

## “SEX” IN THE WORKPLACE: APPROACHES TO SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN THE WORKPLACE ABSENT AN ANTI-DISCRIMINATION LAW\*

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“Judges shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, **sex**, religion, national origin, caste, disability, age, marital status, **sexual orientation**, social and economic status and other like causes.”

-*Canon 5, § 1, New Code of Judicial Conduct for the Philippine Judiciary*

### INTRODUCTION

What does “sex” mean under our Labor Code? What does it mean when it says that the State should “ensure equal work opportunities regardless

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of *sex...*”<sup>1</sup>? The Labor Code does not define the term, perhaps because it is simple enough – you are either a man or a woman – or is it?

In 2007, Rommel Silverio asked the Supreme Court to approve certain changes in his civil registry record. Rommel, born male, had undergone sex reassignment surgery and wanted to change his name to Mely and his sex to female, to reflect his gender identity. The Court denied Silverio’s petition saying that “sex” under the civil registry laws refers to biological distinctions. Moreover, the Court reasoned that, *to wit*:

Sex is defined as ‘the sum of peculiarities of structure and function that distinguish a male from a female’ or ‘the distinction between male and female.’ Female is ‘the sex that produces ova or bears young’ and male is ‘the sex that has organs to produce spermatozoa for fertilizing ova.’<sup>2</sup>

The Supreme Court said that in the absence of a contrary definition in the civil registry laws, “sex” should be construed as it is commonly used. “The words ‘sex,’ ‘male’ and ‘female’ as used in the Civil Register Law and laws concerning the civil registry (*and even all other laws*) should therefore be understood in their common and ordinary usage, there being no legislative intent to the contrary.”<sup>3</sup> (Emphasis Added) Does “all other laws” include the Labor Code?

This paper argues that the Labor Code cannot but be read differently. The Code, specifically its Article 3, should be read to include lesbian, gay, bisexual, and transgender (LGBT) individuals under its anti-discrimination umbrella.

That LGBTs are protected under the Labor Code is far from being a settled matter. In *Ang Ladlad LGBT Party v. Commission on Elections*<sup>4</sup>, the Supreme Court said that “laws of general application should equally apply to LGBTs”. However, it hastened to add that this finding (in a case involving election law) did not “imply that any other law distinguishing between

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<sup>1</sup> Pres. Dec. No. 442 (1974), art. 3. This is the Labor Code of the Philippines.

<sup>2</sup> *Silverio v. Republic* (hereinafter “Silverio”), G.R. No. 174689, October 19, 2007.

<sup>3</sup> *Id.*

<sup>4</sup> (Hereinafter “Ang Ladlad”), G.R. 190582, 618 SCRA 32, 64-65, April 08, 2010.

heterosexuals and homosexuals<sup>5</sup> under different circumstances would similarly fail.”<sup>6</sup>

Second, a plain reading of some of the provisions of the Code may lead to a conclusion that it proscribes disparate treatment and discrimination based on biological attributes and applicable to women workers only. For instance, the Code makes it illegal to discharge a woman on account of her pregnancy or while on leave or in confinement due her pregnancy.<sup>7</sup> Clearly, the woman in such case is discriminated because she has a uterus.<sup>8</sup>

Third, anti-discrimination bills to protect LGBTs have continually been filed in Congress since the 1990s. All failed to pass. In the 12<sup>th</sup> Congress (2001-2004), a bill was passed by the House of Representatives<sup>9</sup> but the Senate version was not even reported out of committee. There are also pending bills in the 15<sup>th</sup> Congress (2010-2013), but their chances of passing is difficult to ascertain, considering the strong opposition from the religious sector, particularly the Catholic Church leadership.<sup>10</sup> The filing of these bills may be

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<sup>5</sup> The use of the term “homosexual” and not “LGBT” may have been due to a lapse by the *ponente*, considering that he began the paragraph with reference to the act of the COMELEC “differentiating LGBTs from heterosexuals.”

<sup>6</sup> Ang Ladlad, *supra* note 4.

<sup>7</sup> Pres. Dec. No. 442, art. 137(2).

<sup>8</sup> The additional costs that employers incur when an employee becomes pregnant (e.g. salary of temporary replacement worker, cost of the loss of expertise provided by the pregnant employee, maternity benefits) are the main reasons for discrimination against the hiring of women or their promotion to top level positions.

<sup>9</sup> This bill was filed by then Akbayan Partylist Representative Loreta Ann Rosales. She is now the Chair of the Commission on Human Rights, which has become more vocal with respect to human rights protection for LGBTs.

