

Revisiting the Moral Dimension of Civil and Ecclesial Marriage in the American – Philippine Perspectives and Understanding the Effect of Same Sex Marriages to Civil and Ecclesial Dichotomy

By: Sonny S. Lukban, A. B.¹

Abstract:

In as much that I would like to argue with the conventional perceptions of the law, the novelty of the issue at hand compels me to innovate standards of understanding what is mistakenly taken for granted in order to give life to the constitution; to the meaning of marriage which primarily tackles the most essential civil and moral dimension of every individual's existence.

For the purpose of this paper, I deeply believe that the common concepts even in the midst of conflicting ideas and principles to hold on with the important effects of marriage in the society are still unsettled. Do we just understand marital union as a duty, a right or a moral demand? Do we just base our conclusion premised from what are empirically observable about the changes on marriage ideals and acceptance?

I and Thou: The Philosophical Understanding of the Self towards and Embodied Perfection with Others

In the common horizon of human reality, the human person is naturally attracted to the abyss contained in the mystery of his existence. In his attempt to unveil the many questions of his life, he transcends beyond the confines of his *known self*² to march into a painful discovery of personhood, a web where he is always inextricably caught in.³ This truth of man's existence seems all the more paradoxical when he enters most intimately into what he calls "*himself*". His ordinary experiences would suggest seeking out reasons to assure his interior longing to know his autonomous identity, about who really he is. "Although the future of his life, as some scholars say, is not totally nebulous; however, it can possibly be anticipated to a certain extent by evaluating what he has at present. He needs to work towards this future even without knowing exactly what will it be."³ His fundamental quest in the sojourn of this self-made destiny or towards his future will always seem uncertain. He will have to come into his senses if confronted by a thought like: "*Is my existence on earth a living death or a dying life?*"⁴

¹ The author is a 3rd year Law Student of Saint Paul School of Professional Studies. He earned his Bachelor's Degree – Classical Philosophy in St. Vincent de Paul College Seminary and currently the chair of the Editorial Board of the Lex Journal Publication of SPSPS.

² This term "*known self*" means unrealized, growing, maturing self as made object of various philosophical and psychological critiques in the field of so many historical investigations.

³ Manuel B. Dy Jr., *Contemporary Social Philosophy* (Quezon City: JMC Press, Inc. 1994), 15.

⁴ St. Augustine of Hippo, *Confession*, VI, 5, 7: CCL 27.

Why am I thrown out into the world of uncertainties? "These questions would simply testify that the meaning and truth of any human phenomenon like that of marriage can never be absolutized. The sphere which is constitutive of the definition of his existence is, therefore, not exempted from this changing character of human life."⁵ This is the primary reason why man is always in the constant struggle about everything—about life and survival. He cannot help, otherwise, but always fall out of his volition into the realm of *whys*, considering the element that covers the genuineness of his human existence. Everything is unclear, a puzzle that needs to be deciphered. And the more he goes to its depth, the more he eventually understands that *life is more a disturbing question rather than an answer in itself*.⁶ Likewise, he becomes aware that this question is an inevitable substance which completes the meaning of his search; hence, *perceiving human life as a great paradox, an incomprehensible contradiction and [even] a dreadful tragedy*.⁷

Now, just like any others, we can also ask: "What is so obscure in one's life that it becomes so pleasing to human inquiry? And despite the effort of great thinkers across space and time, why does it remain an inexhaustible source of amazement and wonder?"⁸

Of course, in this paper, our speculation towards accurately understanding man's nature lies within the boundaries of philosophy and legality. The best way to approach it philosophically is to know its nature and *ask philosophical questions*⁹ as what the Greek immortal sages like Socrates, Plato and Aristotle did. Fr. Norris Clarke, a Jesuit metaphysician provides a good counsel when he says, "Philosophy is the critically reflective, systematically articulated attempt to illumine our human experience in the depth and set it in a vision of a whole."¹⁰ Thus, Fr. Clarke's influence gives impetus to bring this manuscript into what I believe must serve as the fundamental query to unlock this *vision of a whole* where human existence can be intrinsically examined. Such that I could say everything that is experienced by the human person could be explained via a primordial element – the grounds of *freedom*. By freedom, I mean a fundamental piece within human nature that makes him capable of an internal quality, which is open for a 'possibility to act' as he wills to satisfy his human tendencies.¹¹ In fact, this 'possibility to act' is consequently needed in order to perfect the dialogue of human life in communion with others as well, and basically uniting with man's reality even not through marital union.

⁵ Dy, 9.

⁶ Florentino Timbreza, *Quest for Meaning* (Quezon City: New Days Publishers, 2000), 30.

⁷ Timbreza, 2.

⁸ Edgar Ponce, "Human Existence: A Dialogue between Simplicity and Mystery" (Bachelor's synthesis, St. Vincent de Paul College Seminary, 2011), 2.

⁹ Jostein Gaarder, *Sophie's World* (New York: Phoenix House, 1995), 12.

¹⁰ Norris Clarke, *The One and the Many: Contemporary Thomistic Metaphysics* (Notre Dame: University of Notre Dame Press, 2001), 17.

¹¹ George Keithohil, *Make Freedom Your Target* (Bombay: Better Yourself Books, 1992), 10.

