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## ABSTRACT

This paper begins with a narrative on existing forms of LGBT discrimination, exclusion, and violence. It traces the historically ingrained basis of LGBT social exclusion, the birth of human rights, and the social movements for LGBT state inclusion. Key milestones that support the call for policies on LGBT human rights at the global and national level are presented. The paper then argues for the use of discourse for policy analysis. It provides a conceptual understanding of discourse and discourse theory, and emphasizes the value of discourse for policy analysis with examples of dominant discourses that support and oppose LGBT human rights. Two country cases that applied discourse analysis, in Indonesia and Singapore, are presented. An argument for the use of discourse-as-policy in examining the debates on LGBT state inclusion in the Philippines is made, towards an enabling policy environment for a national law to recognize and protect LGBT human rights.

## **The Emergence of LGBT Human Rights & Use of Discourse Analysis for Understanding LGBT State Inclusion**

This paper argues for the importance of state inclusion of lesbian, gay, bisexual and transgender (LGBT) human rights. It begins with a narrative on the existing forms of LGBT discrimination, exclusion, and violence. It goes on to trace the historically ingrained basis of LGBT social exclusion, as well as the birth of human rights and the rise of social movements for LGBT state inclusion. The key milestones that assert and support the call for LGBT rights as human rights at both the global and national level is then presented.

This paper also argues for the use of discourse for policy analysis. It provides a conceptual understanding of discourse, a historical background on discourse theory, and emphasizes the value of discourse for policy analysis with examples of dominant discourses that support and oppose LGBT human rights. Two country cases that have applied discourse analysis, namely in Indonesia and Singapore, is then presented. This is followed by an argument for the use of discourse-as-policy for examining the debates on LGBT state inclusion in the Philippines, towards an enabling policy environment for a national law that would recognize and protect LGBT human rights.

### **Prevalence of LGBT Discrimination, Exclusion, and Violence**

Despite the increased visibility of lesbian, gay, bisexual and transgender (LGBT) people in societies today, social stigma, intolerance, and exclusion of LGBT identities remain (ILGA 2014). In the Philippines, media reports as many as 164 cases of LGBT-related murders in the past 10 years based on records of the Philippine LGBT Hate Crime Watch (Bernal, 2012, 2015). Hate crimes committed against LGBT people are often very brutal -- involving strangulation, multiple stab wounds, drowning -- and rarely justly resolved nor its perpetrators justly punished by the legal justice system. The recent and highly publicized murder of Jennifer Laude on October 11, 2014, by Scott Pemberton a member of the US Marine Corps is a prime example. Pemberton was convicted not for murder but for homicide, which has a much lesser penalty. Because Laude did not say she was a transgender female, this was seen as a mitigating circumstance and used to argue for homicide.

Unjust as it may seem, the Jennifer Laude case could be considered one of the more fortunate cases in terms of seeking justice, receiving media coverage, and access to legal services. Most hate crimes against LGBT people go unnoticed. In a study involving more than 40 local and national LGBT groups, human rights organizations, and academic based organizations, the Philippine legal and social environment for LGBT individuals and groups was reviewed (UNDP, USAID, 2014). This recent study affirms that numerous cases of LGBT discrimination, exclusion, and violence are encountered in the various areas of social, political and economic life. The report shows discrimination against LGBT people in the community, in schools and even in the family. LGBT people experience discrimination when seeking and keeping employment, despite being qualified or fit for the job. There is stigma and rejection of LGBT people from religious institutions. There are negative stereotypes of LGBT people perpetuated by the media, reinforcing homophobia and transphobia in society, as well as, marginalization and invisibility of LGBT people in politics and in the law. In sum, LGBT discrimination and the violation of LGBT human rights continues, despite surveys that report a high level of social tolerance for LGBT people among Filipinos.

In “The Status of Lesbian, Gay, Bisexual and Transgender Rights in the Philippines, Submission to the Human Rights Council for the 13<sup>th</sup> Review”, it was reported that there is a disconnect between the numerous international human rights instruments the Philippines is a signatory of, and the translation of these instruments into national laws. Among some of the basic international human rights obligations denied to LGBT persons are the : [1] *Right to security of person* – given the physical and verbal assaults that LGBT persons experience because of their non-conforming sexual orientation and/or gender identity and expression (SOGIE); [2] *Right to equality and non-discrimination* – given sexual orientation and gender identity and expression are not included or explicitly mentioned as a basis for equality and non-discrimination; [3] *Right to the highest attainable standard of health and protection from medical abuses* – given it is not uncommon for LGBT persons to be subjected to judgment and ridicule by medical personnel and to be refused access to healthcare services; and [4] *Right to recognition before the law* – given the absence of laws necessary for promoting anti-discrimination and protecting the rights of LGBT persons alongside the presence of laws that criminalize and condemn LGBT persons. These are just some examples of the basic human rights denied to LGBT persons.

The denial of LGBT human rights, can be traced to a history of LGBT social discrimination, exclusion, and violence. A history where LGBT identities were framed as sin, sickness, and crime, and led to a struggle for the recognition of LGBT rights as human rights.

### **The Historical Development of LGBT Social Exclusion to Social Inclusion**

Public policies and laws on LGBT human were rights derived from a social context of religious condemnation, medical pathologization, and legal criminalization of LGBT identities. It begins with the early conceptions of homosexuality, as the overarching term for LGBT people.

#### ***Early conceptions of homosexuality***

According to Sanders (2005), attraction, carnal intercourse, and intimate relationships between the same sex did not have a definitive label despite the criminalization and condemnation of such acts during the colonial era. The term "homosexuality" was only introduced during the second half of the 19th Century.

