with the usage of the word when the law was enacted.³¹⁴ Thus, the Court held that, considering that the Civil Registry was enacted in the early 1990s and that the same remains unchanged, it cannot be argued that the word sex can accommodate an interpretation that it is something that can be

309. *Id.*

310. *Id.* § 12.

311. *Silverio v. Republic*, G.R. No. 174689, 537 SCRA 373 (2007).

312. *Republic v. Cagandahan*, G.R. No. 166676, 565 SCRA 72 (2008).

313. *Silverio*, 373 SCRA at 393.

314. *Id.*

changed through operation.³¹⁵ Ultimately, the Court held that it is the legislative department which has the power to enact laws that will consider “sex-reassignment” surgery as possible grounds to alter the sex in the birth certificate.³¹⁶

In *Cagandahan*, the Court held that, unlike a post-operative transgender person, the “gender” of the person is not to be determined at birth, but upon the attainment of age of majority of the person.³¹⁷ Here, the Court recognized that since there is an absence of the law on the matter, the Court opted not to dictate to an intersex on what sex he/she considers himself/herself to be.³¹⁸ According to the Court, such matters concerning sexuality and lifestyle preferences are innately private, and so the Court opted to defer to the right of the person to self-identity.³¹⁹

In the words of the Court, “[t]o him belongs the human right to the pursuit of happiness and of health. Thus, to him should belong the primordial choice of what courses of action to take along the path of his sexual development and maturation.”³²⁰ The different treatment is warranted, according to the Court because the person did not do anything to alter his or her appearance and just let nature take its course.³²¹ The case of *Cagandahan* was decided in 2008, which was just a year after the promulgation of *Silverio*.

These cases illustrated how the Court has treated cases involving gender recognition. According to the Court, current laws are inadequate to cater the situation of post-operative transgenders.³²² For intersex persons, however, even if there is no law on the matter, they may opt to change what appears on their birth certificate depending on the “sex” that they identify themselves upon reaching the age of majority. Nonetheless, it is interesting that, when the Court talks about gender recognition, they discussed it alongside sexual characteristics. As pointed out by Justice Leonen, this has to be reconsidered.³²³ He hopes, too, that Congress will soon enact measures concerning gender recognition.³²⁴ As far as this Note is concerned, the pronouncements of the Court as regards gender recognition of

315. *Id.*

316. *Id.* at 394.

317. *Cagandahan*, 565 SCRA at 86.

318. *Id.* at 87.

319. *Id.* at 88.

320. *Id.*

321. *Id.* at 87.

322. *Silverio*, 373 SCRA at 394-95.

323. *Unabia*, 892 SCRA at 289 (J. Leonen, separate opinion).

324. *Id.* at 296.

transgender women seemingly predict how it will treat a transgender woman claiming protection under the Anti-VAWC Act.

The last case in this section is the case of *Pemberton vs. De Lima*, which concerns the murder charge against Pemberton for the killing of Jennifer Laude.³²⁵ Pemberton argued that Sec. De Lima gravely abused her discretion when she found that the element of abuse of superior strength is present in the case qualifying the crime from homicide to murder.³²⁶ The Court found that there was no grave abuse of discretion.³²⁷ In fact the Court found the observation of Sec. De Lima is based from sound judgment from the record.³²⁸ Sec. De Lima found that,

respondent is a member of [the] United States Marine Corps, which is known to have the strictest recruitment standards among the Uniformed Services of the United States Armed Forces. In view of the rigorous physical and mental training requirements for enlistment, all members of the Marine Corps possess superior strength and exceptional combat skills. *On the other hand, Laude, albeit biologically a man, is a transgender who chose to adapt (sic) a woman's physical appearance and behavior.* Thus, it is clear that there is manifest physical disparity between respondent and Laude and that the former took advantage of his superior strength to cause the death of Laude, as evidenced by the multiple abrasions and contusions found on the latter.³²⁹

This decision is significant, as the Court recognized the societal position of transgender women. Since the Court held that there is no grave abuse of discretion on the part of the Secretary of Justice with regard to the appreciation of abuse of superior strength, this may indicate a tacit approval of the Court's view that, in crimes of violence committed against transgender women, they may be seen vulnerable and the violence can even equate to an abuse of the superior strength of the perpetrator.³³⁰ It is important to note, however, that the final disposition of this case found that the prosecution has failed to establish any of the qualifying circumstances in the Information.³³¹ Consequently, the Court of Appeals upheld the conviction of Pemberton for the crime of homicide, not of murder.³³²

Pemberton teaches us that there is a recognition from the Court that transgender women may be victims of violence done with an abuse of superior strength.³³³

325. *Pemberton v. De Lima*, G.R. No. 217508, 790 SCRA 128 (2016).

326. *Id.* at 133.

327. *Id.* at 136.

328. *Id.*

329. *Id.* at 138 (emphasis supplied).

330. *Id.* at 136.

331. *Pemberton*, CA-CR No. 38620 at 17 & 47.

332. *Id.* at 47.

333. *Pemberton*, 790 SCRA at 137.

Moreover, the case teaches us that with the absence of an appropriate penal law, Pemberton was only prosecuted and found guilty of the crime of homicide.³³⁴ This is regardless of the fact that the violence committed to Laude is motivated by transphobia. In fact, Pemberton even had the courage to raise self-defense on the basis that his honor was violated when he later on found out that Laude was a transgender woman.³³⁵ This further strengthens the legal issue posed in this Note. The next section of this Note, thus, aims to provide for a more elaborate discourse on this matter.

Under this section, it is shown that the Philippines, even without resorting to international human rights law, still has the obligation to respect, fulfill, and protect the rights of transgender women. The Constitution affords right to liberty and equal protection of the laws to transgender women. The Congress has enacted measures already recognizing the rights of transgender women. There is an obvious intent on the part of the State to protect transgender women. Nonetheless, there are still gaps that need to be filled. The next part of this Note aims to expose the gap in the law that the State has the obligation to fill in so far as criminal law is concerned.

V. PHILIPPINE CRIMINAL LAW FRAMEWORK

In the Philippines, the sources of criminal law are: (a) the Revised Penal Code and its amendments; (b) Special Penal Laws; and (c) Penal Presidential Decrees issued during Martial Law.³³⁶ In our jurisdiction, unless there is a law that defines and punishes the act, no criminal liability is incurred.³³⁷ This is the familiar maxim in criminal law as *nullum crimen nulla poena sine lege*.³³⁸

The power to define an act as unlawful and provide for its penalties in case of violation belong to the State.³³⁹ The said power emanates from the State's police power.³⁴⁰ Thus, it has been held that

[t]he right of prosecution and punishment for a crime is one of the attributes that by a natural law belongs to the sovereign power instinctively charged by the common will of the members of society to look after, guard[,] and defend the

334. *Pemberton*, CA-CR No. 38620, at 47.

335. *Id.* at 23.

336. I LUIS B. REYES, *THE REVISED PENAL CODE I* (20th ed. 2021).

337. *Id.*

338. *Evangelista v. People*, G.R. Nos. 108135-36, 337 SCRA 671, 678 (2000).

339. *People v. Santiago*, 43 Phil. 120, 124 (1922).