This is the most important point why I grounded my paper on "Revisiting the Moral Dimension of Civil and Ecclesial Marriage in the American – Philippine Perspective and Understanding the Effect of Civil and Ecclesial Dichotomy." I want my readers to consider this freedom on marriage not in solipsistic isolated notion just like with the misconception observed on the "ego" of Cartesian subjective point of view but rather as a magnetic entity that sustains the so called human unending auto – determination.¹²

This paper is, therefore, an attempt to understand the very "dialogue of marriage" from within, from the ultimate source of human freedom as the fountain where life's mysterious force lies. As such, it exhibits as a distinct exploratory procedure from the traditional approach, which has analyzed the "marriage" from objective categories taken from without, only from external factors in the field answerable by science. Man is more than just a scientific reality! Nevertheless, placing man into a higher pedestal of our philosophical guesswork, his existence could be legitimately understood from the basic dimensions, without missing the most essential element of what makes him as "he is", a human person. Karol Wojtyla asserts that man as a subject of his own experience and action must be perceived through his whole experience as a *suppositum*, also capable of spiritual communion. Wojtyla adds that metaphysical subjectivity or the *suppositum*, as the transphenomenal and therefore fundamental expression of the experience of the human being, is also the guarantor of the identity of his human being in existence and in activity.¹³

In this sense, Wojtyla emphasizes that "uniqueness" is an essential character of the human beings rather than "concreteness". Because of man's interior desire for *communion*, this uniqueness becomes clearer through the exercise of his freedom that is not being overlooked but is conceived, in man's integrity as an avenue for self – determination without necessitation from willing. It becomes the fulfillment brought forth by the internal harmony between reason and feelings, residing in man's spiritual faculty of volition (*will*), in the common *locus* of experience from which man's life solely revolve. By that, man should never be alone.

¹² "Self – determination represents the deeper, more fundamental dimension of human authorship. The synthesis of authorship and self – determination is the only path toward man's revealing himself as an individual endowed with the attributes of self-disposition and self – possession. When man makes choice between other objects and values, he will inevitably make a determination as to himself and to his own value. He thus becomes his own primary object". An extract taken from Karol Wojtyla, *Towards A Philosophy of Praxis* (New York: Crossroad Publishing, 1981), 10 – 23.

¹³ *Suppositum or Suppositum Humanum* can be interpreted as the self or as the subject. Wojtyla writes, "The self is nothing other than the concrete *Suppositum Humanum*" [Karol Wojtyla, "Person: Subject and Community," in *Person and Community: Selected Essays*, 231].

The Civil and Ecclesial Encapsulation of Marriage: Its Scope and Delimitation

Per contra, our definition of human reality and his fundamental vocation *to be with* is a never ending truth to optimize man's personhood. While marriage can be understood as a necessity or an obligation, this understanding can never be tolerated, provided that it only limits the substantial meaning of marriage in general; its civil scope and theological horizon. The Philippine Constitution perceived marriage under Art. 1., as a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences and incidents are governed by law.¹⁴ Moreover, the State recognizes the Filipino Family as the foundation of the nation which strengthens its solidarity and actively promotes its total development. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State, so with that the State shall defend: (1) the right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood; (2) the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development; (3) the right of the family to a family living wage and income; and (4) the right of families or family associations to participate in the planning and implementation of policies and programs that affect them. Justice William O. Douglas (1898 – 1980) provides concrete reasons when he said from his ruling for the majority in the U.S. Supreme Court case, *Griswold v. Connecticut*, dated 1965 – June:

"We deal with a right to privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."¹⁵

With this, while we assume that marriage is a civil right, it is undeniable that it requires an ethical understanding as what Paul Glenn in his *Ethics* has described – the search on what is totally true, good and valuable. The Code of Canon Laws of the Catholic Church defends this argument when it stressed out under Can. 1055 § 1 – 1056. The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a *sacrament* between the baptized. The essential

¹⁴ Title XI – XV, Repealed by Executive Order No. 209, otherwise known as the "Family Code of the Philippines"

¹⁵ This was the first ruling that guaranteed individual right to privacy, at least for married couples. It overturned a state law that criminalized the use of contraceptives. The law had been passed in 1879 and almost never enforced. Note that this quotation is often incorporated into same – sex wedding ceremonies.

properties of marriage are *unity* and *indissolubility*, in which Christian marriage obtains a special firmness by reason of the sacrament.

Furthermore, the Catechism of the Catholic Church substantiated this reason when it added that the intimate community of life and love which constitutes the married state has been established by the Creator and endowed by Him with its own proper laws. God himself is the author of marriage. The vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may have undergone through the centuries in different cultures, social structures, and spiritual attitudes. Let us hope that these differences should not cause us to forget its common and permanent characteristics. Although the dignity of this institution is not transparent everywhere with the same clarity, some sense of the greatness of the matrimonial union exists in all cultures. The late Karol Wojtyla brought these thoughts in simple manner.

Here Wojtyla considers (a) monogamy and the indissolubility of marriage; (b) the value of the institution of marriage; (c) procreation and parenthood; and (d) periodic continence: method and interpretation.

A. Monogamy and the Indissolubility of Marriage

Wojtyla argues that monogamy and the indissolubility of marriage are required by the personalistic norm, declaring: "Attempts to solve the problem of marriage other than by monogamy (*which implies indissolubility*) are incompatible with the the other. In short, I would interpret these pages by saying that monogamy and indissolubility of marriage are rooted in the being of the spouses, the identity they have given themselves by getting married.