Early condemnation of homosexuality existed within religious discourse. Saint Peter Damian coined the term "sodomy", in the 11th Century to refer to any sexual activity that is against biblical teachings from the story of Sodom and Gomorrah in the Book of Genesis (Damian, 1982). Among these activities are masturbation, fornication, bestiality, and oral or anal sex between two persons of the same sex (Damian, 1982). Biblical passages were used for the condemnation of homosexuality in religion. This condemnation and criminalization of homosexuality greatly shaped social structures and interactions.

Another early and highly influential discourse on homosexuality was the medical discourse. The medical discourse on homosexuality emerged due to the need to assess the mental health of people accused of illicit sexual behavior (Group for the Advancement of Psychiatry, 2012). Before the term "homosexuality" evolved, its construction as a congenital or acquired sickness was introduced by European physicians and forensic experts. As a medical condition, homosexuality was deemed as requiring psychiatric care, not legal punishment (Group for the Advancement of Psychiatry, 2012). A French neurologist by the name of Jean Martin Charcot described homosexuality as the "inversion of the genital sense" and concluded that it is a serious mental illness (Group for the Advancement of Psychiatry, 2012). Before the turn of the century,

Richard von Krafft-Ebing, an Austro-German psychiatrist wrote "Psychopathia Sexualis" in 1886 (Sanders, 2005). This psychiatry book documented over 200 cases of human sexual behavior and was used as a reference material in which medical and legal decisions were based. The pathologization of homosexuality led to numerous research studies with the goal of finding biological and/or genetic factors that influence the occurrence of this "condition" (Group for the Advancement of Psychiatry, 2012).

A turning point in the medical discourse occurred when Sigmund Freud, one of the forefathers of psychology, contended that while sexual inversion may be a result of arrested sexual development, it is not an illness but a "variation of sexual function" (Freud, 1951). This claim led to studies that further debunked the notion of homosexuality as a sickness.

A groundbreaking research by Evelyn Hooker in 1951 provided empirical evidence against the claim of homosexuality as an illness. It eventually led to the American Psychiatric Association's removal of homosexuality from the Diagnostic Statistical Manual of Mental Disorders in 1973 (APA, 2013).

### ***Criminalization of homosexuality***

To a large extent, the religious and medical discourses became the bases for legal or state-prescribed discourses. As a result, the argument that homosexuality is both a sin and a sickness is strengthened. An illustration of this would be the laws against same-sex relations in colonies of the British Empire during the nineteenth century. The inclusion of Section 377 which refers to carnal intercourse between same-sex individuals as an offense "against the order of nature" and "unnatural" is a clear indication that homosexuality is viewed as both a sin and a sickness (Carey, 2011; Kannabiran & Singh, 2009). Although the said legislation did not explicitly mention male-to-male or female-to-female sexual relations as a crime, they are considered to be "*against the order of nature*" and punishable by law (Indian Penal Code, 1860). Among the countries that adopted this law are Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, New Zealand, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Western Samoa in the Asia Pacific region; and Botswana, Gambia, Ghana, Kenya, Tanzania, Uganda, Zambia, and Zimbabwe in the African region (Human Rights Watch, 2008). Germany,

one of the most powerful countries during the Second World War, likewise had its own version of the sodomy law stated in Paragraph 175 of the German Criminal Code (AHAA, 2014).

LGBT discrimination has a long history and serves as a remnant of the Colonial Era when the most powerful nations used laws as mechanisms of control over morality and standards of behavior (Human Rights Watch, 2008; UNHRC, N.D.). The criminalization of homosexuality led to the repression of LGBT people which persisted even beyond the end of Second World War when the international community pushed for the recognition and respect for human rights.

Sanders (2005) argues that "a legal and social condemnation" of LGBT people continued after the war as a result of discourses which intensified prejudice and discrimination. He further noted that this condemnation was made discreet by society's blindness to homosexuality, by treating it as taboo, and by concealing it in secrecy. Sanders described blindness to homosexuality as manifested in society's denial of LGBT identities and existence while allowing LGBT people to pursue social and sexual activities. He asserts that homosexuality is tabooed in terms of people's deliberate refusal to discuss homosexuality as natural or normal. And, that LGBT people of the said period kept their identities in secrecy to avoid negative judgment from the larger society.

However, with the rise of the human rights discourse, individuals and groups particularly within the feminist and LGBT social movements advocated for the recognition of LGBT human rights as human rights.

### ***The birth of human rights***

The Universal Declaration of Human Rights is a landmark document of the international community's efforts to recognize and promote the rights of every person, regardless of "race, color, sex, language, religion, political affiliation, national or social origin, property, birth or other status (UN, 1948)". The Universal Declaration, together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, constitute the "International Bill of Human Rights" (UNHRC, N.D.)

Despite the creation of these new international laws and mechanisms to promote human rights after the Second World War, LGBT people remain at the margins of society (Sanders, 2005). Among the indications of this is the reality that criminal laws against same-sex relations were not repealed after the creation of the Universal Declaration of Human Rights. The United

Nations Human Rights Commission (N.D.) reports that at present, laws that criminalize same-sex partnerships still exist in around 76 countries. Out of these, 5 countries impose death penalty on those found 'guilty of same-sex offenses', namely: Iran, Mauritania, Saudi Arabia, Sudan, and Yemen (UNHRC, N.D.). The UN points out that this reality makes LGBT people vulnerable to prejudice and discrimination, subjected to hate crimes, police abuse, torture, family violence, and other overt negative behavior of society which prevents LGBT people from enjoying basic human rights (UNHRC, N.D.).