340. *Santiago*, 43 Phil. at 120.

interests of the community, the individual and social rights and the liberties of every citizen[,] and the guaranty of the exercise of his rights.³⁴¹

From this pronouncement, it is clear that the State enjoys a wide discretion in deciding what acts are considered to be deleterious to the welfare of the society.³⁴²

Moreover, well-settled is the rule that, in criminal cases, the State is the offended party and the private complainant's interest is limited to civil liability arising from the crime.³⁴³ A criminal offense is an outrage to the sovereignty of the State and thus it is the representative of the State who directs and controls the prosecution.³⁴⁴ The purpose of penal laws is to punish or correct criminal acts.³⁴⁵

A. Special Penal Laws

As mentioned earlier, not all crimes are penalized under the Revised Penal Code; other crimes are penalized under Special Penal Laws. This part discusses two special penal laws that concern gender-based violence and/or the protection of transgender women from violence. In particular, this part discusses the Anti-Violence Against Women and their Children Act of 2004 and the Safe Spaces Act.

1. Anti-Violence Against Women and their Children Act of 2004

a. Salient Provisions of the Anti-VAWC Act and Its Implementing Rules and Regulations (IRR)

Gender-based violence is penalized under the Anti-VAWC Act.³⁴⁶ The said law affords victims of violence against women and their children (VAWC) with three distinct remedies: (a) a criminal complaint; (b) a civil action for damages; and (c) a civil action for the issuance of a protection order.³⁴⁷ Moreover, under the said law, VAWC could come in the forms of physical,³⁴⁸ sexual,³⁴⁹ psychological,³⁵⁰ and economic abuses.³⁵¹ In fact, the statute provided for a comprehensive list of

341. *United States v. Pablo*, 35 Phil. 94, 100 (1916).

342. *Santiago*, 43 Phil. at 124.

343. *Cu v. Ventura*, G.R. No. 224567, 881 SCRA 118, 128 (2018) (citing *Mobilia Products, v. Umezawa*, G.R. No. 149357, 452 SCRA 736, 757 (2005)).

344. *Tan, Jr. v. Gallardo*, G.R. No. L-41213-14, 73 SCRA 306, 310 (1976).

345. I REYES, *supra* note 336, at 398.

346. *Anti-Violence Against Women and Their Children Act of 2004*, § 6.

347. *Pavlov v. Mendenilla*, G.R. No. 181489, 823 SCRA 499, 518-19 (2017).

348. *Anti-Violence Against Women and Their Children Act of 2004*, § 3 (a) (A).

349. *Id.* § 3 (a) (B).

350. *Id.* § 3 (a) (C).

351. *Id.* § 3 (a) (D).

what constitutes VAWC.³⁵² More importantly, the law defines violence against women and children as

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.³⁵³

There is no requirement that the woman and the perpetrator are legally married, nor do they need to share common child or children.³⁵⁴ So long as the woman and the perpetrator has or had a sexual or dating relationship, the said law will apply.³⁵⁵ Moreover, the law employs the gender-neutral word “person.”³⁵⁶ Thus, even lesbian relationships are covered.³⁵⁷

Recognizing that the prevalence of VAWC is due to the fact that society views it as a private matter, the law made VAWC a public crime.³⁵⁸ In fact, the law likewise exempts any person from any criminal, civil, or administrative liability when such person, “without using violence or restraint greater than necessary,” intervenes in VAWC cases to ensure the safety of the victim.³⁵⁹ More importantly, with the urgency and gravity of the penalized acts under the Anti-VAWC Act, it affords protective orders to the victims.³⁶⁰ Under the said law, a victim of violence may seek barangay protection order (BPO),³⁶¹ temporary protection order (TPO),³⁶² and permanent protection order (PPO).³⁶³ Section 8 provides the reliefs available under the protection.³⁶⁴

352. *Id.* § 5.

353. *Id.* § 3 (a) (emphasis supplied).

354. *Ang v. Court of Appeals*, G.R. No. 182835, 618 SCRA 592, 582-83, (2010) & Anti-Violence Against Women and Their Children Act of 2004, § 3 (e) & (f).

355. *Ang*, 618 SCRA at 582-83.

356. *Garcia*, 699 SCRA at 425.

357. *Id.*

358. *Id.* at 421 & Anti-Violence Against Women and Their Children Act of 2004, § 25.

359. Anti-Violence Against Women and Their Children Act of 2004, § 34.

360. *Id.* § 8.

361. *Id.* § 14.

362. *Id.* § 15.

363. *Id.* § 16.

364. Anti-Violence Against Women and Their Children Act of 2004, § 8.

BPO and TPO may be issued *ex parte*.³⁶⁵ Meaning, these orders may be issued even without a prior hearing. Likewise, it is mandated that the application for protection orders under the law shall have the priority over all other proceedings.³⁶⁶ Any violation of the said protection orders is penalized.³⁶⁷

Furthermore, under the law, a victim diagnosed of Battered Woman Syndrome (BWS) does not incur any civil and criminal liability regardless of the absence of the elements of self-defense under the Revised Penal Code.³⁶⁸ In ascertaining whether the victim was suffering from BWS during the commission of the crime, expert psychiatrists/psychologists shall be presented before the court.³⁶⁹ Moreover, a victim of VAWC is entitled to 10-day leave with pay.³⁷⁰ Meanwhile, under the Implementing Rules and Regulations (IRR) of the Anti-VAWC Act, victims of VAWC are entitled to emergency shelter, other rehabilitations services,³⁷¹ and medical assistance.³⁷²

b. Jurisprudence on the Anti-VAWC Act

In *Garcia vs. Drilon*, a husband went to Court and challenged the constitutionality of the Anti-VAWC Act of 2004 for being violative of the equal protection clause of the Constitution.³⁷³ Moreover, he argued that the law aims to prevent and penalize spousal and child abuse which could be committed either by the husband or the wife.³⁷⁴ The Court rejected all these arguments and upheld the constitutionality of the Anti-VAWC Act of 2004.³⁷⁵

On the argument that the law is violative of the equal protection clause of the Constitution, the Court held that the requisites for a reasonable classification are present.³⁷⁶ The Court held that the Anti-VAWC Act of 2004 rests on substantial

365. *Id.* §§ 14 & 15.

366. *Id.* § 20.

367. *Id.* § 21.

368. *Id.* § 26.

369. *Id.*

370. Anti-Violence Against Women and Their Children Act of 2004, § 43.

371. Inter-Agency Council on Violence Against Women and Their Children, Rules and Regulations Implementing Republic Act No. 9262, Otherwise Known as the “Anti-Violence Against Women and Their Children Act of 2004,” Republic Act No. 9262, rule VI, § 39 (2004).

372. *Id.* § 40.

373. *Garcia*, 699 SCRA at 383.

374. *Id.* at 403-04.

375. *Id.* at 468.

376. *Id.* at 445.

distinction, the classification is germane to the purpose of the law, the classification is not limited to existing conditions only, and apply equally to all members.³⁷⁷

For the substantial distinction, the Court found that “the unequal power relationship between women and men; the fact that women are more likely than men to be victims of violence; and the widespread gender bias and prejudice against women make for real differences justifying the classification.”³⁷⁸ The Court cited the report of Philippine Commission Women (PCW) showing that violence against women is closely linked with the unequal power relationship between women and men. The United Nations is also of the view that the unequal power relations between men and women have led to the systematic discrimination and violence against women.³⁷⁹

Jurisprudence³⁸⁰ teaches us that the elements of a violation of the Anti-VAWC Act are:

- (1) the offended party is a woman and/or her child or children;
- (2) the woman is either the wife or former wife of the offender, or is a woman with whom the offender has or had a sexual or dating relationship, or is a woman with whom such offender has a common child. As for the woman’s child or children, they may be legitimate or illegitimate, or living within or without the family abode; and
- (3) the act of violence against women and their children is committed through any, some, or all of the nine (9) means which Section 5 of the Anti-VAWC Law specifies as constitutive of “[t]he crime of violence against women and their children.”³⁸¹

In the case of *Ang vs. Court of Appeals*, a former boyfriend was being prosecuted under the Anti-VAWC Act for psychological violence after he threatened a woman that he will upload a nude photo with her face superimposed on it.³⁸² Ang argued that he cannot be prosecuted under the Anti-VAWC Act because while they were in a dating relationship, they did not engage in sexual intercourse.³⁸³ Moreover, the single act of sending the photo does not constitute

377. *Id.* at 411.