B. The Value of the Institution of Marriage

Wojtyla next argues that the "institution of marriage" justifies the intimate sexual relationship between husband and wife in the eyes of society. Why? It does so because the institution, Wojtyla seems to argue, serves to protect the inter-personal structure of marriage as a community of two persons united or made one by reason of their love. In short, so the argument seems to me, the value of marriage as an institution is that it serves to protect conjugal love or the community of persons made one because of their love and thereby "provides a justification for the sexual relationship between a particular couple within the whole complex of society." (p. 219), or, to put it somewhat differently, "in a society which accepts sound ethical principles and lives in accordance with them; this institution is necessary to signify the maturity of the union between a man and a woman, to testify that theirs is a love on which a lasting union and community can be based." (p. 220)

Marriage as an institution is demanded in order to protect conjugal love.

C. Procreation and Parenthood

Marriage is a "state," a durable institution providing the framework necessary to justify the existence of sexual relations between a man and a woman; moreover, within marriage sexual relations are ongoing, a regular succession of acts. But every such act within marriage must have its own internal justification. The problem here, Wojtyła says, is to adapt sexual relations to the objective demands of the personalistic norm: "it is in this context more than in any other that people must show responsibility for their love. Let us add at once that this responsibility for love is complemented by responsibility for life and health: a combination of fundamental goods which together determine the moral value of every marital act." (p.225)

Wojtyła then seems to distinguish sharply (while nonetheless integrating) two orders that "meet" in the sexual union of man and woman: the "order of nature which must not be identified with the "biological order", which has as its object reproduction "or better, procreation", and the personal order, which finds its expression in the love of persons and aims at the fullest realization of that love."

He asserts that these two orders are inseparable and insists that "the correct attitude toward procreation is a condition for the realization of love." Emphasizing that both procreation and love are based on free choice, he then says: "When a man and a woman consciously and of their own free will choose to marry and have sexual relations they choose at the same time the possibility of procreation, choose to participate in creation. And it is only when they do so that they put their sexual relationship within the framework of marriage in a truly personal level." (p. 227). He then argues that in marrying and in engaging in the marital act the man and the woman freely choose to accept consciously the possibility of parenthood, of becoming a mother and father. He contends that "when a man and a woman capable of procreation have intercourse their union must be accompanied by awareness and willing acceptance of the possibility that 'I may become a father' or 'I may become a mother.' Without this the marital relationship will not be 'internally' justified, the union of persons is not the same as sexual union. This latter is raised to the level of the person only when it is accompanied in the mind and the will by the acceptance of the possibility of parenthood."¹⁶

The well – being of the individual person and of both Human and Christian society is closely bound up with the healthy state of conjugal and family life. God who created man out of love also calls him to love the fundamental and innate vocation of every human being. For man is created in the image and likeness of God who is himself

¹⁶ These commentaries are based from the summary made by William E. May on the published book of the late Karol Wojtyła in Polish in 1960 and in English in 1981. This is a magnificent work, philosophical in nature on the human person, human sexuality, love, and marriage. The book has five chapters: One: The Person and the Sexual Urge; Two: The Person and Love; Three: The Person and Chastity; Four: Justice to the Creator; and Five: Sexology and Ethics.

love. Since God created him man and woman their mutual love becomes an image of the absolute and unfailing love with which God loves man. It is good, very good, in the Creator's eyes. And this love which God blesses is intended to be fruitful and to be realized in the common work of watching over creation: "And God blessed them, and God said to them: "Be fruitful and multiply, and fill the earth and subdue it." The Holy Scripture affirms that man and woman were created for one another: "It is not good that the man should be alone." The woman, "flesh of his flesh," his equal, his nearest in all things, is given to him by God as a "helpmate"; she thus represents God from whom comes our help. "Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh." The Lord himself shows that this signifies an unbreakable union of their two lives by recalling what the plan of the Creator had been "in the beginning": "So they are no longer two, but one flesh."¹⁷

Questionable Marital Unions of the 21st Century: Facts Established for Same – Sex Marriages

It is of great importance to understand marriage as both ubiquitous and central in character. All across the world, in every region, every social class, every race and ethnicity, every religion or non - religion, people get married. For many if not most people, moreover, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to – and keep aspiring to, again and again, even when their experience has been far from happy. To be told "You cannot get married" is thus to be excluded from one of the defining rituals of the American life cycle.

The keys to the kingdom of the married might have been held only by private citizens – religious bodies and their leaders, families, other parts of civil society. So it has been in many societies throughout history. In the United States, however, as in most modern nations, government holds those keys. Even if people have been married by their church or religious group, they are not married in the sense that really counts for social and political purposes unless they have been granted a marriage license by the state. Unlike private actors, however, the state does not have the complete freedom to decide who may and may not marry. The state's involvement raises fundamental issues about equality of political and civic standing.

Same – sex marriage is currently one of the most divisive political issues in our nation. In November 2008, Californians passed Proposition 8, a referendum that removed the right to marry from same – sex couples who had been granted that right by the courts. This result has been seen by the same – sex community as deeply degrading. More recently, Iowa and Vermont have legalized same – sex marriages, the former through judicial interpretation of the state constitution, the latter through legislation.

¹⁷ Definitive Edition: Catechism of the Catholic (Liberia Editrice Vaticana, Citta del Vaticano, 1994), 1602 – 1605. This translation is based on the Latin "Editio Typica" of the Catechism promulgated by Pope John Paul II on August 15, 1997. All updates and "corrigenda" have been integrated in the proper context.

Analyzing this issue will help us understand what is happening in our country, and where we might go from here.

