RECOGNIZING THE EFFECTS OF SAME-SEX MARRIAGES: AN EXAMINATION OF DEPARTMENT OF JUSTICE OPINION NO. 11, SERIES OF 2019 ON THE ISSUANCE OF 9(E-1) VISAS TO SAME-SEX SPOUSES OF FOREIGN DIPLOMATS

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Abstract

The Family Code does not provide for same-sex marriage, and until the issuance of Department of Justice (DOJ) Opinion no. 11, series of 2019, same-sex marriages solemnized overseas involving foreign diplomats were not recognized. Same-sex spouses of diplomats assigned in the Philippines were thus accorded a visa category lower than the 9(e-1) granted to opposite-sex spouses of other diplomats. This raised questions of unequal treatment which had vexed the diplomatic corps for years. This article examines from the perspectives of private international law, diplomatic law and Philippine diplomatic practice the DOJ Opinion's seeming recognition of the effects of same-sex marriages involving foreign diplomats. It also explores the Opinion's far-reaching implications and suggests areas for further inquiry.

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I. Introduction

An issue which had vexed segments of the diplomatic corps through the years was the visa and protocolar treatment of same-sex spouses of certain of its members. Same-sex marriages have been recognized in an increasing number of countries, and diplomats with same-sex spouses have inevitably been assigned to the foreign diplomatic missions and inter-governmental organizations in Manila.

Philippine law, specifically the Family Code,[1] does not provide for same-sex marriage, thus when diplomats and officials of international organizations with same-sex spouses took up their assignments, the diplomats and officials were issued the diplomatic 9(e-1) visas, but until recently their same-sex spouse were not issued such visa, but instead the 9(e-3) visa, a lower category one.[2]

As expected, representations were made by a number of foreign missions, mostly from Western countries, with the Department of Foreign Affairs ("DFA") for the issuance of 9(e-1) visas. A lot more was riding on the issue, notably the type of identification cards ("IDs") issued by the DFA Office of Protocol and the extent of the immunities and privileges to be extended. The DFA had wanted to be helpful, given its obligation to be a good host to the missions,[3] but had to politely turn down the requests, in light of the provision in the Family Code which states that "marriage is a special contract of permanent union between a man and a woman."[4]

To further complicate matters, a female Ambassador from a European country was assigned to Manila and was accompanied by her common-law male partner. Her embassy requested a 9(e-1) visa for him as her declared spouse. The DFA was informally told that the two intentionally decided to remain as an engaged couple because their sending state's tax laws and benefits are better for singles than for married couples. Regrettably, the DFA had to deny the request. The matter was raised by that country during a bilateral Political Consultations in 2017.

The DFA was on solid legal footing in its position on the above matters as these were discussed with the Department's Office of Treaties and Legal Affairs.

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1 Exec. Order No. 209 (1987) [hereinafter Family Code of the Philippines].

2 *Infra* notes 19, 20, and 21.

3 Vienna Convention on Diplomatic Relations art. 25 and related articles, Apr. 18 1961, 500 U.N.T.S. 95 [hereinafter VCDR].

4 Family Code of the Philippines, *supra* note 1, art. 1.

The DFA also sought guidance from the Department of Justice ("DOJ"),[5] and the latter issued Opinion No. 99, series of 2002, and Opinion No. 44, s. 2017 backing the DFA's stand.

In the 2002 opinion, the DOJ stated that a 9(e) visa may not be granted to a same-sex spouse of an officer of the Asian Development Bank since same-sex marriages are not allowed under Philippine law. The opinion further noted that the fact that the marriage was validly celebrated abroad did not render ineffective the provisions of Philippine laws for the purpose of granting the 9(e) visa, stating that same-sex marriage cannot be countenanced under Philippine laws for reasons of public policy.[6]

In 2016, the DFA again sought the DOJ's opinion, this time on the request of the United States Embassy seeking the grant of the same diplomatic privileges and immunities to spouses of same-sex married diplomatic couples that are being accorded to opposite-sex married diplomatic couples. The DOJ reiterated its earlier opinion, stating that "unless and until the Family Code is amended, there is no legal basis to recognize same-sex marriages or unions between persons of the same gender and much more to accord the same privileges to the same-sex spouses of diplomats."[7]

The issue would be raised occasionally, which prompted the DFA to consult the DOJ again.