### *Women's rights movements and sexual identities*

In understanding discrimination on the basis of gender and sexuality, it is important to note the significant contribution of the women's rights movement. There were at least two major conferences that initially included lesbian issues on the agenda, namely the Sisterhood is Global Dialogues in 1988 and International Women and Health Meeting in 1990. It is said that these international events marked the recognition of lesbianism as a political issue and the importance of this issue to be addressed by women's movements internationally (de Vela, Ofreneo & Cabrera, 2011).

The first wave of feminism which started in the 17<sup>th</sup> century, focused on women's equality in the law, particularly in having the right to vote, the right to education, and the right to property, deemed as basic rights given to men but denied to women (Freedman, 2003). The second wave of feminism occurred in the 1960s and 1970s, amidst social protests and civic unrest. A time of marches and demonstrations in the streets, where women demanded equality with men, and people of color demanded equality with the dominant white race.

However, in the 1990s, feminist movements consisting of women from diverse sexual identities, economic, and cultural backgrounds came together with the goal of eliminating overlapping issues of gender and racial discrimination in politics, business, and other social units and became known as "third wave feminists" (Ianello, 2010). The third wave of feminism claimed to be more inclusive, as it was multicultural and sexually diverse and sought to put forward issues of other marginalized groups such as gays, lesbians, bisexuals, and transsexuals (Ianello, 2010).

### ***LGBT organizing and activism***

At about the same time that the second wave of feminism started, LGBT organizing was also taking place. Many scholars consider the Stonewall riot in New York on June 27, 1969 as the catalyst for the rise of the LGBT movement (Asico, 2001; Sanders, 2005). The Stonewall riot refers to the series of protests against police harassment and brutality of LGBT people which was taking place at the time. Gay organizations were said to also exist in parts of Europe, such as The Netherlands and Denmark, prior to the Stonewall riot (Sanders, 2005).

After the Stonewall riot in 1969, annual gay pride marches were held in the United States and in other parts of the world (AHAA, 2014). LGBT groups continued to be formed to advocate for the promotion and protection of LGBT rights. Among such groups is the Gay Liberation Front (GLF) which was formed right after the Stonewall riot to raise awareness on the ways in which gays are discriminated in various social contexts (GLF, 1971). There was also the Gay and Lesbian Activists Alliance (GLAA), a Washington, D.C.-based organization which was formed in 1971 to protect the civil rights of lesbians, gays, bisexuals and transgender people in the United States (GLAA, 2016).

At the global sphere is the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), one of the world's largest LGBT communities established in 1978 (ILGA, 2016). It is made up of 1,200 member organizations from 125 countries which advocates for the rights of lesbian, gay, bisexuals, transgender, and intersexed people or LGBTI (ILGA, 2016). Outright International (formerly International Gay and Lesbian Human Rights Commission), another international LGBT organization established in 1990, is also aimed at protecting and advancing the basic rights of LGBTI people, with the goal of empowerment and inclusion of LGBTI people in the global human rights movement (Outright International, 2016).

In the recent decade LGBT activism, both locally and globally, has achieved a number of milestones.

### **The Global and Local Context of LGBT State Inclusion**

Currently, there are 113 United Nations member states that have legally recognized same-sex relations (ILGA, 2015). Also, key international documents and human rights instruments were achieved, among them the Yogyakarta Principles in 2006, the UNHRC



Resolution on Human Rights, Sexual Orientation and Gender Identity (SOGI) in 2011, and the UNHRC Core State Obligations on LGBT Human Rights in 2012.

### ***The Yogyakarta Principles***

In 2006 at Gadia Mada University, Yogyakarta, Indonesia, The Yogyakarta Principles were developed through a gathering of human rights experts, the International Service for Human Rights, and the International Commission of Jurists in November 2006 at Gadjadara University, Yogyakarta, Indonesia (International Commission of Jurists, 2007). The principles were crafted in recognition of the marginalization and discrimination experienced by persons all over the world based on SOGI, and despite the assertion of the Universal Declaration of Human Rights' that "*all human beings are born free and equal in dignity and rights*" and that "*everyone is entitled to all the rights and freedoms (...) without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*" (United Nations, 1948).

The Yogyakarta Principles, composed of 29 key sections, addresses a broad range of universal human rights standards as they apply to issues of sexual orientation and gender identity (SOGI). Among the adverse manifestations of discrimination based on SOGI are various forms of abuses (i. e., physical, sexual, and psychological) and denial of basic human rights such as the rights to health, freedom of expression, education and employment (International Commission of Jurists, 2007). The document attributes these outcomes to stereotyping, prejudice, and discrimination due to religious beliefs and cultural gender norms that condemn the non-conformity of LGBT people.

The intension of the Yogyakarta Principles is to bind all states to the obligation of recognizing, promoting, and protecting LGBT human rights. It also stresses that all state actors should contribute to the fulfillment of this accountability through recommendations addressed to the UNHRC, national human rights agencies, civil society organizations (CSOs), and human rights funding organizations (International Commission of Jurists, 2007).

### ***UNHRC Resolution on Human Rights, Sexual Orientation and Gender Identity***

In June 2011, the UNHRC issued a resolution that seeks to identify existing discriminatory laws, practices, and violence against persons based on SOGI and come up with

possible interventions to mitigate such cases by the end of the said year (UNHRC, 2011a). This resolution was made because of the Council's heightened concern on the rampant violation of human rights based on SOGI across the globe even if international human rights standards have been set forth several decades ago. It serves as an appeal for states to recognize that all individuals, regardless of sex, sexual orientation or gender identity, are protected by international human rights law -- that is, the rights to life, security of person and privacy, freedom from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly (UNHRC, 2012). It specifically called for dialogue at the 19th session of the Human Rights Council, citing violence against person on the basis of SOGI as a priority issue.