Marriage, it soon becomes evident, is no single thing. It is plural in both content and meaning. The institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child-rearing and mutual responsibility; marriages can exist without each of these. (We have always granted marriage licenses to sterile people, people too old to have children, irresponsible people, and people incapable of love and friendship. Impotence, lack of interest in sex, and refusal to allow intercourse may count as grounds for divorce, but they do not preclude marriage.) Marriages can exist even in cases where none of these is present, though such marriages are probably unhappy. Each of these important aspects of human life, in turn, can exist outside of marriage, and they can even exist all together outside of marriage, as is evident from the fact that many unmarried couples live lives of intimacy, friendship, and mutual responsibility, and have and raise children. Nonetheless, when people ask themselves what the content of marriage is, they typically think of this cluster of things.

Nor is the meaning of marriage single. Marriage has, first, a civil rights aspect. Married people get a lot of government benefits that the unmarried usually do not get: favorable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; the spousal privilege exemption when giving testimony in court; and yet others.

Marriage has, second, an expressive aspect. When people get married, they typically make a statement of love and commitment in front of witnesses. Most people who get married view that statement as a very important part of their lives. Being able to make it, and to make it freely (not under duress) is taken to be definitive of adult human freedom. The statement made by the marrying couple is usually seen as involving an answering statement on the part of society: we declare our love and commitment, and society, in response, recognizes and dignifies that commitment. Wojtyla had it in his metaphysical interpretation of love:

"After a brief introduction on the almost inexhaustible richness of meaning found in the word 'love', I wanted to focus on three basic elements in any form of human, interpersonal love, namely attraction, desire, and goodwill. I wanted also to take up the problem of reciprocity of love between human persons, the movement from sympathy to love, and concludes this part with a discussion of betrothed love. I personally believe and provide as my starting point that *'love is always a mutual relationship between persons,'* a relationship based on *'particular attitudes toward the good, adopted by each of them individually and by both jointly.'*" (p. 73)

Marriage has, finally, a religious aspect. For many people, a marriage is not complete unless it has been solemnized by the relevant authorities in their religion, according to the rules of the religion. A 2012 study from the University of Maryland, "The Cross – Pressures of Religion and Contact with Gays and Lesbians, and Their

Impact on Same – Sex Marriage Opinion,” examines how the interaction of these two often – countervailing pressures plays out and influences policy preferences on marriage. The study’s findings include:

1. Having a close relationship with a gay or lesbian individual – a friend or family member – had the greatest impact on the views of Latino Catholics and black Protestants: for Latino Catholics, having such contact diminished support for a ban on same – sex marriage by 12 percentage points on average; for black Protestants, the effect was 5 percentage points.
2. Several things may explain this effect on Latino Catholics and black Protestants: a stronger affiliation between historically marginalized groups; church teachings about equality; and a possible stronger split between religious commitment and political opinion on this issue.
3. However, the effect of having casual contact with a gay person – a co – worker or acquaintance – is not significant for most religious groups, including white and black Protestants. In fact, “The predicted probability of support for the ban is actually greater by about three to four percentage points for white mainline Protestants and white Catholics with a gay coworker or acquaintance.”
4. Among religious groups, only the views of Latino Catholics seem influenced by more casual acquaintance with gay or lesbian persons: such relationships are associated with a 3 – to 5 percentage point decrease in the likelihood of support for a same – sex marriage ban.
5. Among persons unaffiliated with any religion, close personal contact with a homosexual was associated with 8 percentage point decrease in the probability of support for a ban on same – sex marriages in the country.¹⁸

Government plays a key role in all three aspects of marriage. It confers and administers benefits. It seems, at least, to operate as an agent of recognition or the granting of dignity. And it forms alliances with religious bodies. Clergy are always among those entitled to perform legally binding marriages. Religions may refuse to marry people who are eligible for state marriage and they may also agree to marry people who are ineligible for state marriage. But much of the officially sanctioned marrying currently done in the United States is done on religious premises by religious personnel. What they are solemnizing (when there is a license granted by the state) is, however, not only a religious ritual, but also a public rite of passage, the entry into a privileged civic status.

¹⁸ Published in *Politics and Policy*, the study is based on data from two separate sources: the Kinder Houston Area Surveys from 2001 and 2009; and the 2006 – 07 Common Content surveys from the Cooperative Congressional Election Studies (CCES). The study, by Brittany H. Bramlett of the University of Maryland, distinguishes between casual contact with gay persons and closer contact through family or friendship.

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To get this privileged treatment under law people do not have to show that they are good people. Convicted felons, divorced parents who fail to pay child support, people with a record of domestic violence or emotional abuse, delinquent taxpayers, drug abusers, rapists, murderers, racists, anti – Semites, other bigots, all can marry if they choose, and indeed are held to have a fundamental constitutional right to do so – so long as they want to marry someone of the opposite sex. Although some religions urge premarital counseling and refuse to marry people who seem ill – prepared for marriage, the state does not turn such people away. The most casual whim may become a marriage with no impediment but for the time it takes to get a license. Nor do people even have to lead a sexual lifestyle of the type the majority prefers in order to get married. Pedophiles, sadists, masochists, sodomites, transsexuals – all can get married by the state, so long as they marry someone of the opposite sex.

Given all this, it seems odd to suggest that in marrying people the state affirmatively expresses its approval or confers dignity. There is indeed something odd about the mixture of casualness and solemnity with which the state behaves as a marrying agent. Nonetheless, it seems to most people that the state, by giving a marriage license, expresses approval, and, by withholding it, disapproval.