378. *Id.*

379. *Garcia*, 699 SCRA at 412 (citing Declaration on Elimination of Violence Against Women, G.A. Res. 48/104, para. 6, U.N. Doc. A/RES/48/104 (Feb. 23, 1994)).

380. *See AAA v. BBB*, G.R. No. 212448, 851 SCRA 33 (2018); *Dinamling v. People*, G.R. No. 199522, 760 SCRA 27 (2015); & *Pavlow*, 823 SCRA.

381. *Id.*

382. *Ang*, 618 SCRA at 596.

383. *Id.* at 601.

violence against women under the law.³⁸⁴ The Court found both arguments unmeritorious.³⁸⁵

The Court held that the law made a distinction between dating and sexual relationship.³⁸⁶ Under the law, dating “refers to situation wherein the parties live as husband and wife without the benefit of marriage or are romantically involved over time and on a continuing basis during the course of the relationship.”³⁸⁷ Whereas, sexual relations “refer to a single sexual act which may or may not result in the bearing of a common child.”³⁸⁸ Thus, according to the Court, there still exists a dating relationship even if those involved do not engage in sexual intercourse.³⁸⁹

Meanwhile, in the case of *Go-Tan vs. Tan*,³⁹⁰ the parents-in-law of the woman questioned the protection order issued against them under the Anti-VAWC Act of 2004.³⁹¹ According to them, persons liable under the said law are only the partner or former partner of the woman.³⁹² The Court held that they are mistaken.³⁹³ The Anti-VAWC Act of 2004 allows the application of the provisions of Revised Penal Code.³⁹⁴ Consequently, the principle of conspiracy is likewise applicable in the Anti-VAWC Act of 2004.³⁹⁵ Moreover, under the said law, the commission of violence against women may be committed by the offender through another.³⁹⁶ Thus, the Court held that there since there is sufficient allegation of the parents-in-law’s participation in the alleged violence, there was no error in the inclusion of the parents-in-law in the protection order.³⁹⁷

384. *Id.* at 602.

385. *Id.* at 602-03.

386. *Id.* at 602.

387. *Id.* at 600 (citing Anti-Violence Against Women and Their Children Act of 2004, § 3 (e)).

388. *Ang*, 618 SCRA at 601 (citing Anti-Violence Against Women and Their Children Act of 2004, § 3 (f)).

389. *Id.*

390. *Go-Tan v. Tan*, G.R. No. 168852, 567 SCRA 231 (2008).

391. *Id.* at 235-36.

392. *Id.*

393. *Id.* at 238.

394. *Id.* (citing Anti-Violence Against Women and Their Children Act of 2004 § 47).

395. *Id.* at 237.

396. *Go-Tan*, 567 SCRA at 237 (citing Anti-Violence Against Women and Their Children Act of 2004 § 5).

397. *Id.* at 242.

To summarize, the Anti-VAWC Act applies to women in a dating or sexual relationship.³⁹⁸ VAWC comes in the form of physical,³⁹⁹ sexual,⁴⁰⁰ psychological,⁴⁰¹ and economic abuses.⁴⁰² The State made it clear that the VAWC is a public crime.⁴⁰³ The Anti-VAWC Act is a clear manifestation that the State recognizes that domestic violence must be penalized. In doing so, the State addresses the issue of gender bias and prejudices. The end goal of the measure is to change the behavior of society towards women. More importantly, the enactment of the measure is to eradicate the inequality between men and women before the law. To achieve these goals, the law provides for protection orders,⁴⁰⁴ exemption of person intervening in VAWC cases from any civil, criminal, and administrative liability,⁴⁰⁵ classification VAWC as a public crime,⁴⁰⁶ and recognition of BWS.⁴⁰⁷

The discussion on the penalized acts, purpose, and jurisprudence on the Anti-VAWC Act shows that they are not exclusive to women — they are also applicable to transgender women. Nonetheless, while the law does not provide for a definition of who a woman is,⁴⁰⁸ this Note submits that the current law does not cover transgender women. As a special penal law, its interpretation is strictly construed against the State.⁴⁰⁹ Moreover, a reading of *Garcia* does not support the application of the Anti-VAWC Act to transgender women in a dating and sexual relationship. The Court recognized that, based on the deliberations of the Senate, the basis for the law is the existing record of domestic abuses committed against cisgender women.⁴¹⁰

Moreover, as illustrated prior, jurisprudence on gender recognition provides that, unless a gender recognition law is enacted, transgender women remain as

398. Anti-Violence Against Women and Their Children Act of 2004, § 3 (a).

399. *Id.* § 3 (a) (A).

400. *Id.* § 3 (a) (B).

401. *Id.* § 3 (a) (C).

402. *Id.* § 3 (a) (D).

403. *Id.* § 25.

404. Anti-Violence Against Women and Their Children Act of 2004 §8.

405. *Id.* § 34.

406. *Id.* § 25.

407. *Id.* § 26.

408. *Id.* § 3.

409. *Centeno v. Villalon-Pornillos*, G.R. No. 113092, 236 SCRA 197, 205 (1994).

410. *Garcia*, 699 SCRA at 407-08.

male in the eyes of the law.⁴¹¹ This Note asserts that, while such pronouncement is made in the context of civil law, it has to be applied to criminal law such as the Anti-VAWC Act. Well-settled is the rule that penal laws are strictly construed against the State.⁴¹² As a result, this Note submits that due to the current jurisprudence on the gender recognition of transgender women and the legislative intent behind the Anti-VAWC Act, violence committed against transgender women in a dating or sexual relationship remains unpunished. Transgender women, while similarly situated to cisgender women, are not extended the same protection under the Anti-VAWC Act. This gap must be filled.

2. Safe Spaces Act

Another recent law that penalizes gender-based violence is the Safe Spaces Act. It is important to note that the law provided for a statutory definition of gender identity.⁴¹³ Furthermore, in Section 4, the law stated that motive of the offender is immaterial in gender-based sexual harassment and public spaces harassment.⁴¹⁴

Under its penalized acts for gender-based sexual harassment in streets and public spaces, the law declares that transphobic slurs and the use of words, gestures or actions that ridicule on the basis of sex, sexual orientation, gender identity/expression as unlawful.⁴¹⁵ Likewise penalized are any “persistent uninvited comments or gestures on a person’s appearance, relentless requests for personal details, statement of sexual comments and suggestions, public masturbation or flashing of private parts, groping, or any advances, whether verbal or physical, that is unwanted and has threatened one’s sense of personal space and physical safety.”⁴¹⁶ The law provides a higher penalty for

acts such as stalking, and any of the acts mentioned [above], when accompanied by touching, pinching or brushing against the body of the offended person; or any touching, pinching, or brushing against the genitalia, face, arms, anus, groin, breasts, inner thighs, face, buttocks or any part of the victim’s body even when not accompanied by acts mentioned [above].⁴¹⁷

From the cited provisions, it is shown that the law considers the perceived or actual gender identity of the victim as possible reason of the offender in committing the act.