<sup>10</sup> International Gay & Lesbian Human Rights Commission, *Philippines: Religious Opposition Stalls Progressive Legislation* (2008), available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/29.html>. Catholic organizations have filed position papers in Congress, opposing anti-discrimination bills. They include Pro-Life Philippines and Courage (a Catholic ministry with the goal of supporting people with same-sex attractions to “[l]ive chaste lives in accordance with the Roman Catholic Church's teaching on homosexuality”). See Pro-Life Philippines, *Position Paper on House Bill 956*, available at <http://www.prolife.org.ph/news/index.php/2010/01/position-paper-on-house-bill-956/> (last visited: March 22, 2011); Courage Philippines, *Addendum on (sic) the Position Paper of Courage Philippines on House Bill 956 and Senate Bill 11 and other similar bills* (2010), available at <http://couragephilippines.blogspot.com/search/label/anti-discrimination%20bill> (last visited: March 22, 2011).

taken as proof that there is a lacuna in the law that needs to be filled – that the Labor Code, as it now stands, is blind to LGBT discrimination.

This paper<sup>11</sup> extends jurisprudential basis to show that “sex” in the Labor Code, must necessarily include LGBTs because:

- (1) a contrary interpretation would violate the Equal Protection Clause under the doctrine of *relative constitutionality* in *Central Bank Employees Association Inc. v. Bangko Sentral ng Pilipinas*<sup>12</sup> (See Part IV);
- (2) sex discrimination prohibited in Article 3<sup>13</sup> of Labor Code certainly include discrimination due to *sex or gender stereotyping* – a form of discrimination recognized in scattered provisions of the Code and in jurisprudence. Anyone – homosexual, heterosexual, or bisexual, transgender, male or female – can be affected by such stereotyping and is therefore protected by the Labor Code (See Part V); and
- (3) a contrary interpretation would violate our international obligations under, among others, the International Convention on Economic, Social, and Cultural Rights (Part VI).

#### **DEFINING “SEX”: UNDERSTANDING “SEXUAL ORIENTATION” AND “GENDER IDENTITY”**

Before proceeding, we need to clear up the definition of “sex”, “gender”, “sexual orientation”, and “gender identity” Having clear working definitions is critical in understanding the scope of protection being sought here, i.e., who are covered by the protection and what kinds of acts are sought

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<sup>11</sup> A caveat: this paper should not be interpreted to mean that the anti-discrimination bills that are pending in Congress are superfluous. The approaches discussed here are proposed and needed *exactly* due to the absence of such legislation.

<sup>12</sup> (Hereinafter “Central Bank Employees Assoc”) G.R. 148208, 446 SCRA 299, Dec. 15, 2004.

<sup>13</sup> It is the State’s policy to “afford protection to labor, promote employment, ensure equal work opportunities regardless of *sex*, race, or creed...”

to be prohibited. Clearing up these concepts will also show us the intersection of sex and gender, which in turn, shows the link between sex-based discrimination and the disparate treatment of LGBTs.

Also, in the absence of an anti-discrimination law, judges and jurists will likely be asked to infer and deduce (the presence or lack of) public policy on LGBT discrimination from statutes and regulations<sup>14</sup> that make use of some or all of these terms. These laws and regulations do not provide definitions or illustrations to guide those that will interpret them. Therefore, we have to rely on the fields of psychology, health, gender studies and human resource and labor relations, where these concepts have been extensively discussed in order to clarify their meanings.

### *Sex and Gender*

“Gender” is often times interchanged with “sex” during casual conversations and even in formal mediums (court decisions, journals, papers, etc.). “However, in scientific, medical, legal or political and even religious discourse, the discrepant use of the terms can lead to confusion and a lack of understanding.”<sup>15</sup>

“Sex”, as defined in *Silverio*, refers to biological distinctions between male and female. On the other hand, gender “refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.” “Male” and “female” are sex categories, whereas “feminine” and “masculine” are gender categories.<sup>16</sup> But though “sex” is not the same as “gender”, these concepts are intertwined, because traditional gender roles activities, or the type of behavior that a person adopts or is expected to take up - is based on society’s conception of that person’s sex. In Philippine society, for example, men are traditionally expected to be the breadwinner, whereas women are expected to be the homemakers, considering their “nurturing” qualities.

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<sup>14</sup> Part IV provides a more extensive discussion of these laws and regulations.

<sup>15</sup> Milton Diamond, *Sex and Gender are Different: Sexual Identity and Gender Identity are Different*, 7(3) *Clinical Child Psychology and Psychiatry* 320, 321 (2002).