What is this same – sex marriage debate about? It is not about whether same – sex relationships can involve the content of marriage: few would deny that gays and lesbians are capable of friendship, intimacy, “meet and happy conversation,” and mutual responsibility, nor that they can have and raise children (whether their own from a previous marriage, children created within their relationship by surrogacy or artificial insemination, or adopted children). Certainly none would deny that gays and lesbians are capable of sexual intimacy.

Nor is the debate, at least currently, about the civil aspects of marriage: we are moving toward a consensus that same – sex couples and opposite – sex couples ought to enjoy equal civil rights. The leaders of both major political parties appeared to endorse this position during the 2008 presidential campaign, although only a handful of states have legalized civil unions with material privileges equivalent to those of marriage.

Finally, the debate is not about the religious aspects of marriage. Most of the major religions have their own internal debates, frequently heated, over the status of

same – sex unions. Some denominations – Unitarian Universalism, the United Church of Christ, and Reform and Conservative Judaism – have endorsed marriage for same – sex couples. Others have taken a friendly position toward these unions. Mainline Protestant denominations are divided on the issue, although some have taken negative positions. Roman Catholics, both lay and clergy, are divided, although the church hierarchy has strongly opposed. Still other denominations and religions (Southern Baptists, the Church of Jesus Christ of Latter - Day Saints) seem to be strongly opposed collectively. There is no single “religious” position on these unions today, but the heat of those debates is, typically, denominational; heat does not spill over into the public realm. Under any state of the law, religions would be free to marry or not marry same – sex couples.

The public debate, instead, is primarily about the expressive aspects of marriage. It is here that the difference between civil unions and marriage resides, and it is this aspect that is at issue when same – sex couples see the compromise offer of civil unions as stigmatizing and degrading.

The expressive dimension of marriage raises several distinct questions. First, assuming that granting a marriage license expresses a type of public approval, should the state be in the business of expressing favor for, or dignifying, some unions rather than others? Are there any good public reasons for the state to be in the marriage business at all, rather than the civil union business? Second, if there are good reasons, what are the arguments for and against admitting same – sex couples to that status, and how should we think about them?

Panic Over Same – Sex Marriage

As we do that, we need to keep two questions firmly in mind. First, does each argument really justify legal restriction of same – sex marriage or only some peoples’ attitudes of moral and religious disapproval? We live in a country in which people have a wide range of different religious beliefs, and we agree in respecting the space within which people pursue those beliefs. We do not, however, agree that these beliefs, by themselves, are sufficient grounds for legal regulation. Typically, we understand that some beliefs (*including some but not all moral commitments*) can generate public arguments that bear on the lives of all citizens in a decent society, while others generate only intra – religious arguments. Thus, observant Jews abhor the eating of pork, but few if any would think that this religiously grounded abhorrence is a reason to make the eating of pork illegal. The prohibition rests on religious texts that not all citizens embrace, and it cannot be translated into a public argument that people of all religions can accept. Similarly in this case, we must ask whether the arguments against same – sex marriage are expressed in a neutral and sharable language or only in a sectarian doctrinal language. If the arguments are moral rather than doctrinal, they fare better, but we still have to ask whether they are compatible with core values of a society dedicated to giving all citizens the equal protection of the laws. Many legal aspects of our history

of racial and gender – based discrimination were defended by secular moral arguments, but that did not insulate them from constitutional scrutiny.

Second, we must ask whether each argument justifies its conclusion or whether there is reason to see the argument as a rationalization of some deeper sort of anxiety or aversion.

The first and most widespread objection to same – sex marriage is that it is *immoral and unnatural*.¹⁹ Similar arguments were widespread in the anti – miscegenation debate, and, in both cases, these arguments are typically made in a sectarian and doctrinal way, referring to religious texts. (*Anti – miscegenation judges, for example, referred to the will of God in arguing that racial mixing is unnatural.*) It is difficult to cast such arguments in a form that could be accepted by citizens whose religion teaches something different. They look like Jewish arguments against the eating of pork: good reasons for members of some religions not to engage in same – sex marriage, but not sufficient reasons for making them illegal in a pluralistic society.

A second objection, and perhaps the one that is most often heard from thoughtful people, insists that the main purpose of state – sanctified marriage is procreation and the rearing of children. Protecting an institution that serves these purposes is a legitimate public interest, and so there is a legitimate public interest in supporting potentially procreative marriages. Does this mean there is also a public interest in restricting marriage to only those cases where there may be procreation? This is less clear. Philippine historical panic is demanding:

“Anyone thinking of same – sex marriage being allowed in the Philippines better find relief elsewhere. Philippine laws will have to change and public consultations will have to be held in Congress for same – sex marriage to legalize in the Philippines. Hypothetically, that is a process more tedious than going to the United States and contracting a same sex marriage there with all the legal requisites satisfied. Unlike in the US, where a decision from the US Supreme Court legalized same – sex marriage in all fifty states, laws will have to be changed in order to allow it. Given how long laws are passed in this jurisdiction, it is more likely that it will not happen soon. Atty. Lorna Kapunan, who had represented a transgender client who wanted to be legally recognized as a female in his civil registry, explained in a report by GMA News Online that the path to legalized same – sex marriage will be a long one, though she also said

¹⁹ The Same – Sex Marriages become immoral and unnatural because the “communion of persons” occurs when two people freely give themselves to each other and accept one another in love; and the former is never love in all its sense. In fact, true love consists precisely in the mutual self – gift of acceptance. As we see in the Gospels, the main point of the Christian life is to love. John Paul II’s other favorite quote from *Gaudium et Spes* tells us that, “Christ fully reveals man to man himself and makes His supreme calling clear.” What does Christ reveal but that, “Greater love has no man than this; that man lays down his life for his friends.” (Jn. 15:13) It is Christ Himself who reveals to us our basic vocation as persons by giving Himself to us in His death on the Cross. Through his Theology of the Body, John Paul II seeks to present to us the Gospel message of love in a new, deep, and profound way. He knows that love is what all people seek. He goes so far as to say, “Man cannot live without love and love can only be seen from his other half. He emphasizes the role of Eve on this account. He remains a being that is incomprehensible for himself, his life is senseless, if love is not revealed to him, if he does not encounter love, if he does not experience, in the certitude that the only true good of the human person consists in fulfilling this Divine Plan.” (TOB July 25, 1984) p. 392

current law allowed some members of the lesbian – gay – bisexual – and transgender (LGBT) community to get married.

