Statement on the proposed draft consolidated Bill "Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity (SOGI), Providing Penalties Therefore and for Other Purposes"

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1. The comments herein are intended as brief preliminary thoughts on the proposed draft consolidated bill (hereafter referred to as the "Draft Law"), without prejudice to a possible further later exposition on the points outlined below.

Nature of international human rights law

2. There is, as yet, no binding international law obligation relating to sexual orientation or gender identity, or as to that designated as LGBT (i.e., lesbian, gay, bisexual, transgender) "rights". Certainly no written international instrument that expressly mentions sexual orientation or gender identity "rights" constituting a binding international obligation have been entered into by States at the international level. Resolutions, whether of the General Assembly or the Human Rights Council, it must be emphasized, do not form binding obligations on States (and this includes the so-called Yogyakarta Principles).[1] Having said that, at the United Nations level, almost 100 State members have either rejected or otherwise refrained from expressing support for the so-called LGBT "rights".

3. Even as a matter of international customary law, with its requirements of practice and *opinion juris*, it would be hard to argue for LGBT rights considering that 78 States have, in fact, expressed the opposite, labeling the same criminal.[2] As pointed out by one social commentator: "In the first place, and unlike the main elements of the Universal Declaration of Human Rights, sexual liberation has no roots in the traditional cultures and religious traditions that shape the lives of the vast majority of people in the world."[3]

4. But even had there been such a legally binding obligation at the international level, it is in the nature of international human rights law that States will have wide latitude as to its implementation. Many too readily presume the universality

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[1] a fact pointed out by the Supreme Court in Ang Ladlad vs Comelec, G.R. No. 190582, , 08 April 2010: "At 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 Principles 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."

[2] see listing by the International Lesbian, Gay, Bisexual, Trans and Intersex Association; http://76crimes.com/76-countries-where-homosexuality-is-illegal/, retrieved 08 February 2015

[3] Exporting Gay Rights, RR Reno, First Things, February 2012

of international human rights, ignoring the fact that its relatively recent existence poses problems in implementation at the State level. Specifically for sexual orientation and gender identity, such “are vague and ill-defined, and have come to encompass a whole range of morally problematic ideas, including same-sex marriage, adoption by gay and lesbian couples, and presenting the homosexual lifestyle positively to schoolchildren.”[4]

5. There is also the fact that international human rights law is quite political.[5] The United Nations Committee on the Elimination of Discrimination Against Women (which oversees the Convention on the Elimination of All Forms of Discrimination Against Women), for example, has proven to be quite controversial, seen by many as promoting Western-style feminism. The Convention on the Elimination of All Forms of Discrimination Against Women itself has been viewed, by the Women for Faith and Family for one, as being “destructive of rights basic to every human being and the rights of cultural self-determination of nations,” albeit though presenting itself as protecting the rights of women.[6]

Human rights cannot deviate from natural law

6. A point that I believe is beyond contention is that human rights are the "inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being."[7] In short, our rights are based on our appreciation of what it means to be human. Human rights, as in natural law (a universal, objective standard of right and wrong based on right reason, independent of man-made laws[8]), are universal (applicable to everyone and everywhere), and exist in both national and international law.[9]

7. Human rights is, in fact, closely related to that of natural rights,[10] a thought further illustrated by noted philosopher Jacques Maritain: “The philosophical

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[4] Human Rights, Sexual Orientation, and Gender Identity at the UN; Austin Ruse, Public Discourse, November 2012

[5] Four Human Rights Myths, Susan Marks, LSE Law, Society and Economy Working Papers 10/2012; London School of Economics and Political Science

[6] http://www.wf-f.org/CEDAW.html

[7] See Sepúlveda, Magdalena; van Banning, Theo; Gudmundsdóttir, Gudrún; Chamoun, Christine; van Genugten, Willem J.M. (2004). *Human rights reference handbook* (3rd ed. rev. ed.). Ciudad Colon, Costa Rica: University of Peace. ISBN 9977-925-18-6.