<sup>16</sup> World Health Organization, *What do we mean by "sex" and "gender"?*, available at <http://www.who.int/gender/whatisgender/en/> (last visited: March 1, 2011).

Any discussion on sexual orientation and gender identity discrimination requires an understanding of sex and gender roles because discrimination against LGBTs is due primarily to their non-conformity to traditional gender roles and society's expectation of what is a man and woman.

### *Sexual Orientation and Gender Identity*

There is also confusion with regard to the concepts of sexual orientation and gender identity. The decisions of Philippine courts, for instance, show an imprecise understanding of these terms. In *Ang Ladlad*, for example, the Supreme Court interchanged "LGBTs" with "homosexuals" several times,<sup>17</sup> although *not all* LGBTs are homosexuals. Moreover, the Court seems to view "lesbians, gay, bisexuals, and transgender" as categories of *sexual orientations* and unaware of their gender identity aspects.

"Sexual orientation refers to one's attraction to men, women, both or neither, whereas gender identity refers to one's sense of oneself as male, female, or transgender<sup>18</sup>."<sup>19</sup> Two anti-discrimination House bills filed in the present 15<sup>th</sup> Congress recognize the distinctions between these two concepts. The definitions in House Bills 515 and 1483 mirror each other, thus:

Sexual orientation refers to the direction of emotional sexual attraction or conduct. This can be towards people of the same sex (homosexual orientation) or towards people of both sexes (bisexual orientation) or towards people of the opposite sex (heterosexual orientation).

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<sup>17</sup> *Ang Ladlad*, *supra* note 4, at 60-61, 65.

<sup>18</sup> "[Transgender] does *not* exclusively refer to transsexual persons, i.e. those who are transitioning or have transitioned from one gender to another; all transsexual persons are transgender, but not all transgender persons are transsexual. A transgender person is *anyone* who fully accepts a gender identity--androgynous, hermaphroditic, intersex, transsexual, third gender, bigender, or otherwise gender non-conformist--does not match his or her assigned gender." Tom Head, *Transgender*, ABOUT.COM, available at <http://civilliberty.about.com/od/gendersexuality/g/transgender.htm> (last visited: March 2, 2011).

<sup>19</sup> American Psychological Association, *Gender Variance, and Intersex Conditions, Answers to Your Questions About Transgender Individuals and Gender Identity*, 1-2 (2006), available at <http://www.lgbt.ucla.edu/documents/APAGenderIdentity.pdf> (last visited: 21 January 2012).

Gender Identity refers to the personal sense of identity as characterized, among others, by manners of clothing, inclinations, and behavior in relation to masculine and feminine conventions. A person may have a male or female identity with the physiological characteristics of the opposite sex.<sup>20</sup>

A person may be heterosexual, homosexual or bisexual (her/his sexual orientation) **and** may have a male, female or transgender identity (his/her gender identity). There is no one-to-one correspondence between a sexual orientation and a particular gender identity, unlike popular depictions of LGBTs in the Philippines. For instance, some homosexual and bisexual men may be masculine and others are quite feminine. The same is true of homosexual and bisexual women.

On the other hand, *transgender*<sup>21</sup> persons are not necessarily homosexuals. In *Normal*, a 2003 film, Roy Applewood (played by Tom Wilkinson) shocks his family and co-workers and sent ripples through his community, when he reveals that he intends to transition into a woman named Ruth. But Roy, though he identifies as female (i.e. his gender identity), does not have a homosexual orientation (i.e. not sexually attracted to males). “Usually people who are attracted women prior to transition continue to be attracted to women after transition, and people are attracted to men prior to transition continue to be attracted to men after transition.”<sup>22</sup>

As pointed out earlier, a common attribute among LGBTs is their *gender non-conformity*. They do not conform to traditional notions of male or

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<sup>20</sup> H. No. 515, 15<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2010), Sec. 3(a); H. No. 1483, 15<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2010), Sec. 3(a).

Both bills were filed by party-list representatives. HB 515 was filed by Representatives Kaka Bag-ao and Walden Bello of *Akbayan*, while HB 1482 was filed by Representatives Teodoro Casiño and Neri Colmenares of *Bayan Muna*.

<sup>21</sup> “An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Use the descriptive term (**transgender, transsexual, cross-dresser**, FTM or MTF) preferred by the individual. Transgender people may or may not choose to alter their bodies hormonally and/or surgically.” See Gay and Lesbian Alliance Against Defamation, Inc., *Media Reference Guide*, 8 (2010), available at <http://www.glaad.org/files/MediaReferenceGuide2010.pdf> (last visited: March 20, 2011).