It's a very complex scenario. The Family Code of the Philippines explicitly prohibits same – sex marriage. Article 1, states that "Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code. Further, Article 2 provides for the essential requisites of marriage. "No marriage shall be valid, unless these essential requisites are present: (1) Legal capacity of the contracting parties who must be a male and a female; and (2) Consent freely given in the presence of the solemnizing officer. Article 4 of the Family Code provides for the legal implications of the defects in the essential and formal requisites of marriage. It says: "The absence of any of the essential or formal requisites shall render the marriage *void ab initio*, except as stated in Article 35 (2)."

By *void ab initio*, the law provides that marriages with defects in essential and formal requisites are illegal from the beginning. Hence, they do not exist or do not have any binding effect.

While the Family Code of the Philippines prohibits same – sex marriage, people found intriguing ways of circumventing it. For example, a gay man and a lesbian may get married. A transgender male and a transgender female may also get married. However, there is a school of thought in legal parlance that your gender at birth is your gender forever.

"Kapunan said in the report that she recalled a transgender case she handled but lost some years ago. She said her transgender client wanted the gender stated in his birth certificate changed from male to female. Her client wanted legal recognition as female. The US Supreme Court ruled on Friday, 5 – 4, that the US Constitution's guarantees of due process and equal protection under the law meant that states could not ban same – sex marriages. Justice Anthony Kennedy, writing on behalf of the court, said the hope of gay people intending to marry "is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

Immediate reaction among Filipinos to the US Supreme Court ruling favoring same – sex marriage across America, has been mixed, with some totally in favor and some firmly against.

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But the question is, did it really the issue en banc? I think it did not. That is why we should all agree that while procreation, protection, and safe rearing of children are important public purposes; it sounds not clear, however, that we have ever thought these important purposes best served by restricting marriage to the potentially procreative. If we ever did think like this, we certainly haven't done anything about it. We have never limited marriage to the fertile or even to those of an age to be fertile. It is very difficult, in terms of the state's interest in procreation, to explain why the marriage of two heterosexual seventy-year-olds should be permitted and the marriage of two men or two women should be forbidden – all the more because so many same-sex couples have and raise children.

As it stands, the procreation argument looks two-faced, approving in heterosexuals what it refuses to tolerate in same-sex couples. If the arguer should add that sterile heterosexual marriages somehow support the efforts of the procreative, we can reply those gay and lesbian couples who don't have or raise children may support, similarly, the work of procreative couples. Sometimes this argument is put a little differently: marriage is about the protection of children, and we know that children do best in a home with one father and one mother, so there is a legitimate public interest in supporting an institution that fulfills this purpose. Put this way, the argument, again, offers a legitimate public reason to favor and support heterosexual marriage, though it is less clear why it gives a reason to restrict same-sex marriage (and marriages of those too old to have children or not desiring children). Its main problem, however, is with the facts. Again and again, psychological studies have shown that children do best when they have love and support, and it appears that two-parent households do better at that job than single-parent households. There is no evidence, however, that opposite-sex couples do better than same-sex couples. There is a widespread feeling that these results can't be right, that living in an "immoral" atmosphere must be bad for the child. But that feeling rests on the religious judgments of the first argument; when the well-being of children is assessed in a religiously neutral way, there is no difference.

A third argument is that if same-sex marriage receives state approval, people who believe it to be evil will be forced to "bless" or approve of it, thus violating their conscience. This argument was recently made in an influential way by Charles Fried in *Modern Liberty and the Limits of Government*. Fried, who supports an end to sodomy laws and expresses considerable sympathy with same-sex couples, still thinks that marriage goes too far because of this idea of enforced approval.

What, precisely, is the argument here? Fried does not suggest that the recognition of same-sex marriage would violate the Free Exercise clause of the First Amendment – and that would be an implausible position to take. Presumably, the position is that the state has a legitimate interest in banning same-sex marriage on the grounds that it offends many religious believers.

This argument contains many difficulties. First, it raises an Establishment Clause problem: for, as we've seen, religions vary greatly in their attitude to same-sex marriage, and the state, following this argument, would be siding with one group of

believers against another. More generally, there are a lot of things that a modern state does that people deeply dislike, often on religious grounds. Public education teaches things that many religious parents abhor (*such as evolution and the equality of women*); parents often choose home schooling for that reason.

A fourth argument, again appealing to a legitimate public purpose, focuses on the difficulties that traditional marriage seems to be facing in our society. Pointing to rising divorce rates and evidence that children are being damaged by lack of parental support, people say that we need to defend traditional marriage, not undermine it by opening the institution to those who don't have any concern for its traditional purposes. We could begin by contesting the characterization of same-sex couples. In large numbers, they do have and raise children.