As a response to this resolution, a report on discriminatory laws, practices and acts of violence against individuals based on SOGI and how these may be addressed by international human rights law was presented by the UN High Commissioner for Human Rights. It was presented to the UN Human Rights Council in November 2011 and was documented as a report on "Discriminatory Laws and Practices and Acts of Violence Against Individuals based on Sexual Orientation and Gender Identity" (A/HRC/19/41) (UNHRC, 2011b).

### ***UNHRC Core State Obligations on LGBT Human Rights***

The report on the discriminatory laws and practices and acts of violence against individuals based on SOGI delivered by the UNHRC painted a clearer picture of the state of LGBTs across the globe. It also provided pragmatic action points that governments should undertake to promote and protect human rights of all individuals regardless of their sex, gender, sexual orientation, gender identity, and gender expression.

Other than those mentioned above, the UNHRC report aided the Council to identify five (5) core State obligations on safeguarding LGBT human rights. These are: (a) to protect individuals from homophobic and transphobic violence, which refers to protection from hate crimes based on sexual orientation and gender identity, including fair and efficient investigation, and asylum if necessary; (b) to prevent torture and degrading treatment of LGBT persons in detention, which includes the assurance that LGBT persons detained have redress; (c) to decriminalize homosexuality, which includes the call to repeal laws that criminalize homosexuality; (d) to prohibit the discrimination of persons because of their sexual orientation

and gender identity, which includes the need to pass and implement laws that protect LGBT persons from discrimination, particularly discrimination from access to basic services and education opportunities; and (e) to respect and safeguard LGBT, as well as intersex persons', the freedom of expression, association, and peaceful assembly, which includes protecting the exercise of this freedom from intimidation and/or violence (UNHRC, 2012).

### ***Philippine state inclusion of LGBT human rights***

In the Philippines, there is no law that criminalizes homosexuality, unlike its neighboring ASEAN countries – Brunei, Malaysia, and Singapore – where there still exists an Anti-Sodomy Law, a law inherited from British colonization. At the national level, there is neither legal recognition nor criminalization of LGBT people in the Philippines.

While there is no public policy for the protection of LGBT human rights at the national level, there exists public policies at the local level. Using data from the Philippine Statistical Authority, Manalastas (N. D.) points out that 15 Local Government Units (LGUs) have passed ordinances against the discrimination of LGBT persons. However, these local ordinances across cities, municipalities, and barangays in the Philippines, represent a small number of the population. Manalastas also asserts that only 11.2% of the Philippine population are protected by these ordinances, leaving 88.8% of the population unprotected of discrimination based on sexual orientation and gender identity and expression (Manalastas N. D.).

At the national level however, numerous bills have been filed in both the House of Representatives and in the Senate related to the recognition and protection of LGBT human rights. In the House of Representatives, a total of 18 bills were filed in the past two decades. The first bill filed was in 1995 at the 10<sup>th</sup> Congress by Rep. Reynaldo Calalay, titled “*An Act Providing for Additional Sector Known as Third Sex*”. This was followed by a bill filed in 1999 at the 11<sup>th</sup> Congress by Rep. Bellaflor Angara-Castillo titled “*Lesbian and Gay Rights Act of 1999*”. Then Rep. Loreta Ann Rosales filed the “*Anti-Discrimination Act in 2001*” at the 12<sup>th</sup> Congress. Most of the bills that followed were on Anti SOGI Discrimination, many of which were carried by representatives of the Akbayan Partylist such as Etta Rosales, Riza Hontiveros, Kaka Bag-ao, Walden Bello, and the like. It was in the 16<sup>th</sup> Congress where the most number of LGBT-related bills were filed, that is, a total of 12 anti-LGBT discrimination bills filed by various congress representatives from 2013 to 2016.

In the Senate, on the other hand, a total of 15 bills were filed. The first bill was filed in 2004 at the 13<sup>th</sup> Congress. Senator Miriam Defensor-Santiago is among the senators who has carried an anti SOGI discrimination bill from the 13<sup>th</sup> congress up until the 16<sup>th</sup> congress in 2016. Within the 13<sup>th</sup> congress, 4 anti-LGBT discrimination bills were filed. In the 14<sup>th</sup> congress, another 4 anti-LGBT discrimination bills were filed, followed by 2 bills in the 15<sup>th</sup> congress, and 5 bills in the 16<sup>th</sup> congress, making it a sum of 11 bills filed from 2007 to 2014.

However, it would appear that these bills filed in congress for the past two decades are at a standstill. What is the cause of this standstill? Why are these bills not being passed? How are they being argued? The passage of a national law on LGBT human rights has been a struggle of more than 21 years. To date, there has been no study that has examined the public policy process involved in the formulation of a national law that would recognize and protect LGBT human rights in the country. For LGBT human rights to be fully recognized in the Philippines, this paper argues for the need to understand the public policy process towards creating an enabling policy environment for state inclusion of LGBT human rights.

There is a need to critically examine the public policy system surrounding a Philippine national law that would recognize and protect LGBT human rights. To know the actors involved, in favor of and against the passing of a national law on LGBT human rights and their various positions or representations of the issue within the public debate on the proposed policy. To understand the factors in the policy environment that facilitate or hinder the passage of a national law on LGBT human rights. To examine the underlying discourses of the various positions or representations on a national law on LGBT human rights and recommend counter or alternative discourses that will allow for the passage of a national law on LGBT human rights.

By undertaking an interrogation of the public policy system surrounding state inclusion of LGBT human rights, a critical understanding of the constructed discourses can be achieved. Using discourse analysis, an examination of the LGBT policy debates can be directed towards proposals for an enabling policy environment for a Philippine national law on LGBT human rights.