<sup>22</sup> American Psychological Association *supra* note 19, at 2 (2006).

female roles and the “natural” or “proper” sexual attractions that they should have or the type of behavior that they ought to manifest.<sup>23</sup>

The question is whether our labor laws, especially the Labor Code, prohibit discrimination against persons with such gender non-conforming attributes.

### THE PROBLEM OF DISCRIMINATION

The fear of discrimination is a shared experience among members of the lesbian, gay, bisexual, and transgender community anywhere in the world.<sup>24</sup> The fear is that they may not be recognized for their efforts and the merits of their work; treated unfairly and differently in the workplace; and experience discrimination in hiring, promotion and provision of benefits or worse, suffer dismissal.

“This is the essence of discrimination: forming opinions about others not based on their individual merits but rather their membership in a group with assumed characteristics,” said Tom Hanks in the film *Philadelphia*, where he played a gay lawyer fired by his firm for his sexual orientation and for having AIDS.

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<sup>23</sup> See Melinda Chow, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 Harv. J.L. & Gender 207, 215 (2005).

<sup>24</sup> Employment discrimination is just one of the forms in which LGBTs are mistreated in various parts of the world. Amnesty International notes that “...millions of people across the globe face execution, imprisonment, torture, violence and discrimination because of their sexual orientation or gender identity. The range of abuses is limitless: women raped to “cure” their lesbianism, sometimes at the behest of their parents; individuals prosecuted because their private and consensual relationship is deemed to be a social danger; loss of custody of their children; individuals beaten by police; attacked, sometimes killed, on the street – a victim of a “hate crime”; regular subjection to verbal abuse; bullying at school; denial of employment, housing or health services; denial of asylum when they do manage to flee abuse; raped and otherwise tortured in detention; threatened for campaigning for their human rights; driven to suicide; [and] executed by the state.” See Amnesty International, *Sexual Orientation and Gender Identity*, available at <http://www.amnesty.org/en/sexual-orientation-and-gender-identity> (last visited: March 3, 2011). For reports of discrimination and hate crimes against LGBTs around the world, See Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8(2) Hum. Rts L. Rev. 207, 208-214 (2008).

*A. Extent of discrimination*<sup>25</sup>

There are no statistics to give us the extent of sexual orientation and gender identity discrimination in the Philippines. The dearth of information is itself a sign of another facet of the problem. Government agencies that should be involved in issues of sexual orientation and gender identity discrimination – the Department of Labor and Employment, the National Labor Relations Commission, the Civil Service Commission, and even the Commission on Human Rights – do not aggregate reports of LGBT discrimination. Sexual orientation and gender identity discrimination is a category of workplace discrimination that has not become part of mainstream policy dialogues.

What we lack in figures is compensated by both anecdotal and documented cases of discrimination. Lesbian Advocates Philippines (LEAP!)<sup>26</sup> documented 10 case studies of gender discrimination and found strong evidence of workplace discrimination against lesbians. “Discrimination can occur in the process of hiring, in the assigning of wages, in the granting of benefits and promotions, and the retention of lesbian employees”, the report said.<sup>27</sup>

In 2002, Newsbreak reported 4 accounts of discrimination against gay men, including that of Philip Castro:

[Castro], 27, thought he had bagged the job. Witty and confident, he engaged the woman interviewer in an animated discussion. He was applying as a medical representative for a big pharmaceutical firm and thought his warm personality would please the interviewer.

He had another reason to be confident. He had topped the aptitude and psychological tests earlier that day, besting some 30 other applicants. He was being presumptuous. The interviewer began asking him what he thought of gays entering the military.

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<sup>25</sup> The evidence of discrimination provided herein is preliminary. Any test case to remedy sexual orientation and gender identity discrimination will require more extensive data and information and testimony of experts (sociologists, human resource managers, and others) in order to clearly put on record the ways LGBTs can be discriminated in the workplace.

<sup>26</sup> LEAP! is a non-government organization (NGO) that advocates for lesbian rights since 1990.

<sup>27</sup> LESBIAN ADVOCATES PHILIPPINES, UNMASKED: FACES OF DISCRIMINATION AGAINST LESBIANS IN THE PHILIPPINES 140 (2004).

Dumbfounded, he replied that it was unfair to ban homosexuals from the Armed Forces.