If we're looking for a historical parallel to the anxieties associated with same – sex marriage, we can find it in the history of views about miscegenation. At the time of *Loving v. Virginia*, in 1967, sixteen states both prohibited and punished marriages across racial lines. In Virginia, a typical example, such a marriage was a felony punishable by from one to five years in prison. Like same – sex marriages, cross – racial unions were opposed with a variety of arguments, both political and theological. In hindsight, however, we can see that disgust was at work. Indeed, it did not hide its hand: the idea of racial purity was proudly proclaimed. The ideas of taint and contamination were ubiquitous. The Supreme Court concluded that such ideas of racial stigma were the only ideas that really supported those laws, whatever else was said: “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”

We should draw the same conclusion about the prohibition of same – sex marriage: irrational ideas of stigma and contamination, the sort of “animus” the Court recognized in *Romer v. Evans*, is a powerful force in its support. So thought the Supreme Court of Connecticut in October 2008, saying:

“Beyond moral disapprobation, gay persons also face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated. Such visceral prejudice is reflected in the large number of hate crimes that are perpetrated against gay persons. The irrational nature of the prejudice directed at gay persons, who “are ridiculed, ostracized, despised, demonized and condemned “merely for being who they are” is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi – suspect class status. This fact provides further reason to doubt that such prejudice soon can be eliminated and underscores the reality that gay persons face unique challenges to their political and social integration.”

Relating this to Philippine context, we have the forgoing claims:

“The lawyer, who identified himself as openly gay in his May 18 petition, argued that limiting civil marriages and the rights that go with such unions to heterosexuals violate the constitutionally guaranteed protection for equal treatment,

undue interference to liberty rights, and marital autonomy. Petitioner Jesus Nicardo Falcis III said the limitations imposed by the 1987 Family Code favoring only opposite – sex marriages repealed the 1949 Civil Code, which never made such a distinction. His petition was submitted to the High Court a few days before a historic referendum in Ireland approving gay marriage. The contention of Falcis is that those portions violated Section 1, Article III and Section 3 (1), Article XV of the 1987 Philippine Constitution.

Also being questioned in the light of new development concerning marriages in the modern world are portions of Article 46 (4) and 55 (6) of the Family Code that mentioned lesbianism or homosexuality as grounds for annulment and legal separation. Articles 1 and 2 regulate what is considered fundamental rights like the right to decisional privacy, the right to marital privacy, and the right to found a family in accordance with religious convictions. The two articles are said to have deprived some Filipinos of their right to liberty without substantive due process of law.

The bone of contention espoused by the petition is that the contested portions of the Family Code in processing applications for and in issuing marriage licenses against homosexual couples should not be enforced. The petition filed by Falcis maintained that it does not matter whether or not Filipinos are already ready to accept same – sex union. “The enjoyment of fundamental rights and liberties do not depend on the acceptance or approval of the majority. Aside from the ability to found and constitute family, homosexuals just like heterosexuals can fulfill the essential marital obligations laid down by the Family Code.” While there are Filipino gay and lesbian couples getting married in the Philippines, these individuals have undergone such a ceremony to express their love and commitment to one another. They may have done it to also rekindle the debate on same – sex marriages. However, no matter how you look at the legal protection and benefits that flow from marriage cannot be availed of similarly in the case of same – sex marriages.

It is very clear in our laws that this jurisdiction does not recognize and protect same – sex marriage. It is of no moment which religion one belongs. Unlike certain religious and cultural matters – divorce, for instance, which is allowed for the Muslim community – the legal non – recognition of same – sex marriage applies to all groups and religions. At least for now.”²⁰

We have now seen the arguments against same – sex marriage. They do not seem impressive. We have not seen any that would supply government with a “compelling” state interest, and it seems likely, given *Romer*, that these arguments, motivated by animus, fail even the rational basis test.

The argument in favor of same – sex marriage is straightforward: if two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity. And that is not a tolerable question for us to decide.

²⁰ http://www.edgedavao.net/index.php?option=com_content&view=article&id=22133:forbiddenunion&catid=51:on-the-cover&Itemid=265, by Neilwin Joseph L. Bravo accessed December 19, 2016.

What is a Right to Marry? In American and Philippine Perspectives

In our constitutional tradition, there is frequent talk of a "right to marry." In the U.S. ruling, the Court calls marriage "one of the basic civil rights of man." A later case, *Zablocki v. Redhail*, recognizes the right to marry as a fundamental right, apparently under the Equal Protection Clause; the Court states that "the right to marry is of fundamental importance for all individuals" and continues with the observation that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." Before courts can sort out the issue of same-sex marriage, they have to figure out two things: (1) what is this "right to marry"? and (2) who has it?

What does the "right to marry" mean? On a minimal understanding, it just means that if the state chooses to offer a particular package of expressive and/or civil benefits under the name "marriage," it must make that package available to all who seek it without discrimination. Another pertinent early case, *Skinner v. Oklahoma*, invalidated a law mandating the compulsory sterilization of the "habitual criminal," saying that such a person, being cut off from "marriage and procreation," would be "forever deprived of a basic liberty." A more recent case, *Turner v. Safley*, invalidated a prohibition on marriages by prison inmates. All the major cases, then, turn on the denial to a particular group of people of an institutional package already available to others.

Is the right to marry, then, merely a non-discrimination right? If so, the state is not required to offer marriages at all. It's only that once it does so, it must do so with an even hand. The talk of marriage as a "fundamental right," together with the fact that most of these decisions mingle equal protection analysis with due process considerations, suggests, however, that something further is being said. What is it? Would it violate the Constitution if a state decided that it would offer only civil unions and drop the status of marriage, leaving that for religious and private bodies?