### **Understanding Discourse Analysis for Examining the LGBT Policy Environment**

Discourse refers to “systems of meaningful practices that form the identities of subjects and objects” (Howarth & Stavrakakis, 2000, pp.3-4). This builds on Foucault’s definition of discourses as “practices that systematically form the objects of which they speak” (Foucault, 1969, p. 49). As systems of social relations and practices, discourses are intrinsically political as they institutionalize “insiders” and “outsiders”. Discourses exercise power as they constitute which possibilities are included and which are excluded. Discourses are also contingent upon historical and social contexts, shaped by political forces and events at a given space and time.

According to Torfing (2005), discourse is constructed through hegemonic struggles. Discourse is a result of political decisions, “not conscious decisions of central decision makers on the basis of rational calculation” but a series of decisions resulting from “a myriad of decentred strategic actions undertaken by political agents aiming to forge a hegemonic discourse” (Torfing, 2005, p.15). Discourse analysis refers to the practice of analyzing empirical raw data as discursive text. Speeches, reports, interviews, policies, are among a range of data treated as texts that constitute a “discourse”, constructing a “reality”, and providing the conditions for experiencing such reality (Howarth & Stavrakakis, 2000).

#### ***A brief background on discourse theory***

Torfing (2005) accounts for the history of discourse theory as emerging in the 1970s as a critique of structuralist theories of language, culture, and society coming from poststructuralist and postmodern thought. Discourse theory comes from various traditions, disciplines, and ontologies. One such theory is poststructuralist discourse theory that has become a political science research programme and one that has significantly impacted social sciences in general and political science in particular. Torfing argues that poststructuralist discourse theory has offered an alternative to the objective, reductionist, and rationalist bias of modern theory by emphasizing the role of discourse and politics in shaping social phenomena. It has also opened up new issues such as knowledge paradigms, identity formations, and the discursive construction of norms and values. Hence, policy analysts now recognize the importance of knowledge frames in identifying and solving policy problems.

Torfing (2005) describes three generations of discourse theories. The first generation of discourse theories defined discourse in the linguistic sense and focused on the semantic meaning

of written and spoken text. The focus was on speakers' use of language. Some of these theories were sociolinguistics, content analysis, conversation analysis, discourse psychology, and critical linguistics.

The second generation of discourse theories went beyond language and attempted to link discourse to politics and power. Discourse expanded from written and spoken language to a wider set of social practices. Critical Discourse Analysis (CDA) by Norman Fairclough is one such discourse theory that espouses for the link between linguistically mediated discursive practices and the naturalization of constructed meanings derived from these discursive practices. This is referred to as ideological discourses that produce hegemony or the reproduction of the social and political order as well as counter-hegemony or social transformation.

In contrast, Foucauldian Discourse Analysis (FDA) coming from the work of Michel Foucault goes a step back and seeks to understand "the rules that form" discursive practices, the rules that regulate "what can be said, how it can be said, who can speak and in which name" (Torfing, 2005, p.7). In Foucault's archaeological writings, he links the discursive and the non-discursive (i.e. material); and in his genealogical writings, he focuses on the power struggles and the ways in which discourse regulate action. For Foucault, power and discourse mutually constitute each other.

The third generation of discourse theories extend discourse to all social phenomena and argue that everything becomes discourse. As with the work of Laclau and Mouffe, this third generation contend that the non-discursive phenomena such as institutions or technology are ultimately constructed in discursive practices and are therefore still part of the discursive realm.

### ***The value of discourse theory to policy analysis***

What value does discourse theory add to mainstream public administration and policy analysis? Torfing (2005) presents six added value or contributions of a discourse approach: (1) discourse theory poses other kinds of research questions, that is, it is problem-driven and generates problems not identified by behaviorist, institutionalist, or rationalist choice approaches; (2) discourse theory draws attention to the contingent nature of social phenomena, that is, it does not take social structures and subjective interests as givens but rather examines political processes leading to these structures and interests; (3) discourse theory emphasizes language and the link of language to action, that is, it looks at how language constitutes structures and

identities; (4) discourse theory emphasizes social change, that is, it sees history as marked by political struggles that organize and reorganize the social order; (5) discourse theory puts power and political struggles on the agenda, that is, it reveals how discourses create inclusionary and exclusionary practices given that discourses and power are inherently linked; and, (6) discourse theory is particularly interested in the formation of political groups, communities, networks, and alliances and how meanings and identities bind actors together into imagined political communities.

It is argued that discourse theory can make a valuable contribution to public administration and policy analysis, specifically LGBT policy. A discourse analysis of state inclusion of lesbian, gay, bisexual, and transgender or LGBT human rights in Philippine national law contributes to: (1) interrogating the problematization of LGBT human rights and how various actors in Philippine governance construct the ‘problem’ or issue of LGBT human rights; (2) understanding the political process of creating a national law or public policy on LGBT human rights as contingent upon historical and social forces; (3) examining how the language, the text, the words used to construct the issue of LGBT human rights represent discourses that shape the meaning of the ‘problem’ or issue and its proposed ‘solution’ or action orientation; (4) emphasizing the nature of social change and how the negotiation and contestation of the issue of LGBT human rights has evolved and progressed in time; (5) reflecting the power of discourses to include and/or exclude subjects, identities, or groups of people in development, and how discourses have either promoted state inclusion or propagated state exclusion of LGBT human rights; and, (6) highlighting how political groups or alliances of civil society actors have come together to challenge the current status quo towards promoting an enabling environment for the state inclusion of LGBT human rights in Philippine national law.

To further assert the value of discourse theory to policy analysis, a brief review of studies that have surfaced dominant discourses both in support and opposed to LGBT human rights is presented.