411. See, e.g., *Silverio*, 537 SCRA; *Cagandahan*, 565 SCRA; & *Unabia*, 892 SCRA.

412. *Centeno*, 236 SCRA at 205.

413. Safe Spaces Act, § 3 (f).

414. *Id.* § 4.

415. *Id.* § 11 (a).

416. *Id.* §§ 4 & 11 (a)-(b).

417. *Id.* § 11 (c).

This Note desires to emphasize how important and revolutionary the said law is. For the first time, under our Philippine laws, gender-based violence on the basis of the victim's gender identity is penalized. The law only applies, however, to gender-based sexual harassment in public places. The penalized acts are limited to sexual, emotional, and physical violence. No protection orders are likewise mentioned in the said law. The relationship of the perpetrator and the victim is immaterial. Thus, while the law penalizes an act of violence committed against transgender women, it still does not cover domestic violence against transgender women. If at all, this law may be considered as a building block in establishing a community where transgender women are free from all forms of violence. The next part provides for the discussion of the relevant crimes under the Revised Penal Code.

B. Revised Penal Code

The Revised Penal Code⁴¹⁸ is divided into two books. Book Two contains the felonies that are penalized and the penalties provided for each. It is further divided into Fifteen Titles.⁴¹⁹ For the purpose of this Note, only three titles will be discussed. These three titles are: (a) Title Eight (Crimes Against Persons);⁴²⁰ (b) Title Eleven (Crimes Against Chastity);⁴²¹ and (c) Title Nine (Crimes Against Personal Liberty and Security).⁴²² The reason for these limitation is that, among all the titles, these three titles concern the possible infliction of injury, whether it be physical, sexual, emotional, or economical. Furthermore, the discussion for each section shall only be limited to the crimes that may be committed against a transgender woman.

Under Title Eight, the following acts, among others, are penalized: parricide,⁴²³ death or physical injuries inflicted under exceptional circumstances,⁴²⁴ murder,⁴²⁵ homicide,⁴²⁶ physical injuries,⁴²⁷ and rape.⁴²⁸ The next part of this

418. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815 (1930).

419. *Id.*

420. *Id.* tit. 8.

421. *Id.* tit. 11.

422. *Id.* tit. 9.

423. *Id.* art. 246.

424. REV. PENAL CODE, art. 247.

425. *Id.* art 248.

426. *Id.* art. 249.

427. *Id.* arts. 262–266.

428. *Id.* art. 266–A.

section discusses each mentioned crime. The aim of this section is to explore whether the gender identity of the victim is considered.

1. Parricide

In this crime, what is being penalized is the killing of a person. What makes it parricide is the relationship between the accused and the deceased. In fact, it is the important element of this crime.⁴²⁹ The gender identity of the victim is not essential.⁴³⁰ So long as the relationship mentioned in the article is present, then the crime is parricide. The penalized act is limited to physical violence.

2. Death or Physical Injuries Inflicted Under Exceptional Circumstances

This is perhaps one of the peculiar crimes under the Revised Penal Code. Again, the act involved in this article is the infliction of bodily injury, whether it may result to physical injuries or death. In this article, however, there can be two sets of accused and victims. The first is when the act is done by a legal wife or a husband to his/her spouse,⁴³¹ while the second is when a parent commits the act against his/her daughter who is under 18 years of age and living with the former.⁴³²

Under this crime, the gender identity of the victim is not important. The essential factors in this crime are the relationship and the time of the commission of the crime, i.e., whether it happened immediately after the perpetrator has witnessed the sexual intercourse. The penalized act is limited to physical violence.

3. Murder and Homicide

In these two mentioned crimes, what is being penalized is the killing of a person. Under Article 249, a person who kills another, provided that the relationship mentioned in Article 246 does not apply, is guilty of homicide.⁴³³ On the other hand, if any of the six attendant circumstances listed under Article 248 is present,

429. 2 LUIS B. REYES, *THE REVISED PENAL CODE* 599 (20th ed. 2021).

430. The elements of parricide are:

- (c) the death of the deceased;
- (d) that he or she was killed by the accused; and
- (e) that the deceased was a legitimate ascendant or descendant, or the legitimate spouse of the accused.

People v. Castillo, Jr., G.R. No. 121768, 275 SCRA 752, 756 (1997).

431. REV. PENAL CODE, art. 247, para. 1.

432. *Id.* art. 247, para. 2.

433. *Id.* art. 249.

and the same does not fall under Article 246, the crime shall be qualified as murder.⁴³⁴

Again, in these crimes, the gender identity of the victim is not taken into consideration. The relationship between the offender and the victim is also irrelevant. Currently, perpetrators of the killing of transgender women are usually prosecuted under these crimes. This can be seen in the case of *Pemberton*. Moreover, in the said case, the Court held that there was no grave abuse of discretion on the part of the DOJ Secretary in finding that there is a probable cause for murder, since the qualifying circumstance of abuse of superior strength is probably present in the case.⁴³⁵ The DOJ said that the accused abused his superior strength, given that he is a U.S. marine, against the victim who, while biologically male, was a transgender woman.⁴³⁶ Unfortunately, after trial, the trial court, and as affirmed by the Court of Appeals, found that the prosecution failed to establish the abuse of superior strength.⁴³⁷ Thus, the accused was only found guilty of homicide, and not murder, despite the fact that it was proven in trial that the accused killed the victim after he found out that the victim was a transgender woman.⁴³⁸ These two crimes cover only physical violence.

4. Physical Injuries

Under the Revised Penal Code, there are five crimes that relate to physical injuries.⁴³⁹ The following crimes are:

- (1) Mutilation (Article 262)⁴⁴⁰
- (2) Serious physical injuries (Article 263)⁴⁴¹
- (3) Administering injurious substances or beverages (Article 264)⁴⁴²
- (4) Less serious physical injuries (Article 265)⁴⁴³

434. *Id.* art. 248.

435. *Pemberton*, 790 SCRA at 137.

436. *Id.* at 138-139.

437. *Pemberton*, CA-CR No. 38620, at 47.

438. *Id.* at 32.

439. REV. PENAL CODE, arts. 262-66.

440. *Id.* art. 262.

441. *Id.* art. 263.

442. *Id.* art. 264.

443. *Id.* art. 265.

(5) Slight physical injuries and maltreatment (Article 266)⁴⁴⁴

Under this section, whenever there is an infliction of bodily injury and the accused did it without intent to kill, the crime committed is physical injuries. The designation of the crime, whether it is serious, less serious, or slight physical injuries, will depend on the gravity of the injury caused to the victim.

In case where the injury committed was the mutilation of some essential organ of reproduction, whether wholly or partially, the crime committed is mutilation. When the injuries resulted to serious physical injury, and the same were inflicted by knowingly administering to him any injurious substance or beverages or by taking advantage of his weakness of mind or credulity, the crime then is administering injurious substances or beverages under Article 264.