[8] This is a commonly accepted definition, sometimes attributed to Javier Hervada (see Criticial Introduction to Natural Law, 2006)

[9] See Nickel, James (2010). "Human Rights". *The Stanford Encyclopedia of Philosophy* (Fall 2010 ed.).

[10] Jones, Peter. *Rights*. Palgrave Macmillan, 1994, p. 73.

foundation of the rights of man is natural law" and that "the true philosophy of the rights of the human person is based upon the true idea of natural law".[11]

8. Accordingly, as human rights is based on natural law, then it can be fairly said that there can be no human right contrary to natural law: "The moral absolutes give legal reasoning its backbone. xxx These moral absolutes which are rationally determined and essentially determinate, constitute the most basic human rights."[12]

9. International law itself recognizes the significance of natural law in relation to the matter of rights. One can easily see this in the creation of the United Nations (of which Jacques Maritain played a not insignificant role), as well as important documents on human rights such as the 1948 UN Declaration on Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, amongst others (incidentally, these international instruments are mentioned in the Draft Law even though none make direct express reference to sexual orientation or gender identity rights).[13] Thus, one basis of international law is said to be the natural law, upon which our concepts of *jus cogens* (as well as *erga omnes*) is rooted.

10. The Philippine legal system itself considers "the United Nations instruments to which the Philippines is a signatory, namely the UDHR ... binding upon the Philippines, the ICCPR and the ICESCR."[14] This has been expressly stated by the Supreme Court in Republic vs Sandiganbayan, where then member of the Court Reynato Puno cogently and methodically traced the history of the concept of natural law and elaborates on the central position it holds in the Philippine legal system.[15] The significance of the foregoing is that it expresses a fact about the Philippine legal system: that our concept of human rights stem from natural law.

11. Recently, of course, there has been a move to present our legal system as purely coming from the perspective of the positivist theory of law. This is perhaps

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[11] Man and the State, Jacques Maritain, University of Chicago Press, 1951, Chap. IV, pp. 76-107.

[12] Natural Law Theory, Natural Law and Legal Reasoning, John Finnis, 1992, pp.148

[13] Justice Puno, Separate Opinion, Republic vs Sandiganbayan, GR No. 104768, 21 July 2003; see also Morsink, Johannes (1999). *The Universal Declaration of Human Rights: origins, drafting, and intent*. University of Pennsylvania Press. ISBN 978-0-8122-1747-6

[14] Justice Puno, Separate Opinion, Republic vs Sandiganbayan, GR No. 104768, 21 July 2003; citing Fernando, E., Perspective on Human Rights: The Philippines in a Period of Crisis and Transition (1979), pp. 1-2, citing Borovsky *v.* Commissioner of Immigration, et al., 90 Phil. 107 (1951); Mejoff *v.* Director of Prisons, 90 Phil. 70 (1951); Chirskoff *v.* Commissioner of Immigration, et al., 90 Phil. 256 (1951); Andreu *v.* Commissioner of Immigration, et al., 90 Phil. 347 (1951).

[15] G.R. No. 104768, July 21, 2003.

understandable when one considers that a substantial number of our law professors were brought up appreciating the contributions of liberal academic legal institutions in the US. But this problematically compels one to essentially take the view that as Congress could provide a right, then Congress can take that right away.

12. The foregoing, however, runs counter to our established belief that human rights as universal and immutable, as can be seen from the natural law inspired provisions of the Constitution such as Articles II and III thereof. Legal philosopher Javier Hervada says it at his concise best: “Outside the fulfillment of natural law, there is no right.”[16]

13. Thus, this insight from the Supreme Court is relevant for the issue at hand: “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. xxx [To do so will have] the effect of diluting real human rights.”[17]

Constitutionalism as duty of all

14. It is also relevant to note that Article VIII Section 1 of the 1987 Constitution has broadened the scope of judicial review, expanded by the adoption of Article VIII, Section 1 of the 1987 Constitution, which defines judicial power as “the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of Government.”