Finally, in April 2019, the DOJ issued Opinion No. 11, series of 2019 (*"Opinion"*), effectively abandoning its earlier opinions. Secretary Menardo Guevarra laid the new rule as follows:

> … (it) is our opinion that if the marriage of a foreign government official assigned to the country and his or her foreign same-sex spouse is considered valid in the place where it was celebrated (lex loci celebrationis) and said spouses are also considered validly married under their laws of nationality (lex nationalii) or domicile (lex domicilii), a diplomatic 9(e-1) visa … may be issued to the foreign same-sex spouse of the said foreign government official. On the other hand, in view of the lack of a

[5] The Department of Justice is the "principal law agency of the government and the legal counsel and representative thereof," per the Administrative Code of 1987 (Title III, Chapter 1, Section 3).

[6] *See* Sec. of Justice Op. No. 99, s. 2002, at 2.

[7] *See* Sec. of Justice Op. No. 44, s. 2017, at 1.

> marriage bond between a foreign government official and his or her informal same-sex partner or common-law spouse or partner, a diplomatic 9(e-1) visa … may not be issued to such partner or spouse.[8]

On the above basis, the DFA issued a circular Note dated May 23, 2019 to the diplomatic and consular missions and international organizations informing them that –

> … dependent spouses, who are current holders of 9(e-3) visas may now apply for conversion to 9(e-1) dependent visas, provided that the subject marriage is considered valid in the place where it was celebrated and the parties are also considered validly married under their laws of nationality or domicile.
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> A copy of the marriage certificate, or any equivalent document, should be attached to the filled-out Application Form.

These developments merit closer examination in light of their importance.

II. Diplomatic Immunities and Privileges

The grant of immunities and privileges to diplomats and their staff dates back to the earliest relations between and among states, and the rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law.[9] These include, among others, the inviolability of the person of the ambassador and his residence, and immunity from criminal jurisdiction of the receiving state.[10] These are meant to accord them full facilities for the performance of their functions. The immunities and privileges would extend to the members of his family derivatively.[11]

The legal framework of modern diplomatic law is the 1961 Vienna Convention on Diplomatic Relations (VCDR) to which the Philippines is a state

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[8] *See* Sec. of Justice Op. No. 11, s. 2019, at 5-6. *See* pp. 153-157 for a copy of the Opinion.

[9] MALCOLM SHAW, INTERNATIONAL LAW 567 (8th ed., 2017).

[10] EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 233 (4th ed., 2016).

[11] *Id.* at 319.

party.[12] The VCDR is largely a codification of customary international law, having attained stability over long practice among states.

The VCDR, in Article 37(1), recognizes and provides for immunities and privileges to the family of the diplomat and the members of his or her household: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36." The treatment goes back to the second half of the 17th century when states began extending such immunities and privileges to the ambassador's spouse and children (as well as members of the household forming the "diplomatic suite") because they were viewed as extensions of his or her person, and their protection was equally necessary in order to ensure his or her independence.[13]

During the negotiations on the then proposed VCDR, attempts to define "members of the family" were made but ultimately failed, and the VCDR "was left without either a true definition or a procedure for settling differences of opinion between sending and receiving States."[14]

While practice varies from state to state, informal/domestic partners, as well as same-sex partners, are increasingly being accepted as falling within the term "members of the family."[15] In her authoritative book *Diplomatic Law*, Eileen Denza noted that in the subsequent years after the VCDR took effect:

> … The increasing number of States making legal provision for same-sex marriage has extended the number of spouses seeking acceptance as family members in other States which also make such provision or accept same-sex marriages valid under foreign laws. Article 10 of the Convention requires notification to the receiving State, inter alia, of '(b) … the fact that a person becomes or ceases to be a member of the family of a member of the mission'—and such a

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[12] The Vienna Convention on Diplomatic Relations was signed by the Philippines on Oct. 20, 1961; ratified by the President on Oct. 11, 1965; and concurred in by the Senate on May 3, 1965. It entered into force for the Philippines on Dec. 15, 1965. *See* J. EDUARDO MALAYA AND CRYSTAL GALE DAMPIL-MANDIGMA (EDS), PHILIPPINE TREATIES IN FORCE 2020 263 (University of the Philippines Law Center, 2021).

[13] DENZA, *supra* note 10, at 321.

[14] DENZA, *supra,* note 10, at 319-320.

[15] ANTHONY AUST, HANDBOOK OF MODERN INTERNATIONAL LAW 134 (2nd ed., 2010).

> notification will normally provide an appropriate context for resolution of differences between sending and receiving States. [16] (underscoring supplied)

III. Visa Categories, Protocol IDs, and their Corresponding Entitlements

Like other countries, the Philippines accords varying degrees of privileges and immunities to different categories of foreign government officials coming to the country for official purpose, including the issuance of visas classified as 9(e).

A visa is "a written endorsement made on a travel document or passport by the consular official denoting that the visa application has been properly examined and that the bearer is permitted to proceed to the country of his or her destination."[17]

Per the Codified Visa Rules and Regulations of 2002 ("CVRR") which is based on the Philippine Immigration Act of 1940 (Commonwealth Act no. 613), as amended,[18] visas relevant to diplomats are of three types, as follows:

> (1) The **9(e-1)** visa is issued to persons enjoying diplomatic immunities and privileges, specifically to the following:
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> (a) Heads of States and Heads of Government and their personal representatives;
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> (d) Cabinet ministers and their deputies and officials with cabinet rank of ministers;
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> (e) Presiding officers of national legislative bodies;
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> (f) Justices of the highest judicial bodies;
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> (g) Diplomats and consular officials;
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> (i) Military, naval, air and other attaches assigned to a diplomatic missions;
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[16] DENZA, *supra* note 10, at 321.

[17] RONALDO LEDESMA, AN OUTLINE OF PHILIPPINE IMMIGRATION AND CITIZENSHIP LAWS 198 (Vol. 1, 2018) (citing Section 136 of the Foreign Service Code).

[18] Commonwealth Act No. 613 (1940), as amended, sec. 9(e).

> (k) Representatives of international organizations who have diplomatic status and are bearing diplomatic passports issued by their governments;
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> xxx
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> (n) Accompanying wives and unmarried minor children of aliens within the above mentioned categories.[19] (underscoring supplied)

> (2) The **9(e-2)** visa is issued to any other person not included in the foregoing list, who is an officer of a foreign government recognized by the Philippines, is a national of the country whose government he represents, and is proceeding to the Philippines in connection with the official business he represents.
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> This visa category includes *inter alia* the members of an embassy or consulate, the staff of international organizations, and official students or participants in programs under the auspices of the Philippine Government or recognized international institutions. The family members of the above-mentioned persons are also issued 9(e-2).[20] (underscoring supplied)
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> (3) The **9(e-3)** visa is issued to the members of the household, the attendants, servants and employees of persons to whom 9(e-1) and 9(e-2) visas have been granted, and to the members of families of such the attendants, servants and employees.[21] (underscoring supplied)

The term "family," as defined in Section 79(b) of the CVRR, refers to the "immediate family of the official consisting of his spouse and unmarried minor children" while Section 79(c) specifies "members of the household" as "other persons relying solely on the support of the official and regularly or permanently residing with him, like minor unmarried adopted children, minor unmarried stepchildren, dependent parents, and children who lost status of dependent."