Similar to the crimes of homicide and murder, the following crimes do not require that the acts committed are done on the ground of the gender identity of the victim. Thus, while, arguably, infliction of bodily injury to transgender women could very well be prosecuted under these crimes, the evil intent of the accused is still left unpunished. The primary question is — “would the accused have done it had not the victim been a transgender woman?” Thus, these crimes still do not consider the moral perversity of the accused towards transgender women. Moreover, this set of crimes is limited to physical violence. The relationship between the offender and the victim is not a relevant element.

5. Rape

Under the new Anti-Rape Law, the following are considered as the crime of rape:

Article 266-A. Rape; When and How Committed.—Rape is Committed—

- (a) By a person who shall have carnal knowledge of another person under any of the following circumstances:
 - a. Through force, threat, or intimidation;
 - b. When the offended party is deprived of reason or otherwise unconscious;
 - c. By means of fraudulent machination or grave abuse of authority; and
 - d. When the offended party is under sixteen (16) years of age or is demented, even though none of the circumstances mentioned above be present[.] *Provided, [t]hat there shall be no criminal liability on the part of a person having carnal knowledge of another person under sixteen (16) years of age when the age difference between the parties is not more than three (3) years, and the sexual act in question is proven to be consensual, non-abusive, and non-*

444. *Id.* art. 266.

exploitative[.] *Provided, further,*[t]hat if the victim is under thirteen (13) years of age, this exception shall not apply.

As used in this Act, non-abusive shall mean the absence of undue influence, intimidation, fraudulent machinations, coercion, threat, physical, sexual, psychological, or mental injury or maltreatment, either with intention or through neglect, during the conduct of sexual activities with the child victim. On the other hand, non-exploitative shall mean there is no actual or attempted act or acts of unfairly taking advantage of the child's position of vulnerability, differential power, or trust during the conduct of sexual activities.

- (b) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.⁴⁴⁵

The above cited provision is article 266-A of the Revised Penal Code, as amended initially by the Anti-Rape Law of 1997,⁴⁴⁶ and subsequently, by Republic Act No. 11648 in 2022.⁴⁴⁷ In the former amendatory law, Congress expanded the coverage of the crime of rape.⁴⁴⁸ The law now considers as rape as any act of sexual violence on "sex-related" orifice other than woman's organ.⁴⁴⁹ Thus, two kinds of rape are penalized. These are (a) rape by sexual intercourse and (b) sexual assault.⁴⁵⁰ Under the first paragraph, only a biological woman may be the victim.⁴⁵¹ This is because of the law referring to the act having "carnal knowledge of a woman."⁴⁵² Jurisprudence provides that this paragraph can only

445. REV. PENAL CODE, art. 266-A (as amended).

446. An Act Expanding the Definition of the Crime of Rape, Reclassifying the Same as a Crime Against Persons, Amending for the Purpose Act No. 3815, as Amended, Otherwise Known as the Revised Penal Code, and for Other Purposes [The Anti-Rape Law of 1997], Republic Act No. 8353, § 6 (1997).

447. An Act Providing for Stronger Protection Against Rape and Sexual Exploitation and Abuse, Increasing the Age for Determining the Commission of Statutory Rape, Amending for the Purpose Act No. 3815, as Amended, Otherwise Known as "The Revised Penal Code," Republic Act No. 8353, Also Known as "The Anti-Rape Law of 1997," and Republic Act No. 7610, as Amended, Otherwise Known as the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act," Republic Act No. 11648, § 1 (2022).

448. REV. PENAL CODE, art. 266-A (as amended).

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

be committed as against a biological woman,⁴⁵³ and has categorized this kind of rape as penile rape.⁴⁵⁴ On the other hand, under second paragraph, the biological sex of the victim is not material.⁴⁵⁵ This kind of rape has been categorized as instrument or object rape or gender-free rape.⁴⁵⁶

The expansion of the definition of rape covered the possible case of rape committed against transgender women. Pursuant to this law, the act of insertion of the penis into the mouth or anal orifice or any object to the genital or anal orifice of a transgender woman is now penalized as rape through sexual assault. While the expansion of the coverage of the law affords transgender women from sexual assault, this crime still does not consider the gender identity of the victim. Moreover, with the penalized act and means of committing them, the crime of rape is limited to physical, emotional, and sexual violence. Another related crime to that of rape is acts of lasciviousness.⁴⁵⁷ This crime, however, is not classified under Crimes against Persons, but rather under Title Eleven: Crimes Against Chastity.

6. Acts of Lasciviousness

Similar to the crime of rape, the crime of acts of lasciviousness⁴⁵⁸ is not restrictive, and thus, covers even acts of lewdness committed against transgender women. Acts that are considered falling under this crime are those that are deemed lascivious or lewd. Jurisprudence defines lewd as “obscene, lustful, indecent, lecherous; it signifies that form of immorality that has relation to moral impurity; or that which is carried on a wanton manner.”⁴⁵⁹

In this kind of crime, the motive of the accused is not material, because what is only considered here is the lewdness of the very act itself.⁴⁶⁰ Thus, as in the crimes mentioned above, the gender identity of the victim plays no factor in penalizing the said act. The act is penalized regardless of the victim’s perceived or actual gender; however, the act penalized is limited to sexual violence.

453. *People v. Soriano*, 388 SCRA 140 (2002).

454. *People v. Pareja*, G.R. No. 202122, Jan. 15, 2014.

455. REV. PENAL CODE, art. 266-A (as amended).

456. *People of the Philippines v. Pareja*, G.R. No. 202122, 714 SCRA 131, 136 (2014).

457. REVISED PENAL CODE, art. 336.

458. *Id.*

459. *People v. Adajar*, G.R. Nos. 14368-71, 904 SCRA 279, 299-301 (2019) (citing *Lutap v. People*, 825 Phil. 10, 27 (2018)).

460. 2 REYES, *supra* note 429, at 1144 (citing *People v. Famularcano, C.A.*, 43 O.G. 1721).

7. Grave Threats, Light Threats and Other Light Threats

Title Nine defines and penalizes crimes against personal liberty and security. Under Chapter 2, Section 3 of the said title, it contains crimes against security pertaining to threats and coercion.

There are three acts that are punishable as grave threats.⁴⁶¹ The first one is done when the threat is made demanding money or any other condition, even though not unlawful, and the offender was successful in attaining the purpose of the threat. The second one is similar to the first case, but the offender failed to attain his purpose. Lastly, there is also grave threats when the threat was not made subject to a condition. Article 282 is broad enough to cover grave threats committed against transgender women. The crime, however, still finds gender identity of the victim irrelevant. Likewise, it is limited to emotional and economic violence.

The punishable act under Article 283 is similar to that of grave threats. The only difference is that, under light threats, the threatened wrong does not constitute a crime. As such, similar observations to that of Article 282 are applicable under this article.

Acts penalized as other light threats are still similar to grave threats and light threats.⁴⁶² Acts constituting as other light threats, however, must not be accompanied with a condition. Otherwise, they will be penalized as other grave threats or light threats. Therefore, the element that the offender did the act due to the actual or perceived gender identity of the victim remains absent, and the penalized acts are limited to emotional violence.

8. Grave Coercions and Light Coercions

For the crime of grave coercions, what is being penalized is the act of preventing another from doing what is not prohibited by law or compelling another to do something against his will, whether it be right or wrong.⁴⁶³ Such act must be committed with violence, threat, or intimidation. Again, while the said crime may protect transgender women from such acts, it still does not consider whether the act was committed, just because of the gender identity of the victim. The acts penalized are limited to physical, emotional, and economic abuse.