Then she asked if I'm going to have a girlfriend, if I'm planning to have a family in the future, if I am willing to act like a man, questions which I thought were out of bounds. Those questions did not have anything to do with the job I was applying for." He knew he had lost the job. The company later sent its regrets. **Castro knew he was rejected because he is openly gay, although the company did not say so.** He also knew that had he been a closet gay, he would have been a welcome addition to the company.<sup>28</sup> (Emphasis Added)

Newsbreak observed that Castro's experience is shared by hundreds of gay men. "Hundreds of jobless gays have been rejected outright or silently turned down, and given vague excuses why they are not fit for the job."<sup>29</sup>

In 2009, four graduate students of the Ateneo de Manila University's psychology department conducted a survey of 120 respondents (60 identified as heterosexuals and 60 identified as homosexuals). They found that homosexual respondents felt the need to work harder in order to prove their qualifications to their employers and that they are less prioritized in promotions compared to their straight<sup>30</sup> colleagues. They also thought that they were penalized more than straights for the same mistakes committed.<sup>31</sup>

### *B. Official recognition of discrimination against LGBTs*

In recent years, there had been a shift in government's stand with respect sexual orientation and gender identity discrimination. From sheer silence, there are now a number of official government pronouncements recognizing discrimination faced by the LGBT community.

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<sup>28</sup> Aries Rufo, *Silent Discrimination against gays* (2002), available at <http://www.newsbreak.ph/2002/07/21/silent-discrimination/>

<sup>29</sup> *Id.*

<sup>30</sup> Meaning, heterosexuals.

<sup>31</sup> Kristine Concordia et al., *No gays allowed*, PHIL. DAILY INQUIRER, Feb 22, 2009, available at <http://business.inquirer.net/money/features/view/20090222-190431/No-gays-allowed> (last visited: January 21, 2012).

For instance, in an August 2010 forum, the director of the labor department's Institute of Labor Studies observed that "much has already been written and debated on gender discrimination among women, but little has yet to be heard on discrimination against LGBTs. Despite their multifaceted contributions to many areas of Philippine life, these workers are still a marginalized group in the workplace."<sup>32</sup>

After years of tepid support for LGBT rights protection, the Commission on Human Rights under Chairperson Leila de Lima took strong steps in support of the LGBT community, including filing a brief with the Supreme Court in support of the accreditation of the LGBT party list in *Ang Ladlad LGBT Party v. Commission on Elections*.<sup>33</sup> De Lima, herself, said that LGBT community "remain[s] to be one of the sectors most vulnerable to human rights abuses, such as discrimination in the workplace and even harassment in educational institutions."<sup>34</sup>

Even the Supreme Court noted "that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal."<sup>35</sup> "[T]hrough the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval. It is not difficult to imagine the reasons behind this censure – religious beliefs, convictions about the preservation of marriage, family and procreation, even dislike or distrust of homosexuals themselves and their perceived lifestyle."<sup>36</sup>

Official recognition of LGBT discrimination has a direct bearing on any future test case, as they can provide the factual basis, for the protection sought by the litigant and support the claim that LGBTs are discriminated *as a class*.

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<sup>32</sup> Department of Labor Employment, *DOLE holds labor forum on workplace and gender discrimination* (2010), available at <http://www.dole.gov.ph/secondpage.php?id=1296> (last visited: January 21, 2012).

<sup>33</sup> The Comelec denied the right of Ang Ladlad LGBT Party to run in the party-list elections because, *inter alia*, it advocates sexual immorality. The LGBT party questioned the ruling by filing a petition for certiorari before the Supreme Court. See Part IV for a discussion of Ang Ladlad *supra* note 4.

<sup>34</sup> *CHR vows to promote gay, lesbian rights*, PHIL. DAILY INQUIRER, Dec 6, 2008, available at <http://newsinfo.inquirer.net/breakingnews/nation/view/20081206-176498/CHR-vows-to-promote-gay-lesbian-rights> (last visited: January 21, 2012).

<sup>35</sup> Silverio, *supra* note 2.

<sup>36</sup> Ang Ladlad, *supra* note 4.

**EQUAL PROTECTION FOR LGBTs: APPLYING THE PRINCIPLE  
RELATIVE CONSTITUTIONALITY TO ARTICLE 3 OF THE LABOR CODE**

*A. Relative Constitutionality*

In *Central Bank Employees Association Inc. v. Bangko Sentral ng Pilipinas*<sup>37</sup>, the Supreme Court was asked to decide on the constitutionality of the last proviso Section 15(c) Article II of Republic Act 7653 (the New Central Bank Act). It provides that the compensation and wage structure of Central Bank's rank and file employees shall be in accordance with the rates prescribed under the Salary Standardization Law (Republic Act 6758).