15. “Grave abuse of discretion” is frequently defined as "capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction."[18] In addition, explanations of the concept of “grave abuse of discretion” equate the same to where power is exercised “in an arbitrary and despotic manner by reason of passion and hostility.”[19] The foregoing also must be accomplished with the Constitution’s directive that the State “promote the common good … [and] truth.”[20]

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[16] Underscoring supplied; Criticial Introduction to Natural Law, Javier Hervada, 2006, p.137

[17] Ang Ladlad vs Comelec, G.R. No. 190582, 08 April 2010

[18] See, for example, *De Vera v. De Vera*, G.R. No. 172832, April 7, 2009.

[19] Ibid. Citation omitted.

[20] see the Preamble

16. The point here is that the mandate given to the Supreme Court also results in the logical corollary duty on the part of Congress: that the broad discretion that the legislature enjoys in enacting laws is not absolute but must follow, among others, such standards on legislation being “sound”, fair, and reasonable.

17. Put another way, constitutional law, properly understood, does not give to the Supreme Court the exclusive power to determine the constitutionality of an issue. It is not meet or proper that the other branches of government pass such questions to the Supreme Court.

18. Congress is certainly authorized, empowered, and mandated to pass only legislation that in its rightful use of judgment is in compliance with our Constitution and in accordance with right reason.

Ambiguity of Draft Law

19. Beyond the fundamental issues relating to international law, the nature of rights, and constitutional interpretation, there are also other more specific issues that need to be addressed in the Draft Law, particularly with regard to ambiguity and the difficulty of implementation.

Identity of those protected

20. At the outset, it would be apt to point out that Facebook alone identifies at least 51 genders[21]. Gender experts, however, vary: there could be as many as three or even as many genders as there are individuals.

21. The point here is that, no scientific consensus exists that homosexuality is genetic.[22] And there is no consensus on the nature and origin of sexual orientation.[23] This is significant. Because in order for this penal law, meaning the Draft Law, to be effective it must be able to:

a) identify properly those covered by the protections it offers; and

b) capable of being implemented by the police or judicial system in terms of evidence.

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[21] What Each of Facebook’s 51 New Gender Options Means; Daily Beast, 15 February 2014

[22] see for example the result (or non-results) of Dr George Rice of Canada’s University of Western Ontario study, reported in the Independent, (U.K.), April 23, 1999, p. 5; as well as Science, April 23, 1999, pp. 571, 665–667.” Note, however, Paul McHugh, University Distinguished Service Professor of Psychiatry at Johns Hopkins University (in his article Surgical Sex, First Things, November 2004): “Johns Hopkins Psychiatry Department eventually concluded that human sexual identity is mostly built into our constitution by the genes we inherit and the embryogenesis we undergo.”

[23] Sexual Orientation and Homosexuality, American Medical Assocation; retrieved 8 February 2015; http://web.archive.org/web/20130808032050/http://www.apa.org/helpcenter/sexual-orientation.aspx

22. True, Section 3.b. and 3.c. of the Draft Law does define “gender identity” and “sexual orientation” but it does so in an unfortunately ambiguous and superficial way. Much of what can constitute identity or orientation cannot be seen through clothing or even at skin level. And yet, we are supposed to punish individuals (e.g., employers, faculty administrators, business owners, ordinary service employees, etc.) for failing to identify the very particular kind of people covered by a special law.