***Dominant discourses in support of LGBT human rights***

First is the review of dominant discourses in support of LGBT human rights, that is, discourses that support state policies promoting social inclusion of LGBT people.

Petchesky (2001) illustrated the evolution of a sexual health discourse, a sexual rights discourse, and a sexual and reproductive health and rights or SRHR discourse in the UN system,

particularly in the international covenants concerning women's rights in the past two decades. She cited the Declaration on the Elimination of Violence against Women (UN, 1993) as the first UN document to introduce the word "sexual" into human rights language in the context of eliminating all forms of "sexual" violence. The most progressive language pertaining to "sexuality" appeared in the International Conference on Population and Development (ICPD, 1994) as it "acknowledges sexual activity as a positive aspect of human society" (Tambiah, 1995, as cited in Petchesky, 2001). Eventually, the World Health Organization (WHO) would refer to "sexual health" as a right that population and development programs should protect, with sexual health requiring that "people are able to have a satisfying and safe sex life" (WHO as cited in Petchesky, 2001).

A global study on state policies on same-sex sexual relations from 1984 to 1995 by Frank and Mceneaney (1999) traced the state legitimation of same-sex sexual relations as indicated by nations liberalizing their policies on homosexuality and the presence of lesbian and gay social movements. Liberalization included decriminalizing same-sex relations, legalizing same-sex marriage, protecting homosexuals from hate crimes, protecting immigrant rights for those fleeing persecution or joining partners, and providing equal access to employment and housing. In their analysis, Frank and Mceneaney (1999) attributed this global change towards legitimizing same-sex relations to an individualization discourse where modern western societies are seen as shifting their focus from family procreation to individual personhood. An individualization discourse transformed the meaning of sex from family to individual and from procreation to pleasure. Frank and Mceneaney (1999) also found a gender equality discourse to be linked to state legitimation of same-sex relations. Using a quantitative research design, they measured nations' adherence to an individualization and gender equality discourse and correlated these to how liberal the policies of nations are towards same-sex relations. This global change in the 1980s and 1990s towards upholding the rights of LGBT people through decriminalizing homosexuality, anti-discrimination laws, and equality laws, among others, were also linked to the increased visibility of the LGBT community and the support of the scientific and medical community in the 1970s. A depathologization discourse emerged from the scientific and medical profession's (e.g., the American Psychiatric Association or APA and the World Health Organization or WHO) declaration that homosexuality is normal and no longer an illness or pathology. An identity politics discourse emerged with the rise and visibility of lesbian and gay



identities in Western societies. A human rights discourse also became a dominant discourse among transnational social movements such as Amnesty International, the International Lesbian and Gay Association or ILGA, and the International Gay and Lesbian Human Rights Commission or IGLHRC (Frank & Mceneaney, 1999).

In a treatise, Sullivan (1995) argued that an equality discourse is what will lead to the state's inclusion of LGBT rights as human rights. An equality discourse demands full equality for all citizens, including homosexuals, and calls for an end to discrimination and inclusion in all human rights. Such a politics affirms the principle that "all discrimination against homosexuals be ended and that every right and responsibility that heterosexuals enjoy as public citizens be extended to homosexuals" (Sullivan, 1995, p.171). Sullivan also identified a political liberal discourse as leading to the state's inclusion of sexual minorities to rights and protection of human liberty. According to Petchesky (2009), the idea that sexual rights are human rights, and that reproductive rights are human rights, follow the principle of "indivisibility" discourse.

### ***Dominant discourses that oppose LGBT human rights***

A review of dominant discourses surrounding state policies that continue to discriminate against and criminalize same-sex sexual relations, transgender identities and expressions is also provided.

In analyzing the negotiations between various stakeholders towards the Beijing Platform for Action in 1995, Petchesky (2001) identified the Vatican-led fundamentalist alliance as expressing the strongest opposition to sexual rights. The taboo against homosexuality, bisexuality and diverse family forms are based on a traditional family discourse that privileges heterosexual marriage and having children (procreation) as the only acceptable form of intimate relations. According to the Holy See, a couple always refers to "the individual man and woman" bonded in marriage which is the basis of family (as cited in Petchesky, 2001). The Vatican-led alliance led a crusade in behalf of "parental rights" and the "family" (Holy See, as cited in Petchesky, 2001). The religious right also utilized an irresponsible sex discourse, blaming homosexuality for the spread of HIV/AIDS, and calling it a "hedonistic mentality unwilling to accept responsibility in matters of sexuality" and "a self-centered concept of freedom" (Catholics for a Free Choice, 1995, as cited in Petchesky, 2001). According to Petchesky (2009),

fundamentalist conservative religious discourses on moral purity are shared by Christians, Islamists (Muslims), and the radical right.

Rubin (1989) had earlier argued how discourses about morality, masculinity and femininity, and family relations shape the public debates around gender and sexuality. A morality discourse, a traditional gender role discourse, and a traditional family discourse dictate what is good and what is bad, what is acceptable and what is not, in terms of gender expression and sexual relations. These discourses seek to maintain traditional masculine and feminine gender roles and preserve the tradition of heterosexual marriage and procreation.

Sullivan (1995) identified several dominant discourses that influence state policies and practices regulating homosexuality. The first is an unnatural discourse which states that homosexuality is an abomination, an aberration, and unnatural (and heterosexuality as the only natural form of being). The second is a pathology discourse that considers homosexuality an illness that requires a cure. The third is a social deviance discourse that treats homosexuality a transgression that deserves punishment. The fourth is a political conservative discourse, as opposed to a political liberal discourse, that combines private tolerance with public disapproval of homosexuality, speaking against persecution of homosexuals but maintaining heterosexist social norms in public.