The employees' association presented an equal protection challenge to the Court, pointing out that laws passed subsequently to the Central Bank Act amended the charters of seven (7) other government financial institutions (GFIs)<sup>38</sup> exempting the rank and file of these GFIs from the coverage of the Salary Standardization Law. The association argued that continuing application of the assailed proviso discriminated against the Central Bank rank and file vis-à-vis workers who are similarly situated in other GFIs.

The Supreme Court struck down the assailed section of Republic Act 6758. It said that though the last proviso of the Section 15 (c) of RA 7653 [i.e. dissimilar compensation schemes between rank and file and the officers of the Central Bank] was valid at the time it became law, it became void at a subsequent point of time, in light of "altered circumstances" or "changed conditions". The Court referred to this as the concept of *relative unconstitutionality*.<sup>39</sup> The assailed proviso in relation the subsequent laws passed by Congress indirectly denied the Central Bank rank and file the equal protection of the laws.

*The ... subsequent enactments, however, constitute significant changes in the circumstance that considerably alter the*

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<sup>37</sup> Central Bank Employees Assoc., *supra* note 12.

<sup>38</sup> The seven GFIs and their respective charters are: Land Bank of the Philippines [Rep. Act. No. 7907 (1995)]; Social Security System [Rep. Act. No. 8282(1997)]; Small Business and Guarantee and Finance Corporation [Rep. Act. No. 8289 (1997)]; Government Service Insurance System [Rep. Act. No. 8291 (1997)]; Development Bank of the Philippines [Rep. Act. No. 8523(1998)]; Home Guarantee Corporation [Rep. Act. No. 8763(2000)]; and Philippine Depositors Insurance Corporation [Rep. Act. No. 9302(2004)].

<sup>39</sup> Central Bank Employees Assoc., *supra* note 12, at 347-48.

*reasonability of the continued operation of the last proviso of Section 16 (c), Article II of the Republic Act No. 7653, thereby exposing the proviso to more serious scrutiny. This time, the scrutiny relates to the constitutionality of the classification – albeit made indirectly as a consequence of the passage of eight<sup>40</sup> other laws – between the rank-and-file of the BSP and seven other GFIs. The classification must not only be reasonable, but must also apply equally to all members of the class. The proviso may be fair on its face and impartial in appearance but it cannot be grossly discriminatory in its operation, so as practically to make distinctions between persons who are without differences.*<sup>41</sup> (Emphasis Added)

The Court explained that employees of government financial institutions have been traditionally treated as a distinct class from other government agencies.<sup>42</sup> Now, as a result of several legislative acts, Congress created a subclass among GFI employees (i.e. the Central Bank's rank and file. "*Alikes are being treated as unalikes without any rational basis.*"<sup>43</sup>)

The Court explained that inequality of treatment suffered by the Central Bank rank and file cannot be justified on the assertion that the different benefits given to the rank-and-file rests on the policy determination by Congress. The assertion fails to appreciate that "what is at issue... is not the declared policy of each law *per se*, but the oppressive results of Congress' inconsistent and unequal policy towards the [Central Bank] rank-and-file and of those of the seven other GFIs.

There are four (4) elements that were present when the Supreme Court applied *relative constitutionality* in *Central Bank Employees Association*:

- (1) There is a provision of law being assailed, that is valid on its face and as applied, at the time of its effectivity.
- (2) There are subsequent laws whose provisions are *in pari materia* to that of the assailed provision.

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<sup>40</sup> The Supreme Court added an eight law to the seven cited by the petitioners. The Court noted that Rep. Act. No. 8799 (2000) also exempted the employees of the Security and Exchange Commission from the coverage of the Salary Standardization Law.

<sup>41</sup> Central Bank Employees Association, *supra* note 12, citing *People v. Dela Piedra*, G.R. 121777, 350 SCRA 359 January 24, 2001.

<sup>42</sup> Central Bank Employees Association, *supra* note 12, at 367.

<sup>43</sup> *Id.*, at 369.

- (3) There is a different treatment of the persons covered in the assailed provision and the persons covered in the subsequent legislation, *even though all of them belong to the same distinct class*, resulting in “invidious discrimination” against the first.
- (4) Subsequent legislation ought to provide benefits/protection to *most or a substantial part of the same distinct class* in order to be open to an attack for invidious discrimination.<sup>44</sup>

All these elements are present, if we look at Article 3 of the Labor Code in relation to recent legislation providing protections to LGBTs.

### *B. Article 3 of the Labor Code*

As explained earlier, the anti-discrimination clause in Article 3 of the Labor Code and its implementing articles fail to *explicitly* protect members of the LGBT community against workplace discrimination. This, by itself, does not make the said provision assailable on equal protection grounds.