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[19] Codified Visa Rules and Regulations (2002), sec. 81.

[20] *Id.* sec. 82.

[21] *Id.* sec. 83.

Furthermore, the DFA Protocol Handbook on Immunities and Privileges lists as "members of the family" the spouse (as defined under Philippine law) and unmarried sons and daughters less than 21 years of age, while "other recognized members of the household" are those physically residing with the diplomatic or consular agent and those subject to reciprocal arrangements including dependent parents/parents-in-law, common-law spouse; and other dependents subject to approval of the DFA.[22]

The visa classification has implications on the type of Protocol ID issued, which in turn denotes the entitlements of the individual, as follows:

> (1) Ambassadors and officials of diplomatic rank and qualified members of their families who are holders of diplomatic passports and 9(e-1) visas are issued **Diplomatic IDs.** Other qualified diplomatic officials under existing Headquarters Agreements are also issued Diplomatic IDs.
>
> (2) Administrative and technical staff of embassies and consulates (*i.e.*, those engaged in administrative, fiscal, security, clerical and other technical functions) who are holders of 9(e-2) visas, and the qualified members of their families, are issued **Official IDs.** The qualified personnel of international organizations, including their spouses and qualified dependents, are also issued Official IDs.
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> (3) Members of the household and foreign private staff of members of foreign missions may also be issued official IDs if they are holders of official passports and 9(e-3) visas.[23]

As specified in the VCDR, the 1963 Vienna Convention on Consular Relations and relevant agreements and conventions,[24] ambassadors and those with diplomatic rank, and the members of their families (who are issued Diplomatic IDs), are entitled to absolute immunity from the criminal jurisdiction

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[22] DEPARTMENT OF FOREIGN AFFAIRS ("DFA") OFFICE OF PROTOCOL, HANDBOOK ON PRIVILEGES AND IMMUNITIES 5 (DFA, 2016).

[23] *Id.* at 7-8.

[24] E.g., 1946 Convention on the Privileges and Immunities of the U.N., 1947 Convention on the Specialized Agencies of the U.N., and the Headquarter Agreements to which the Philippines is a signatory.

of the host country. They may not be arrested nor detained, and are also immune from civil and criminal jurisdictions except in three cases.[25]

Administrative and technical staff and their families (who are also holders of Official IDs) enjoy immunity from criminal jurisdiction, but their immunity from civil jurisdiction does not extend to acts performed outside the course of their duties. Service staff enjoy immunity only in respect to acts performed in the course of their duties.[26]

Inasmuch as the three 9(e) visa categories correspond to varying degrees of immunities and privileges, the lumping of same-sex spouses and common-law partners of diplomats with "members of the household, attendants, servants" has been a source of discomfort among certain members of the diplomatic corps, particularly those who are or identify as lesbian, gay, bisexual, and transgender.

Until the DOJ issued the Opinion No. 11 in 2019, the DFA had only been issuing to both same-sex spouses and common-law spouses or partners the 9(e-3) visas. Same-sex spouses were not accorded the same status as opposite-sex spouses. The issuance of 9(e-3) visas to same-sex spouses, which places them in the same category as "attendants, servants and employees" of persons having a higher visa category, could have been taken as an affront by the sending state.

When the first co-author of these Notes was DFA Assistant Secretary for Treaties and Legal Affairs, his office did not object to the issuance of 9(e-1) visas to same-sex spouses of foreign diplomatic and consular officials, if such persons are conferred such status by their sending state. This position is consistent with the principle that the grant of diplomatic privileges and immunities, including the issuance of appropriate visas, depends not on the application of Philippine personal laws but the recognition of the status of such individuals under the Immigration Act, in the context of the VCDR.

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[25] VCDR, *supra* note 3, arts. 29, 31, and 37(1). Under Article 31 of the VCDR, the exceptions to immunity from civil and administrative jurisdiction are the following cases: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending States; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

[26] VCDR, *supra* note 3, art. 37(2, 3).