For light coercions,⁴⁶⁴ this Note is concerned only with the second paragraph of Article 286, which penalizes other coercions and unjust vexations. In unjust

⁴⁶¹ *Id.* at 776.

⁴⁶² *Id.* art 285.

⁴⁶³ *Id.* art 286, para. 1.

⁴⁶⁴ *Id.* art 287, para. 2.

vexation, the question asked is “whether the offender’s act cause *annoyance, irritation, vexation, torment, distress, or disturbance* to the mind of the person to whom it is directed.”⁴⁶⁵ While it may appear that unjust vexation is catch-all provision, an act may not be considered as unjust vexation if there is violence or intimidation involved.⁴⁶⁶ Thus, with this limitation, only emotional violence is penalized.

As discussed above, the Anti-VAWC Act does not cover transgender women, and that the current remedy of transgender women is to prosecute offenders under existing criminal laws other than the Anti-VAWC Act. To better illustrate whether these existing criminal laws afford transgender women the same protection under the Anti-VAWC Act, a table showing whether these crimes consider the dating or sexual relationship of the victim and the offender, the penalized acts, and the remedies afforded is provided below.

Crime	Dating or Sexual Relationship of the Victim and the Offender	Penalized Acts				Protection Orders
		Physical Violence	Psychological/ Emotional Violence	Sexual Violence	Economic Abuse	
Gender-Based Sexual Harassment (Safe Spaces Act)	×	✓	✓	✓	×	×
Parricide	×	✓	×	×	×	×
Death or Physical Injuries Inflicted Under Exceptional Circumstance	×	✓	×	×	×	×
Murder and Homicide	×	✓	×	×	×	×
Physical Injuries	×	✓	×	×	×	×

465. 2 REYES, *supra* note 429, at 806 (citing *People v. Gozum*, 54 O.G. 7409 (emphasis supplied)).

466. *Id.* (citing *People v. Banzaon*, 66 O.G. 1533 (CA) & *People v. Sebastian*, 40 O.G. 2498 (CA)).

Crime	Dating or Sexual Relationship of the Victim and the Offender	Penalized Acts				Protection Orders
		Physical Violence	Psychological/ Emotional Violence	Sexual Violence	Economic Abuse	
Rape	×	✓	✓	✓	×	×
Acts of Lasciviousness	×	×	×	✓	×	×
Grave Threats	×	×	✓	×	✓	×
Light Threats	×	×	✓	×	✓	×
Other Light Threats	×	×	✓	×	×	×
Grave Coercions	×	✓	✓	×	✓	×
Light Coercions	×	×	✓	×	×	×

This table shows that, except for the Anti-VAWC Act, no other penal law considers dating or sexual relationship of the offender and the victim as an element of the crime. This alone exposes that gap in the law, insofar as transgender women in a dating or sexual relationship are concerned. When it comes to penalized acts, it is true that there are some crimes that penalized more than one form of violence, such as gender-based harassment, rape, grave threats, light threats, and grave coercions. No crime, however, actually penalizes all forms of violence that are covered by the Anti-VAWC Act. Furthermore, no crime affords transgender women in a dating or sexual relationship the same protection orders that are available under the Anti-VAWC Act.

Having exposed the gap in the criminal law, the next part of this Note provides for the discussion on whether the absence of a law addressing the violence committed against transgender women in a dating or sexual relationship is a violation of the State's obligation in protecting transgender women's right to life and liberty.

VI. ANALYSIS

*Dignitary wounds cannot always be healed with a stroke of a pen.*⁴⁶⁷

Transgender women wake up every day in constant fear of getting harassed, discriminated against, and harmed. The silence of the law on the protection of transgender women from violence contributes to the insecurities of transgender women. No one should live in fear. The law should protect transgender women for courageously living their truth. At the end of this section, it will be seen that

⁴⁶⁷ *Obergefell*, 135 S.Ct. at 2606.

transgender women in a dating or sexual relationship are victims of gender-based violence. Since the current legal framework does not recognize transgender women in accordance with their gender identity, however, acts of violence committed against them in the context of dating or sexual relationship remain unpunished. This gap denies transgender women their right to life, liberty, equal protection of the laws, and access to justice.

A. Transgender Women in a Dating or Sexual Relationship Are Victims of Gender-Based Violence

Many manifest that the prevalence of gender-based violence against transgender women in a dating or sexual relationship has ideological roots.⁴⁶⁸ The society, being patriarchal, places transgender women as vulnerable to violence.⁴⁶⁹ This is because transgender women challenge the patriarchal notions of masculinity and femininity.⁴⁷⁰ With the ideological roots of domestic violence against transgender women, it is no surprise that such violence is systemic, frequent, and severely underreported.⁴⁷¹ Without reducing the victims into numbers, the stories of transgender women shared in this Note show that transgender women in a dating or sexual relationship are victims of gender-based violence. They continue to be so, until and unless the State finally sees them and honors their names.

B. Under Philippine Law, Transgender Women Are Not Recognized in Accordance with Their Gender Identity

As of today, while there are recent laws that recognize the concept of gender identity,⁴⁷² there is still no law which allows gender recognition. As such, the cases of *Silverio*, *Cagandahan*, and *Unabia* remain to be binding. Moreover, while these cases are decided in the realm of civil law, the pronouncement of the Court in *Silverio* predicts that no complaint of VAWC filed by a transgender woman will prosper. The Court said that laws that particularly apply to women do not extend to transgender women.⁴⁷³ This is despite the fact that no law provides for a definition of woman.⁴⁷⁴ Nonetheless, since the victim in VAWC cases should be a biological woman,⁴⁷⁵ the Supreme Court's non-recognition of transgender

468. International Gay and Lesbian Human Rights Commission, *supra* note 6, at 25.

469. *Id.* at 26.

470. *Id.*

471. *Id.*

472. *See, e.g.*, The Magna Carta of Women & Safe Spaces Act.

473. *Silverio*, 537 SCRA at 394.

474. United Nations Development Programme & Commission on Human Rights of the Philippines, *supra* note 15, at 22.

475. *Garcia*, 699 SCRA at 500-01 (J. Leonen, concurring opinion).

women in accordance with their gender identity bars transgender women from claiming protection under the said law.

C. Acts of Gender-Based Violence Against Transgender Women Are Not Covered by Existing Laws

Violence committed against transgender women in a dating or sexual relationship is prevalent and rampant. However, our legal framework does not recognize transgender women in accordance with their gender identity. As a result, transgender women are barred from seeking protection under the Anti-VAWC Act. Therefore, the odious and reprehensible acts of violence committed against transgender women in a dating or sexual relationship remain unpunished.

Transgender women in a dating or sexual relationship, like women, are victims of gender-based violence. However, they are not protected by the Anti-VAWC Act. This is an anomaly in the law which must be addressed. The second section of this Note tells us that violence against transgender women is rooted on the fact that ours is a society of patriarchy where masculinity is favored. Transgender women challenge this idea. They defy the notions of sex and gender. Thus, they become vulnerable to violence. Moreover, like women, transgender women in a dating or sexual relationship are victims of violence because of their gender identity. They receive such treatment as “punishment” for appearing and presenting as women. Clearly, their intimate partners commit acts of violence against them because of their gender identity. Furthermore, like women, transgender women refused to report acts of violence committed against them because they consider it as a private affair and some also refused to report for fear of further transphobia.