However, since the Labor Code became effective, national policies had not been stagnant with respect to sexual orientation and gender identity discrimination.<sup>45</sup> Legislation and administrative regulations protecting LGBT workers, both in the private and public sectors, have been put in place.

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<sup>44</sup> I doubt if the Court would reach the same conclusion in *Central Bank* if only the rank-and-file of 2 or 3 GFIs were exempted from the coverage of the Salary Standardization Law. In this hypothetical scenario, the discriminatory effect of subsequent legislation may not be that palpable.

<sup>45</sup> There are also developments at the local government and organizational levels. For instance, Quezon City Ordinance No. SP-1309 (2003) makes it unlawful to commit discriminatory acts against LGBTs “in the matter of hiring, treatment, promotion or dismissal in any office [in the City], whether in the government or the private sector.” The Social Security System, a government-owned and controlled corporation, prohibits discrimination against SSS members, employers, SSS officials or employees “by word or conduct, bias or prejudice based on race, religion, national or ethnic origin, gender, belief or political affiliation, **sexual orientation**, age, marital status, color and mental or physical disability.” Section 8(C), Code of Ethical Standards for Social Security System Officials and Employees [SSC Resol. No. 376 (July 10, 2008)].

These subsequent laws and regulations have provided *enforceable* workplace protection for a *substantial number of LGBT workers*. Public sector employees, in general, are protected under Civil Service regulations. Female police officers and all public social workers are covered by specific legislation. In the private sector, workers living with HIV-AIDS and women are afforded similar protection.

### *C. Subsequent Legislation Protecting LGBTs*

#### *Police Force*

The *Philippine National Police Reform and Reorganization Act of 1998* requires the National Police Commission (Napolcom) to “formulate a gender sensitivity program...to include but not limited to the establishment of equal opportunities for women in the PNP, the prevention of sexual harassment in the workplace, and **the prohibition of discrimination on the basis of gender or sexual orientation.**”<sup>46</sup> (Emphasis Added)

One can argue that Section 59, above, only protects LGBT women (i.e. lesbians, bisexuals, and female-to-male transgender persons) in the PNP because it is premised on providing “equal opportunities for women” and in light of the other sections in the same title where Section 59 is found – Section 58 (prioritization of women for recruitment) and Section 61 (on promotion of women in the force). Moreover, Section 31, also *in pari materia*, requires that the promotion system “shall be *gender fair* and shall ensure that *women members of the PNP* shall enjoy equal opportunity of promotion.” (Emphasis Added)

However, there is no doubt as to the enforceability of the non-discrimination clause in Section 59 because there is penalty clause under Section 60. Any personnel who violate the established rules and regulations regarding gender sensitivity and gender equality shall be suspended without pay for not less than thirty (30) days and shall undergo gender sensitivity seminar or training. If the personnel violate the rules more than twice, he/she shall be demoted in rank or dismissed from the PNP.

In view of these provisions in the PNP Reorganization Act, it is surprising to find that under Napolcom Memorandum Circular No. 2005-002,

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<sup>46</sup> Rep. Act No. 8551, § 59 (1998).

a police officer can be administratively discharged for sexual perversion, including “latent and overt homosexuality.”<sup>47</sup> The memorandum places homosexuality under “neurological and psychiatric disorders” that make a person unsuitable for service. This is exactly the type of discrimination – the unfounded perception that LGBT people are not fit to perform their jobs and public service due to their sexuality and identity - which Section 59 of the PNP Reorganization Act seeks to strike down. This invidious categorization of homosexuals in the memorandum circular is clearly *ultra vires*.

As an aside, the inclusion of the homosexuality as a psychiatric disorder is also not supported by science. As early as 1974, the American Psychiatric Association has removed homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>48</sup> The American Psychological Association added its concurrence, saying in 1975 that “[h]omosexuality per se implies no impairment in judgement, stability, reliability, or general social and vocational capabilities.” The American Psychological Association also urged mental health professionals “to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.”<sup>49</sup>

### Social Workers

Under the *Magna Carta for Public Social Workers*, public social workers have the right to be protected from “discrimination by reason of sex, *sexual orientation*, age, political or religious beliefs, civil status, physical characteristics/disability, or ethnicity...”<sup>50</sup> (Emphasis Added) Unlike the PNP Reorganization Act, this law protects all LGBT public social workers, regardless of their (biological) sex.

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<sup>47</sup> Napolcom Memo. Circ. No. 2005-002, § 14.