23. There is also the difficulty of proving that one has indeed been discriminated due to gender identity or sexual orientation (and not for any other reason), and proving that such a status of gender identity or sexual orientation did exist at the time of the supposed discrimination. In other words, there is the failure to identify the evidence that must be presented to our courts that at the time of the supposed discrimination taking place the person making the claim is indeed covered under the purview of the provisions of the Draft Law and that the person or persons committing the discrimination did so because of that complainant’s sexual orientation or gender identity and not for another (justifiable) reason. This difficulty is heightened because of the possibility that sexual orientation can unilaterally change through time.[24]

24. It is to be noted that the foregoing ambiguities cannot even be cured by an administrative rule or regulation due to the lack of appropriate standards or legally perceived boundary.

Extent of protection from discrimination

25. Then there is the paradox that by seeking the removal of discrimination, that discrimination is the result. Section 3.a of the Draft Law defines “discrimination” again in an unfortunately ambiguous way, to the point that the Draft Law seeks to provide discrimination in relation to “all rights and freedoms”.

26. This, however, as I said, paradoxically creates its own set of discriminations. Not all citizens enjoy equal rights and freedoms. And yet, a tiny portion of the population is to experience what the rest of the population does not enjoy.

27. I reiterate that the LGBT population is quite limited. A recent US study pegs its own LGBT population to between 2-5% of population.[25] The Philippine demographic may not be too far off.

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[24] see Sexual Orientation, Gender Identity, and Employment Law, Paul McHugh and Gerard V. Bradley, Public Discourse, July 2013

[25] Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013

28. Fundamentally, and this is something that many perhaps do not appreciate, our system of laws is built on discrimination. We distinguish and we make judgments: from who can run for Congress to who can practice law or medicine; can someone drink alcohol, to who can drive a car. What our laws, do not allow for is wrongful discrimination, built on unequal treatment between those belonging to a similar class. As Richard W. Garnett, Law Professor at Notre Dame Law School, says: "it is not true that 'discrimination' is always or necessarily wrong. Nor is it the case that governments always or necessarily should or may regulate or discourage it -- say, through its expression and spending -- even when it is wrong. 'Discrimination,' after all, is just another word for decision-making, for choosing and acting in accord with or with reference to particular criteria."[26]

29. The eccentric thing about the Draft Law is that it purports to say that there is no difference between the rest of the Philippine population and the LGBT and then proceeds, as I noted above, to provide rights and protections to the LGBT that the rest of the community does not enjoy (which is the total absence of legal discrimination). Not only is this against the essence of democratic rule, it also illogically violates the doctrine of equal treatment, as well as the idea of human rights being universal.[27] Rather than equality of rights, we have a balkanization of rights for groups of people rather than for all people.

Effect on other laws

30. The Draft Law also needs further study on the probable effect it will have on other laws. Judging by the usual listing that LGBT advocates have regarding the "rights" they are pushing for, such will involve laws relating to employment, military service, adoption, marriage, student activities (such as attending school dances with same-sex dates and dressed in gender nonconforming ways if they choose), parenting, schools, and government identity documents.[28]

31. In which event, the implications and possible conflicts such will have vis-à-vis the constitutional protections relating to religion, free expression, academic freedom, and contract will need to be examined and address, along with its

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[26] Confusion About Discrimination, Richard W. Garnett, Public Discourse, April 5, 2012

[27] A short word on "tolerance": "The root meaning of the word [tolerance] suggests what the virtue involves. The Latin *tol-* is related to a group of words having to do with carrying a burden: German *dulden,* to be patient, to endure; Old English *tholian,* to suffer; Latin *tuli,* I have borne. When we tolerate we *bear with* someone or something; we *bear* the existence of a wrong. We do so because, given the circumstances, to protest would invite a greater wrong. There is a time for public correction, and a time for quiet endurance and, if the opportunity arises, private correction." (Tolerance and reciprocity, Professor Anthony Esolen**,** Public Discourse)

[28] American Civil Liberties Union; retrieved 8 February 2015, https://www.aclu.org/lgbt-rights

relationship to family (including marriage, adoption, succession), labor, education, tax and social services, military, and health laws, amongst others. The affected stakeholders need to have a say and be consulted because, as pointed above, the possible unintended effect is discrimination in order to ostensibly rid of discrimination.