IV. DOJ Opinion No. 11 and Its Reasoning

In Opinion No. 11, series of 2019, the DOJ framed the issue as:

whether the Philippines can consider these (same-sex) spouses or (common-law) partners as the legal spouses of said foreign government officials, for the purpose of issuance to them of diplomatic 9(e-1) visas under Section 81 (n) of the Codified Visa Rules and Regulations of 2002… in relation to the Philippine Immigration Act of 1940, as amended.[27]

It then discussed the issue in the following manner:

> The Philippines follows the nationality principle (lex nationalii) in the determination of status of a person, whether a Filipino or an alien. Article 15 of the Civil Code provides that "laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines even though living abroad." In case of aliens, Philippine courts may also refer to the law of their domicile (lex domicilii), if they belong to a country that follows the domiciliary principle.
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> xxx (W)hether or not a foreign government official assigned to the Philippines is considered married is determined by the law of his or her nationality (lex nationalii) or his or her domicile (lex domicilii), and not by Philippine law.
>
> Aside from Article 15 of the Civil Code, Article 26 of the Family Code is also relevant to the issue at hand. It deals with the validity of marriages celebrated outside the Philippines. A pertinent portion of said Article reads as follows:
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> > Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those

[27] Sec. of Justice Op. No. 11, *supra* note 8, at 1.

> prohibited under Articles 35 (1), (4), (5) and (6), 36, 37 and 38.

Pursuant to the above-quoted Article, the Philippines follows the principle of lex loci celebrationis with respect to the validity of marriages celebrated abroad, i.e., a marriage that is valid where it was celebrated would also be recognized as valid here in the Philippines. This principle is subject to certain exceptions, as specified in the said Article, such as if the marriage is considered incestuous or void by reason of public policy. These exceptions apply only to marriages solemnized abroad between Filipinos, and not to marriages solemnized outside the Philippines between aliens, such as between foreign government officials assigned to the Philippines and their foreign same-sex spouses. With respect to the latter, the validity of their marriages solemnized outside the Philippines is governed principally by the principle of lex loci celebrationis. The only instance when the validity of their marriages will not be recognized here in the Philippines is when their marriages are considered universally incestuous or highly immoral…

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We note that same-sex marriages are valid in several countries around the world and may not, therefore, be considered to be universally immoral. Hence, same-sex marriages solemnized abroad between foreigners that are considered valid in the country where the marriages are solemnized may be recognized as valid here in the Philippines on the basis of Article 26 of the Family Code (lex loci celebrationis). The personal status of said foreigners as married may also be recognized here in the Philippines pursuant to Article 15 of the Civil Code (lex nationalii or domicilii).

One consequence of such recognition is the issuance of appropriate visas to the same-sex spouses of foreign government officials assigned to the country, such as diplomatic 9(e-1) visas under the CVRR and their enjoyment of the relevant privileges and immunities under the Vienna Convention on Diplomatic Relations. The other consequences of such recognition, such as the exercise of civil rights of guardianships, stepchild adoption and joint adoption of

Filipino child and commercial surrogacy, are governed by the pertinent prohibitions of Philippine law in order to prevent serious injury to the public interest."[28]

The DOJ emphasized that the discussion:

pertains to the recognition of the validity of the marriages solemnized outside the Philippines between foreign government officials assigned to the Philippines and their foreign same-sex spouses, as well as their personal status as being married to one another, such that these foreign same-sex spouses may be considered the 'accompanying wives (or husbands)' of such foreign government officials under Section 81(n) of the CVRR.[29] (underscoring supplied)

The DOJ then drew the line on common-law spouses:

With respect to informal same-sex partners as well as common-law spouses or partners of foreign government officials assigned to the Philippines, in view of the fact that there is no marriage bond between them, the same recognition cannot be given to these spouses or partners as they may not be considered the "accompanying wives (or husbands)" of such foreign government officials under the aforesaid Section 81(n) of the CVRR.[30]

[28] *Id.* at 2-5.