Put in terms of our three categories, then, does the "right to marry" obligate a state to offer a set of economic and civil benefits to married people? Does it obligate a state to confer dignity and status on certain unions by the use of the term "marriage"? And does it require the state to recognize or validate unions approved by religious bodies? Clearly, the answer to the third question is, and has always been, no. Many marriages that are approved by religious bodies are not approved by the state, as the case of same-sex marriage has long shown us, and nobody has thought it promising to contest these denials on constitutional grounds. The right to the free exercise of religion clearly does not require the state to approve all marriages a religious body approves. Nor does the "right to marry" obligate the state to offer any particular package of civil benefits to people who marry. This has been said repeatedly in cases dealing with the marriage right.

On the other side, however, it's clear that the right in question is not simply a right to be treated like others, barring group-based discrimination. The right to

marry is frequently classified with fundamental personal liberties protected by the Due Process of law. What does due process liberty mean in this case? Most of the cases concern attempts by the state to forbid a class of marriages. That sort of state interference with marriage is, apparently, unconstitutional on due process as well as equal protection grounds. So, if a state forbade everyone to marry, that would presumably be unconstitutional.

Nowhere, however, has the Court held that a state must offer the expressive benefits of marriage. There would appear to be no constitutional barrier to the decision of a state to get out of the expressive game altogether, going over to a regime of civil unions or, even more extremely, to a regime of private contract for marriages, in which the state plays the same role it plays in any other contractual process.

Again, the issue turns on equality. What the cases consistently hold is that when the state does offer a status that has both civil benefits and expressive dignity, it must offer it with an even hand. This position, which I've called "minimal," is not so minimal when one looks into it.

In other words, marriage is a fundamental liberty right of individuals, and because it is that, it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason. It's like voting: there isn't a constitutional right to vote, as such: some jobs can be filled by appointment. But the minute voting is offered, it is unconstitutional to fence out a group of people from the exercise of the right. At this point, then, the questions become: who has this liberty/equality right to marry? And what reasons are strong enough to override it?

Who has the right? At one extreme, it seems clear that, under existing law, the state that offers marriage is not required to allow it to polygamous unions. Whatever one thinks about the moral issues involved in polygamy, our constitutional tradition has upheld a law making polygamy criminal, so it is clear, at present, that polygamous unions do not have equal recognition. The legal arguments against polygamy, however, are extremely weak. The primary state interest that is strong enough to justify legal restriction is an interest in the equality of the sexes, which would not tell against a regime of sex – equal polygamy.

Regulations on incestuous unions have also typically been thought to be reasonable exercises of state power, although, here again, the state interests have been defined very vaguely. The interest in preventing child abuse would justify a ban on most cases of parent – child incest, but it's unclear that there is any strong state interest that should block adult brothers and sisters from marrying. Nonetheless, it's clear that if a brother – sister couple challenged such a restriction today on due process/ equal protection grounds, they would lose, because the state's alleged interest in forbidding such unions would prevail.

How should we think of these cases? Should we think that these individuals have a right to marry as they choose, but that the state has a countervailing interest that

prevails? Or should we think that they don't have the right at all, given the nature of their choices? I incline to the former view. On this view, the state has to show that the law forbidding such unions really is supported by a strong public interest.

The best way of summarizing the tradition seems to be this: all adults have a right to choose whom to marry. They have this right because of the emotional and personal significance of marriage, as well as its procreative potential. This right is fundamental for Due Process purposes, and it also has an equality dimension. No group of people may be fenced out of this right without an exceedingly strong state justification. It would seem that the best way to think about the cases of incest and polygamy is that in these cases the state can meet its burden, by showing that policy considerations outweigh the individual's right, although it is not impossible to imagine that these judgments might change over time.

Futuristic Views on Marriage Reality

What ought we to hope and work for, as a just future for families in our society? Should government continue to marry people at all? Should it drop the expressive dimension and simply offer civil – union packages? Should it back away from package deals entirely, in favor of a regime of disaggregated benefits and private contract? Such questions, the penumbra of any constitutional debate, require us to identify the vital rights and interests that need state protection and to think how to protect them without impermissibly infringing either equality or individual liberty. Our analysis of the constitutional issues does not dictate specific answers to these questions, but it does constrain the options we ought to consider.

The future of marriage looks, in one way, a lot like its past. People will continue to unite, form families, have children, and, sometimes, split up. What the Constitution dictates, however, is that whatever the state decides to do in this area will be done on a basis of equality. Government cannot exclude any group of citizens from the civil benefits or the expressive dignities of marriage without a compelling public interest. The full inclusion of same – sex couples is in one sense a large change, just as official recognition of interracial marriage was a large change. On the other hand, those changes are best seen as a true realization of the promise contained in our constitutional guarantees. We should view this change in the same way. The politics of humanity asks us to stop viewing same – sex marriage as a source of taint or defilement to traditional marriage but, instead, to understand the human purposes of those who seek marriage and the similarity of what they seek to that which straight people seek. When we think this way, the issue ought to look like the miscegenation issue: as exclusion we can no longer tolerate in a society pursuing equal respect and justice for all.²¹

²¹ I am most indebted to the thoughts of Martha Nussbaum who is Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago, appointed in Law, Philosophy, and Divinity. This essay is adapted from her *From Disgust to Humanity: Sexual Orientation and the Constitution*, which will be published by Oxford University Press in February 2010.