From this observation, this Note submits that the evil the State wants to eliminate in enacting the Anti-VAWC Act is present to the situation of transgender women. The inherent power imbalance in society paves way for the violence committed against transgender women. Their intimate partners actually view and treat them as women. Moreover, the underreporting of domestic violence committed against transgender women is caused by the belief that such violence is a private affair and not a public offense. It is also caused by the fear of further transphobia. The State enacted the Anti-VAWC Act as an answer to these kinds of evil. However, since the State does not recognize transgender women as women, they still battle these evils alone and without the arm of the Anti-VAWC Act.

Furthermore, the CEDAW Committee declared that the provisions of the CEDAW must likewise apply to transgender women.⁴⁷⁶ Therefore, the Anti-VAWC Act being enacted to fulfill the State’s obligation under the CEDAW must

476. CEDAW General Recommendation No. 28, *supra* note 134, ¶ 18.

then be applied to transgender women as well. This Note submits that this is legally possible. The elements of violence against women and children are likewise present in the situation of transgender women. The stories of the transgender women mentioned in this Note show that, they, too, have or had dating or sexual relationships with the persons who committed acts of violence against them. These acts of violence come in the form of physical, sexual, psychological, and economic abuse. Thus, they satisfy the elements of violence against women and their children under the Anti-VAWC Act.

Furthermore, except for the Anti-VAWC Act, no other law considers the dating or sexual relationship between the offender and the victim. No other crime treats physical, emotional, sexual, and economic abuse as violence against transgender women. Moreover, no other crime provides for the protection orders available in the Anti-VAWC Act. More than these observations, this Note reiterates that the Anti-VAWC Act is not only a measure to prevent gender-based violence, but it is also a measure to promote gender equality. It is the State's response to eliminate all forms of discrimination between men and women. Transgender women are similarly situated to women in this context. Therefore, while it is arguable that acts of violence committed against them are penalized, these are not enough. Physical, emotional, sexual, and economic abuse are committed against them on account of their gender identity. They receive these acts of violence because of how society perceives them. The society which penalizes women for being women is the same society which penalizes transgender women for identifying as women. Hence, just like how the State addressed violence committed against cisgender women, the State must likewise afford transgender women the same protection.

VII. CONCLUSION AND RECOMMENDATIONS

Naming and describing violence [have] powerful political as well as practical consequences. Across all regions, feminists and women's groups have observed that when violence against women is delinked from social norms and societal attitudes, legal change falters; State interventions and prevention measures are not successful. ... [W]omen's safety and security are inextricably tied to women's equality. For example, when the country conditions are hostile to women and girls, and when States are neglectful of women's lives, all women are at risk, including lesbians, bisexual women, gender non-conforming women (butch lesbians, women who dress in masculine attire, male to female transgender women), and as this research shows, female-to-male transgender men.

— International Gay and Lesbian Human Rights Commission⁴⁷⁷

This section provides for the conclusion and the recommendations on the issue presented. The author first provides for the conclusion of the legal discussion made in the earlier sections. Thereafter, the author proposes the possible remedies to the

477. International Gay and Lesbian Human Rights Commission, *supra* note 6, at 24-25.

problem. This Note submits that there must be proper procedure for documenting violence committed against transgender women in a dating or romantic relationship. Moreover, this Note proposes an amendment to the Anti-VAWC Act by providing for a definition of women that will recognize transgender women as women.

A. Conclusion

As already established, the current criminal framework does not provide any penal sanction for violence committed against transgender women in a dating or sexual relationship on the basis of their gender identity. As it now stands, the remedy is to prosecute violators under existing crimes that do not consider whether such act was committed on the basis of the victim's gender identity. The failure to penalize acts of violence against transgender women is a violation of the State's obligation to ensure that transgender women live a life with dignity and free from violence. The continued omission of the State to penalize such violence sends a chilling message that the lives of transgender women are not deserving of protection from the State. Hence, it fosters a culture of impunity. Instead of punishing the abusers of transgender women, the State seems to cradle them even.

As discussed in the earlier sections, the position of transgender women in our society can be likened to the position of women. Theirs is a position that made it seem that to demand the realization of their right is a demand for a privilege. The difference, however, between transgender women and women is that the State has afforded the latter the freedom from gender-based violence.⁴⁷⁸ Moreover, the State considers the Anti-VAWC Act as a tool to ensure that societal behavior towards women will change.⁴⁷⁹ This has yet to be done for transgender women.

Needless to state, this Note does not wish to compare struggles, nor does it assert that women and transgender women share the same struggles. Rather, the juxtaposition of women and transgender women is only to remind the State of its recognition that the main principle behind the passage of the Anti-VAWC Act is to correct the behavior of society towards women.⁴⁸⁰ More than anything, it is a recognition that women have long suffered discrimination and violence and the State has the mandate to end this. Thus, having established that transgender women in a dating and sexual relationship are victims of gender-based violence, this Note submits that the State has the equal obligation to the transgender women. The society's behavior toward transgender women is so hostile that even

478. *See Garcia*, 699 SCRA 352.

479. *Id.* at 420-21.

480. *Id.*

down to their basic act of using a comfort room is being debated upon. This has to stop.

This Note shows that the call for the State to penalize violence committed against transgender women is not a mere wishful demand. This Note made an attempt to provide the factual and legal foundation for it. As shown, the State, as a signatory to the UDHR, the ICCPR, and the CEDAW, appears to be not in compliant with its international obligations of respecting, fulfilling, and respecting the rights of transgender women against gender-based violence. This mandate is likewise enshrined in our 1987 Constitution. Thus, there is an actual need for the State to enact a law which will afford the said protection to transgender women. Acts of violence committed against them on the basis of their gender identity must be penalized.

To end, this Note aims to contribute to the instruments that immortalize the names of Jennifer Laude, Jessa Remiendo, and Donna Nierra, and other transgender women whose lives have been taken away from them without giving the dignity they deserve. It likewise intends to honor the names of Candy, Jelay, and Brigitte. It is high time to recognize that violence committed against transgender women in a dating or sexual relationship is violence against women and their children under the Anti-VAWC Act.

B. Recommendations

This Note proposes two remedies to address the gap in the law. The first remedy is a possible model for data collection. Second, this Note proposes an amendment to the Anti-VAWC Act. The proposed amendment to the Anti-VAWC Act seeks to provide for a definition of woman. The amendment also includes how a transgender woman may claim protection under the said law.

I. Data Collection

The CHR admitted that the State has no existing mechanism on data collection relative to persons of diverse SOGIE.⁴⁸¹ As such, while violence committed against them are widespread and rampant, the State has dearth data on such violence.⁴⁸² This, according to the CHR, contributes to the invisibility of people of diverse SOGIE to the law makers and many government duty bearers.⁴⁸³

Under the 1987 Constitution, the CHR has the mandate to monitor the State's compliance to its human rights obligations, investigate complaints of human rights violations, and propose to Congress any policy that will respect, protect, and

481. Commission on Human Rights, *supra* note 4, ¶ 3.

482. *Id.* ¶ 5.