[29] *Cf.* Under the Civil Partnership Act 2004, the United Kingdom has accepted as members of the household same-sex partners of entitled members of the diplomats of diplomatic missions. The Marriage (Same Sex Couples) Act 2013 makes the marriage of same sex couples lawful. The practice of Canada, Australia and New Zealand is similar to that of the U.K. Since 2009, the U.S. State Department has included same-sex domestic partners as "members of the family forming part of the household." Opposite-sex domestic partners would, however, not be included. DENZA, *supra* note 10, at 321-323.

[30] Sec. of Justice Op. No. 11, *supra* note 8, at 5.

V. Application of Private International Law

The 2002 and 2017 opinions of the DOJ underscored the state interest in the institution of marriage, finding same-sex marriages as not being recognized in the Philippines due to public policy reasons. Marriage, after all, is no ordinary contract; under Philippine law, it is characterized as a special contract of permanent union between a man and a woman and a vital foundation of society. As such, Philippine domestic law does not permit same-sex marriages nor does it recognize common-law unions as equivalent to marriage, having instead provisions on property relations for unions without marriage to govern them. Notably, these "unions without marriage" again exclude same-sex unions since these only apply to a man and a woman who are capacitated to marry each other and live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage.[31]

Nonetheless, the need to apply conflicts of law principles is evident here to ascertain the effect of the marriage of two foreign nationals abroad, one of whom is a diplomat, and the effect of their foreign marriage in the Philippines and the status thereof of the "diplomatic spouse."

In private international law, there is universal recognition of the proposition that the legal position of an individual should normally be determined by the law of the state with which s/he is connected to in a permanent way, instead of the divergent laws of states in which he or she may be physically present, to act or engage in various transactions. This proposition includes two parts: (a) that a person is attributed certain legal characteristics of a comparatively permanent character; and (b) that these permanent characteristics should be determined by one law for all purposes rather than on a case-to-case basis by different laws.[32]

An individual's nationality or domicile serves as a permanent connection between the individual and a state, and assigning him or her a personal law will allow a determination as to which courts may exercise jurisdiction or the choice-of-law rules to govern a specific situation or transaction. An individual's personal law follows him or her wherever s/he goes and it governs transactions which affect him or her most closely (e.g., marriage, divorce, legitimacy and capacity to transact). Under the nationality principle, it is the nationality or citizenship of the

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[31] *See* Family Code of the Philippines, *supra* note 1, arts. 147 and 148.

[32] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 153 (1995).

individual that regulates his civil status, capacity, condition, family rights, duties, laws on succession, and capacity to succeed.[33] On the other hand, under the domiciliary principle, domicile, or where one establishes a permanent home, provides the basis for the individual to exercise his rights and the state to impose duties on him.[34]

Thus, with respect to foreigners, the laws on marriage will depend on their law of nationality (*lex nationalii*) or law of domicile (*lex domicilii*), and not Philippine law.

A conflict of laws perspective also takes a broader view of marriage and not just of one under Philippine domestic law. As noted by Jovito Salonga:

> ... There are other marriages contracted in other legal systems that do not exactly conform to our notion of marriage; to deny validity to them in all cases would create chaos in many domestic relationships. Furthermore, where the question at issue in a given case is neither the celebration of the marriage nor the cohabitation of the spouses in the forum, the moral standards of the forum are not infringed by conceding validity to the incidents of a foreign marriage...[35]

The above rationale for recognizing the validity of marriages celebrated abroad between foreign nationals is clear and is also supported by Art. 220 of the Civil Code which states that "(i)n case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage."[36]

On the other hand, the principle of *lex loci celebrationis*, or the law of the place of celebration, generally means that all states recognize as valid those marriages celebrated in foreign countries if these complied with the formalities of

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[33] COQUIA AND PANGALANGAN, CONFLICTS OF LAW: CASES, MATERIALS AND COMMENTS 154-155 (2000).