In ten case studies conducted by Sexuality Policy Watch across eight countries (Brazil, Egypt, India, Peru, Poland, South Africa, Turkey, Vietnam) and two international agencies (World Bank, United Nations), Nathanson, Sember, and Parker (2009) concluded that religion and the state coalesce in nationalist discourses in supporting state policies against sexual and reproductive rights. Nationalist discourses claim that state policies that criminalize same-sex relations, for example, work towards preserving the nation-state. In the case of India, for instance, the “modern Indian state” defended the anti-sodomy law or 377, a law inherited by the Indian state from British colonial rule, to protect the nation (claiming that the nation is at stake!) and preserve Indian culture (claiming that Indian culture is endangered!). A similar nationalist discourse shaped anti-homosexuality in South Africa by asserting that a lesbian, gay, bisexual, transgender or LGBT identity is counter to an African identity. State policies then against LGBT identities defend “Africanness” or an African national identity.

### **Applying Discourse Analysis in Understanding LGBT Policy**

To illustrate the utility of analyzing the discourses surrounding state regulation of sexual orientation and gender identity and expression (SOGIE) and how these shape a nation's policies on LGBT human rights in the context of Southeast Asia -- two key studies are discussed. The first study by Blackwood (2007) is on Indonesia, while the second study by Obendorf (2013) is on Singapore.

### *LGBT discourses in Indonesia*

In a paper entitled "Regulation of sexuality in Indonesian discourse: Normative gender, criminal law, and shifting strategies of control", Blackwood (2007) documented the changing discourses surrounding homosexuality as espoused by the Indonesian state in three historical periods.

In the first period of the New Order in the 1960s and 1970s, the Indonesian state normalized heterosexuality, marriage, and the family by promulgating the concept of the nuclear family as the ideal. It idealized marriage and motherhood as the ideal role for women and naturalized gender differences. With a traditional family discourse, anything outside heterosexual marriage was deemed unacceptable. The Indonesian state's position towards same-sex relations was implied in its assertion of marriage, motherhood, and the family and was shaped by Indonesian traditional values or customary practices alongside Islamic morals or Islamic law.

In the second period, with the prominence of Media in the 1980s and 1990s and the rise in visibility of lesbi (L) + gay (G) media representations, a "moral panic" ensued. Despite the increased visibility of LG media representations, these pathologized homosexuality as a sickness and abnormality and stigmatized LG as "abnormal/sick" vs. normal heterosexuals. LG was seen as a mental illness and as a crime, as "sick and deviant". Faced with international social movements that pushed for LGBT rights as human rights, the Indonesian state's position on homosexuality was to assert that LG is deviant and is not part of Indonesian culture. Coming from a traditional family discourse (that valued family and marriage) and a naturalist discourse (that deemed homosexuality as "unnatural", as outside "natural" manhood/womanhood), the Indonesian state allied with fundamentalist Islamic factions. It argued against homosexuality on the basis of an Indonesian sense of "family values" combined with Islamic morals. Homosexuality was depicted as a product of the West, as immoral, and as unnatural.

In the third period of the Reformasi in the 2000s, the Indonesian state increased its repression of LGBT identities and expressions and criminalized homosexual acts. A growing LGBT movement and democracy movement emerged alongside the rise in religious fundamentalism within the Indonesian state. Conservative Islamic law (shariah) led to the criminalization of homosexual relations by only permitting heterosexual sex within marriage, i.e., between a man and a woman. Homosexual sex became a crime against morality (a sin). Though there is no direct law prohibiting same-sex relations, the Indonesian state indirectly criminalizes same-sex relations through a law that only permits heterosexual sex within marriage. The current situation is that of criminalization and state surveillance of individual behaviors versus a privacy discourse, a liberal discourse, and an individualism discourse. As the question is raised as “who has the power to regulate morality?” with individualism and free choice threatening the stability of the state, there is stronger state repression of homosexuality.

### *LGBT discourses in Singapore*

In another illustration of discourse analysis of state regulation of sexuality in a Southeast Asian country, is the study by Obendorf (2013) of the unique case of Singapore. In a paper entitled “A few respectable steps behind the world: Gay and lesbian rights in contemporary Singapore”, Obendorf (2013) analyzes the unique case of one of the most economically developed country in Southeast Asia that refuses to decriminalize homosexuality.

Using a nationalist narrative or discourse, the Singaporean state contends that it is “okay” to lag behind on the protection of rights of homosexual citizens. As such, the Singaporean Supreme Court has re-affirmed the criminalization of male homosexual sex in the Singapore Penal Code (377) that civil society has sought to repeal. The Singaporean state has decided to continue criminalizing homosexual intercourse and has chosen to censor queer (LGBT) cultural expression.

The Singaporean state’s position has to be understood in the context of its colonial legacy, having inherited 377 from British law, and its assertion of postcolonial independence and statehood. Touted as the “Singapore Model”, the Singaporean system of social and political regulation is said to have led to its independence which consequently led to its economic growth and global success. As such, to survive as a city-state, an efficient authoritarian model is

implemented to create a communitarian social order that allows the nation to survive and the economy to grow.

Alongside the above is a context of a conservative society that promotes the nuclear, heterosexual family of a man + woman + marriage + children. Promoting procreation or reproduction, the Singaporean state views queer (LGBT) identities as non-procreative and non-normative, therefore threatening the survival and viability of the nation or city-state. (Ironically, it is progressive to transsexuals or those who have changed their sex through sexual reassignment surgery or SRS. SRS is legal and transsexuals can change their legal documents and marry. This irony is understood in a discourse that sees transsexuals as conforming to heterosexual norms.)