483. *Id.* ¶ 6.

promote human rights.⁴⁸⁴ Moreover, the Magna Carta of Women designated the CHR as Gender Ombud.⁴⁸⁵ It tasked the CHR to entertain complaints of violations of Magna Carta of Women and other relevant human rights treaties.⁴⁸⁶ In pursuing this mandate, the CHR issued its Gender Ombud Guidelines.⁴⁸⁷ The said guidelines show the protocol for casing of discrimination and violence, not only against women, but also against people of diverse SOGIE.⁴⁸⁸ As shown in the *Inputs on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity with Focus on Data Collection* of the CHR, however, there is no specific rule in the said guidelines on how to collect data of gender-based violence committed against transgender women.⁴⁸⁹ This Note proposes amendments to the existing data collection of the CHR as Gender Ombud. In particular, this Note submits that in addition to the data being monitored by the CHR, the following information must also be collected by the CHR:

CHR as the Gender Ombud			
Crime/ Violation		Data to be collected	
Violence committed against transgender women		Does the victim identity herself as a woman?	What is the relationship, if any, of the offender and the transgender woman? What are the acts of violence committed against transgender women?

This Note submits that the collection of the said data aids in the enactment of a penal law that will address all forms of violence committed against transgender women in a dating or sexual relationship. As the CHR mentioned, the unavailability of data makes transgender women invisible to policy makers. Furthermore, as illustrated in this Note, there are other forms of gender-based violence that are particularly committed against transgender women, such as the threatening to out her gender identity or using such information against her. Thus, collecting this data ensures that all forms of violence committed against transgender women in a dating or sexual relationship are covered.

2. Amendment to the Anti-VAWC Act

This Note supports the proposal of Camille Angelica Mendoza to enact a law that will allow transgender individuals to be recognized in accordance with their

484. PHIL. CONST. art. XIII, § 18 (1) & (6).

485. The Magna Carta of Women, § 39.

486. *Id.* § 39 (b).

487. GENDER OMBUD GUIDELINES, *supra* note 290.

488. *Id.* at 57–58.

489. Commission on Human Rights, *supra* note 4, ¶ 11.

gender identity.⁴⁹⁰ Until and unless such law is enacted, however, the State is not precluded from recognizing transgender women as women under the Anti-VAWC Act. In order for the State to comply with its obligations, this Note proposes that the State must amend and extend the coverage of the Anti-VAWC Act to transgender women. Doing so will help transgender women enjoy the protective remedies under the said law. Moreover, the intent of the law to change behavior towards women may likewise be extended to transgender women.

a. Definition of Woman

The criteria of what makes a woman a woman should not be based on the biological make up of a person. Womanhood does not refer to sex, but to gender. Being a woman is a gender identity, and it is not determined by one's sex assigned at birth. Thus, this Note proposes that the Anti-VAWC Act shall embrace this definition. Transgender women shall be recognized as women under the said law.

With the assertion that the protection of transgender women should not be at the expense of transgender men, this Note proposes a definition of women that includes those whose sex assigned at birth is female and those who identify themselves as women. This definition may accommodate transgender men, should they wish to invoke the Anti-VAWC Act for their protection. This does not mean, however, that this Note does not push for the recognition of their gender identity. Rather, it is the submission of this Note that there shall be a separate investigation on the experiences of transgender men that can be the source of an appropriate legislation for the particular issues that they experience. Until then, they may still find refuge under the protection of the Anti-VAWC Act.

b. Affidavit as Proof of Gender Identity

Transgender women should not be burdened in proving their gender identity. Thus, this Note proposes that the framework adopted in the State of California for gender recognition be used in the prosecution of violence committed against transgender women.⁴⁹¹ A provision in the law will only require an affidavit by the victim stating that she/he/they identifies/identify herself/himself/themselves as a transgender woman under the penalty for perjury and not for fraudulent purposes.

This Note submits that other requirements, such as medical evaluation of the gender identity of transgender women are not necessary in order for them to claim protection under the Anti-VAWC Act. Transgender women are victims of gender-based violence, not because they have undergone gender-affirming

490. Camille Angelica A. Mendoza, *Should We Recognize Gender Identity?*, at 101-12 (2019) (unpublished J.D. Thesis, Ateneo De Manila University) (on file with the Professional Schools Library, Ateneo De Manila University).

491. Gender Recognition Act of 2004, § 2 (1).

surgeries, neither because they are diagnosed with gender dysphoria, but because they identify themselves as woman. As such, this Note submits that an affidavit declaring that the transgender women identify as women is sufficient. In any case, the recognition of their gender identity will only be limited to the application of the Anti-VAWC Act. It will not affect the civil status of the transgender women. Ultimately, the submission of an affidavit aims to ensure administrative feasibility and to safeguard the law from possible abuses.

In order to address the gap in the law, the Author proposes an amendment to the Anti-VAWC Act, a copy of which is presented in the final section of this Note.

ANNEX

Republic of the Philippines
Congress of the Philippines
Metro Manila
Nineteenth Congress
Second Regular Session

Begun and held in Metro Manila, On Monday the twenty-seventh day of July,
two-thousand and twenty.

[“REPUBLIC ACT NO.” _____]

AN ACT PROVIDING FOR A DEFINITION OF WOMEN, AMENDING
FOR THE PURPOSE REPUBLIC ACT NO. 9262, OTHERWISE KNOWN
AS ANTI-VIOLENCE AGAINST WOMEN AND THEIR CHILDREN ACT
OF 2004.

*Be it enacted by the Senate and House of Representatives of the Philippines in Congress
assembled:*

SECTION 1. *SHORT TITLE.* – This Act shall be known as the “*Babae
Ako Act of 2020.*”

SEC. 2 *VIOLENCE AGAINST WOMEN AND THEIR CHILDREN.* – The crime
of violence against women and their children is committed against the victim on
account of her gender identity. Accordingly, a definition of women shall be
included under SECTION 3. *DEFINITION OF TERMS* of R.A. 9262 to read as
follows:

- (i) “*Women*” refer to those:
 - (a) persons whose assigned sex at birth is female; and
 - (b) persons who identify themselves as women regardless of their
sex assigned at birth.

For the purpose of paragraph (b), a person claiming protection under R.A. No. 9262 must submit an affidavit which must attest that she identifies herself as a woman. Such affidavit must be attested under penalty of perjury and that it is not made for fraudulent purposes.

SEC. 3. *INSTITUTION OF THE ACTION FOR PERJURY.* – No criminal complaint of perjury shall be filed against a person who executed the affidavit referred to in Sec. 2 (i) (b) of this Act unless the proceedings in which such affidavit was used is dismissed and the court has made a finding that there is a prima facie case of perjury.

SEC. 4. *SEPARABILITY CLAUSE.* – If any part, section, or provision of this Act is declared invalid or unconstitutional, the other parts thereof not affected thereby shall remain valid.

SEC. 5. *REPEALING CLAUSE.* – All laws, acts, presidential decrees, executive orders, administrative orders, rules and regulations inconsistent with or contrary to the provisions of this Act are deemed amended, modified or repealed accordingly.

SEC. 6. *EFFECTIVITY.* – This Act shall take effect fifteen (15) days after completion of its publication in two (2) newspapers of general circulation.

Approved,

FERDINAND MARTIN G. ROMUALDEZ JUAN MIGUEL F. ZUBIRI
Speaker of the House of Representatives President of the Senate

This Act, which is a consolidation of Senate Bill No. 645 and House Bill No. 3788, was finally passed by the Senate and the House of Representatives on November 16, 2023 and November 17, 2023, respectively.

REGINALD S. VELASCO
Secretary General

RENATO N. BANTUG JR.
Secretary of the Senate
House of Representatives

Approved: December 1, 2023

FERDINAND ROMUALDEZ MARCOS, JR.
President of the Philippines