[34] *Id.,*at 212.

[35] SALONGA, *supra* note 32, at 260.

[36] Art. 220 of the Civil Code states: "In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage, the indissolubility of the marriage bonds, the legitimacy of children, the community of property during marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression."

marriages there.[37] The principle springs from the maxim *locus regit actum*, meaning "the place governs the act." This means that marriages that meet the "formal" (as opposed to "substantive") requirements for marriage where these are celebrated, are valid elsewhere.[38]

As Salonga opined:

> As a general rule, a marriage should be upheld if valid according to the place of celebration, unless the marriage itself or the enjoyment of the incidents of marital relationship would offend the strongly-held notions of decency and morality of a State that has a close relationship to the contracting parties.[39]

Examples of such marriages are those considered universally incestuous (e.g. marriage between brother and sister, parent and child, etc.) or highly immoral. Same-sex marriages, as the *Opinion* noted, "not being universally incestuous and which are validly recognized in other parts of the world, would not then be considered as highly immoral."[40]

In light of the application of the laws of nationality and domicile and the *lex loci celebrationis*, there is no cogent reason to deny recognition of the effects of same-sex marriage solemnized overseas between foreign nationals.

Thus, the official notification to the DFA by the sending state of the members of the family of the diplomat[41] and the certification that an individual is his or her spouse are *imprimatur* of the validity of the marriage and the legal status of the same-sex spouse.

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[37] SALONGA, *supra* note 32, at 262.

[38] *Lex loci celebrationis* is also embodied in Article 26 of the Family Code of the Philippines, which provides that all marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except certain marriages considered void due to public policy. Notably, Article 26 as an expression of the principle is only applicable to Filipinos and not foreign nationals. Note also Art. 17, paragraph 1 of the Civil Code which states that generally "(t)he forms and solemnities, wills, and other public instruments, shall be governed by the laws of the country in which they are executed." SALONGA, *supra* note 32, at 263.

[39] *Id.* at 273.

[40] Sec. of Justice Op. No. 11, *supra* note 8, at 5.

[41] VCDR, *supra* note 3, art. 10(b).

Having established that for as long as the same sex marriage is valid in the country where it was solemnized and is considered valid according to the personal law of the foreign government official and his or her same-sex spouse, the same-sex spouse should thus be recognized as the spouse of the foreign official in the Philippines,[42] and hence entitled to the diplomatic visa appropriate for a spouse, and the corresponding immunities and privileges for such status.

However, the *Opinion* stopped short of granting the same diplomatic 9(e-1) visa to the informal same-sex partner or common-law spouse or partner of foreign government officials due to the "lack of a marriage bond" between them.[43]

Salonga's earlier observations on the matter are insightful:

> The… odd situation occurs with reference to a common-law marriage, i.e., a marriage accomplished by cohabitation and agreement without formal ceremony. If valid in the State where the parties cohabited while holding themselves out as man and wife, it is given recognition in sister States which do not permit this informal method of entering into the marital status; the validity has also been upheld in England and also, for their respective nations, by courts of Belgium, France, Germany and Italy. In the recent case of *Eugenio v. Velez,* the Supreme Court reiterated the rule that common-law marriages are not recognized under Philippine internal law.[44] (citations omitted)

In her study of the practices among states, Denza noted that "(t)here are also signs that in many other capitals an unmarried partner is accepted as a 'spouse' in the context of defining the diplomat's family for the purpose of administering privileges, though this does not seem to have been widely acknowledged."[45]

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[42] *See* the U.S. case Obergefell v Hodges, 135 S. Ct. 2584 (2015) which upheld the validity of same-sex marriage.

[43] Sec. of Justice Op. No. 11, *supra* note 8, at 5-6.

[44] SALONGA, *supra* note 32, at 267 (citing Eugenio v. Velez, G.R. No. 85140, May 17, 1990).

[45] DENZA, *supra* note 10, at 323.