SOGI and natural law

32. It has to also be considered that the identity of our society can be seen in our Constitution. And our society and its Constitution were both created not within a vacuum or through a veil of ignorance, but with a peculiar context, circumstance, and history.

33. It is a given that our Constitution has been inspired by the text of the US Constitution. Clearly, the people who wrote our Constitution knew the context in which they were writing it (particularly coming off the Martial Law experience, as an example) but also the context in which the US Constitution was written.

34. One particular context that must be considered is the background of the US Constitutional Convention delegates, particularly the religious and philosophical beliefs of the delegates. Most were Christians (only two were Catholics, the rest were Protestants). At the very least, all believed in a deity or were theists of some sort. Also, the delegates were certainly quite aware of Aristotelian thought, and quite definitely the ideas of the Enlightenment thinkers such as Locke and Rousseau. That would mean then that the US Constitution was framed with the idea of man's *telos* or purpose, of self-evident natural rights, and of the common good (or "general will").

35. As such, the explanation by noted legal philosopher John Finnis on the relationship between laws and homosexuality is of interest: "Let me begin by noticing a too little noticed fact. All three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual conduct as intrinsically shameful, immoral, and indeed depraved or depraving. That is to say, all three rejected the linchpin of modern 'gay' ideology and lifestyle."[29]

36. "At the heart of the Platonic-Aristotelian and later ancient philosophical rejections of all homosexual conduct, and thus of the modern 'gay' ideology, are three fundamental theses: (1) The commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage. (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural. (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act are manifestly unworthy of the human being and immoral."

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[29] Law, Morality, and "Sexual Orientation" John Finnis; 1997

37. Accordingly, there is an inherent absence of the element of the “common good” so necessary in our constitutional system, inasmuch as homosexuality itself would involve the partners “treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus disintegrates each of them precisely as acting persons.” This is contrary to reason and the idea of human dignity that natural law seeks to protect and is embodied in our Constitution.

38. If, then, what Finnis says is correct, then we have a proposed legislation that not only seeks to recognize a matter that contradicts natural law (as well as the tenets of the Constitution, particularly of the common good) but even, as I pointed out above, gives rights to a small portion of the population over that of other citizens. Fundamentally, this opens up the Draft Law to being categorized as one that is “arbitrary”, "capricious or whimsical exercise of judgment”, contrary to reason, amounting to “grave abuse of discretion”.

39. Having said that, this is not to say that wrongful discrimination should be tolerated. It shouldn’t. But there are two things to be considered:

a) The provisions of the Constitution, particularly its Bill of Rights, should be allowed and trusted to resolve whatever concerns that the Draft Law is concerned about; and

b) In this issue, complicated as it is, the Congress would do well not to ignore the basic philosophical foundations of our Constitution: the common good (found in the Preamble) and subsidiarity (the theme of which runs through the Constitution, particularly on devolution of authority). These two go hand in hand.

40. Instead, with the Draft Law, we are creating further complexities: of men who say they are women using women’s restrooms, of girls coming to school using boy’s school uniforms or sports jerseys, of persons demanding to be identified contrary to what is recorded in public documents. The point here is not our passing feelings or sentiments but that legislation and public policy build a society based on truths about the human person and human dignity rather obfuscate matters with unproven social claims that could possible pave the way for the confusion of future generations.

41. Finally, of common good (and subsidiarity's role in it), the best definition can be found in John Finnis' Natural Law and Natural Rights: "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."

42. Note the repeated mention of the attainment "for themselves" by the people. The government, including this Congress, is encouraged not to involve itself in every facet of human interrelationships. Sometimes, as in the present case, it is better to trust in the inherent wisdom of the people and the Constitution rather than create a law incapable of grasping a matter of immense social, legal, scientific, medical, psychological, economic, and political complexity.