In addition, fundamental morality or traditional values (Islam, Chinese, Christian) is said to make Singapore distinct from the neo-colonial moral imperialism of the West (with its individualism, economic stagnation, and immorality, e.g., divorce).

The Singaporean case is a situation of state suppression (with its criminal prohibition and social disapproval) versus a vibrant LGBT community (with its empowerment and love as a human need discourse). Singapore's case is a situation of social tolerance as there is criminal prohibition but no actual implementation or police enforcement of the law "as long as you stay in your own space". In keeping with Singapore's "cosmopolitanism, diversity, and sophistication" narrative or discourse; the Singaporean state seeks to keep its "creative" (LGBT) people in the economy by taking a pragmatic approach to the state's regulation of homosexuality.

### **A Call to Problematize LGBT Human Rights in the Philippines**

Discourse analysis can inform a policy analysis of state inclusion of LGBT human rights in Philippine national law. Policy-as-discourse can focus on the role of the state or Philippine government in formulating a national policy on LGBT human rights. In particular, the role of the Legislative, that is, the House of Representative and the Senate, as the branch of government primarily in-charge of national public policy formulation. A discourse analysis approach unpacks the role of the Legislative by looking at how actors in this branch of government engage and interact with each other in formulating a national law or policy. A discourse analysis goes beyond individual actors, political parties, organizations, and institutions and instead locates these actors' discursive practices or text and talk as part of wider discourses or the "rules that

form” or the rules that govern these discursive practices (Parker, 1990,1992; Foucault, 1969; Howarth, 2005). The focus of a policy research then is in analyzing the discourses surrounding state inclusion of LGBT human rights in Philippine national law as articulated by the various actors involved in national policy formulation and decision-making.

A discourse analytical approach understands the exercise of control and power over policy formulation and decision-making. A discourse analysis looks at the power beyond organizations and institutions and what is legitimized by the state and highlights the power of the discourses themselves. Following Foucault’s work, discourses have the power to shape policy proposals, position statements, and speeches, and the power to influence policy decisions (Parker, 1990, 1992; Foucault, 1969; Howarth, 2005).

Discourse-as-policy looks at the complex and continuously evolving nature of the public policy process that in the case of LGBT human rights has spanned decades. It can examine the bills on LGBT human rights formulated and filed in both the House of Representatives and the Senate, the specific social and historical context of the filing of these bills, and the public debates or discursive practices surrounding these bills through time. An analysis that can look at how these various formulations of the problem or issue of LGBT human rights have been discussed, debated, negotiated, and contested through time.

Finally, discourse analysis goes beyond the actors within the Philippine government or the state and locates the public policy process in the wider network of civil society actors in Philippine governance involved in the public policy debate over a national law on LGBT human rights. These include government and non-government actors; civil society groups including LGBT groups, human rights groups, religious or Catholic groups. This reflects the complexity of the web of individual and institutional actors that can participate in, collaborate with, and contest each other in the public policy process. This has led to understanding the various ways in which society is governed, as well as theory building on the very nature of open governance itself.

LGBT human rights groups who are among the actors in Philippine governance, may assert that the Philippine government has the duty to uphold the human rights of LGBT persons as a signatory to international human rights covenants. This rights-based approach in identifying the need for an Anti-SOGI Discrimination Act, provides a frame of the proposed policy as a national commitment to international standards of human rights. The universal human rights discourse, therefore, contributes to constituting the problem or the process of problematization.

Other actors in the public policy debate, for instance, Catholic or religious groups, may oppose an Anti-SOGI Discrimination Act on the grounds of immorality. Arguing on the basis of religious beliefs or religious text, these groups may contest that the behaviors that LGBT persons engage in are immoral. As such, a religious moral discourse may be made more prominent in the public debate on the proposed Anti-SOGI Discrimination Act. As such, a religious discourse may be shaping problem formulation and the process of deciding on a national law that aims to protect LGBT persons from discrimination.

Policy analysis as discourse analysis is deemed a suitable and appropriate approach to understand the national law or public policy formulation and decision-making process surrounding state inclusion of LGBT human rights in the Philippines. The central premise of policy-as-discourse is that policy problems are not neutral, objective realities, but rather, are shaped and constituted within the policy proposals that seek to remedy a given problem (Bacchi, 2000; Cooper, 2006). It recognizes that within policy or policy proposals, language, or more broadly, discourse, provides the frame, parameters, and limits on what can be said and thought with regards a policy problem (Bacchi, 2000; Cooper, 2006). The assumption of the policy-as-discourse approach is that governments are not addressing problems that are out there, waiting to be discovered. Rather, the policy-as-discourse approach asserts that policy problems are shaped by the public policy process (Bacchi, 2000; Cooper, 2006). The focus of policy-as-discourse theorists is not the assumed problem as identified within a given policy, but the process of ‘problematization’ (Bacchi, 2000; Bacchi & Bonham, 2014; Bacchi, 2015).

There is a shift, therefore, from policy analysis as problem-solving to policy analysis as problem-questioning (Bacchi, 2009). This focus on policy-questioning occurs through an examination of where power is located with regards a policy problem. The policy-as-discourse analysis emphasizes the sites of power, where policy shapes, and is shaped by, related discourse. It also recognizes that those who are in position of power or privilege, can more easily participate in shaping discourse, while those not in a position of power or privilege, can be more easily shaped by the discourse (Bacchi, 2000).

Although there is no law that criminalizes LGBT people in the Philippines, LGBT people in the Philippines continue to experience differing forms and degrees of discrimination, stigma, and violence in various spheres of life. The basic human rights of LGBT people are at risk and are being violated. The need for state intervention through a national law to recognize and

protect LGBT human rights is an imperative. A discourse-as-policy approach can be a step towards addressing that imperative.

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