VI. A Case for Hope, and Areas for Further Inquiry

As expected, the issuance of DOJ Opinion No. 11 was greeted with elation by many in the diplomatic corps. Not only are same-sex spouses of foreign diplomats given better treatment visa-wise, they are also now issued protocol IDs and accorded immunities and privileges as family members. It also removed a sore point between the DFA and many foreign diplomats.

Following this development, it may be asked whether same-sex marriage may now be conducted in the Philippines by foreign embassies or consulates general, for instance? The *Opinion* did not address this point. However, it may be useful to recall that Philippine law does not have provisions on same-sex marriage nor its solemnization in the country. Furthermore, Philippine laws would govern the solemnities of marriage celebrated within the embassy or consulate premises, since these are deemed within the territorial jurisdiction of the Philippines.[46]

The same view was expressed by the Superior Court for the Commonwealth of the Northern Marianas Islands in a case which incidentally involved a marriage conducted between two Filipinos inside the Philippine Consulate in Saipan. The consular marriage was invalidated by the Saipan court on the ground that a marriage conducted in the Consulate should conform to its local laws, noting that for purposes of marriage, the Consulate is not a sovereign territory of the sending state, and only the Saipan governor and mayor, not foreign consular officials, are authorized to issue marriage licenses.[47]

The DOJ was careful to confine its *Opinio*n to the issue of the proper visa category that may be issued to same-sex spouses of foreign government officials assigned to the country, in light of the time-honored definition of marriage as being "between a man and a woman." The *Opinion* though used mostly civil law and private international law principles to reach its conclusions. This being so, can the *Opinion* apply to other foreigners with same-sex spouses and not just foreign diplomats, given that same or similar considerations and reasonings seem present in both cases? This is an aspect worthy of further examination.

The *Opinion* declined to authorize the issuance of 9(e-1) visa to "informal same-sex partner or common-law spouse." How about those in a "civil union"?

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[46] ELIZABETH AGUILING-PANGALANGAN, MARRIAGE AND UNMARRIED COHABITATION - THE RIGHTS OF HUSBANDS, WIVES, AND LOVERS 29 (2nd ed., 2019).

[47] *Id.* (citing the case *In Re Marriage of Antonia Reyes Medina vs. Gil Ramos Medina* (FCD case no. 18-0024) decided on Jan. 20, 2018).

Civil union, also known as civil partnership, is a marriage-like relationship, often between members of the same sex, recognized by civil authorities within a jurisdiction. Opposite-sex or same-sex couples can live together in accordance with the laws of the countries providing for such, but with no husband-wife relationship created between them.[48] If a couple is in a civil union, how are they to be treated? Would the "civil union" satisfy the requirement of a "bond of marriage"? The *Opinion* made no reference to civil union. As the *Opinion* didn't go that far, the issue is another aspect for further examination.

These and other related issues may have to await resolution by the DOJ in another opinion or the courts when raised in appropriate cases or by Congress through the enactment of appropriate legislation.

Finally, would this ruling apply to Philippine diplomats who may have entered into same-sex marriage overseas? The short answer is no. As noted earlier, the Philippines follows the nationality principle and its "(l)aws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines even though living abroad."[49]

The DOJ Opinion No. 11 took on an open-minded outlook when it acknowledged the increasing incidence of same-sex marriages in several countries and recognized them as valid between foreigners on the basis of the nationality and domiciliary principles and *lex loci celebrationis*. Being so, it has given much hope to those who have long wanted and waited for Philippine law to evolve and take into account the reality of the complexity of human relationships.

[48] *See* the U.S. case of Langan v. St. Vincent's Hospital of New York, 802 N.Y.S. 2d 476 (N.Y. App. Div. 2005) which stated that the relationship of parties in same-sex unions is still governed by the law creating the union, which does not grant the parties therein the same relationship as husband and wife.

[49] Rep. Act No. 386 (1949), art. 15.