<sup>48</sup> *Facts About Homosexuality and Mental Health*, UC DAVIS, available at [http://psychology.ucdavis.edu/rainbow/html/facts\\_mental\\_health.html](http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html) (last visited: March 1, 2010).

<sup>49</sup> Conger, J.J. (1975). Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives. *American Psychologist*, 30, 620-651.

<sup>50</sup> Rep. Act No. 9433, § 17 (2007).

This right against discrimination is also enforceable and not a mere declaration of policy. Violation of this right may result in a fine of P20,000-40,000 or imprisonment of not more than one (1) year , or both.<sup>51</sup>

### Civil Service Regulations

Civil Service Commission's (CSC) Office Memorandum 29-2010, provides a system of procedure that prohibits discrimination against LGBTs applying for civil service examinations. "There should be equal treatment/regard accorded to them [LGBTs], leaving no room for feelings of discrimination. Unnecessary remarks or reactions should be avoided."<sup>52</sup>

The Office Memorandum is premised on "upholding the principles of equality of rights and respect for the inherent dignity and worth of a human being regardless of gender identity and sexual orientation."<sup>53</sup>

The CSC *Revised Policies on Merit Promotion Plan* also states that there shall be "no discrimination in the selection of employees on account of **gender**, civil status, disability, religion, ethnicity, or political affiliation."<sup>54</sup>

According to Noreen Boots Gocon-Gragasin, CSC Director for Personnel Management and Development, there has been no case in which the CSC has been asked to interpret the said section of the *Merit Promotion Plan*. Nevertheless, it is viewed as a protection for LGBTs bureaucracy within the Commission.<sup>55</sup>

### Philippine AIDS Prevention and Control Act of 1998

Republic Act 8504, which *covers the private and public sectors*, prohibits employment discrimination against people who actually have, suspected or perceived to have the human immunodeficiency virus (HIV).

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<sup>51</sup> § 24.

<sup>52</sup> CSC Office Memo. No. 29 (2010), par.2 (1).

<sup>53</sup> *Id.*, at par. 1.

<sup>54</sup> CSC Memo. Circ. No. 3 (2001).

<sup>55</sup> Interview with Noreen Boots Gocon-Gragasin, Director for Personnel Management and Development of Civil Service Commission, Quezon City, February 16, 2010.

“Discrimination in any form from pre-employment to post-employment, including hiring, promotion or assignment, based on the actual, perceived or suspected HIV status of an individual is prohibited. Termination from work on the sole basis of actual, perceived or suspected HIV status is deemed unlawful.”<sup>56</sup> Neither shall “the right to seek an elective or appointive public office...be denied to a person with HIV”.<sup>57</sup>

This Act is very relevant, especially to male homosexuals and bisexuals considering that men-who-have-sex-with-men are one of the groups most vulnerable to HIV infection.<sup>58</sup>

### *Magna Carta for Women*

Public and private entities and individuals are also liable for acts of sexual orientation and gender identity discrimination under the recently-passed *Magna Carta for Women*.<sup>59</sup> Government officers can be charged administratively. If a private organization or individual commits this violation, the person directly responsible for the violation shall be liable to pay damages.<sup>60</sup>

Section 4(b) of the Act defines “discrimination against women” as:

[A]ny **gender-based distinction**, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, **economic**, social, cultural, civil, or any other field.

It includes **any act or omission, including by law, policy, administrative measure, or practice, that directly or indirectly excludes or restricts women in the recognition and promotion**

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<sup>56</sup> Rep. Act No. 8504, § 35 (1998). This is the Philippine AIDS Prevention and Control Act of 1998.

<sup>57</sup> § 37.

<sup>58</sup> Philippine National Aids Council, *Snapshot: HIV/AIDS in the Philippines*, available at [http://www2.doh.gov.ph/naspcp/download/policies/MWP/JP\\_8\\_HIVSnapshot.pdf](http://www2.doh.gov.ph/naspcp/download/policies/MWP/JP_8_HIVSnapshot.pdf) (last visited: February 28, 2010).

<sup>59</sup> Rep. Act No. 9710, § 35 (2009).

<sup>60</sup> § 41.

of their rights and their access to and enjoyment of opportunities, benefits, or privileges.<sup>61</sup> (Emphasis Added)

Protection for LGBTs is found in the proviso of Section 4(b) which states that “**discrimination compounded by or intersecting with other grounds, status, or condition**, such as ethnicity, age, poverty, or religion shall be considered discrimination against women.” (Emphasis Added)

“[O]ther grounds, status, or condition” in Section 4(b) covers sexual orientation, in view of Section 3 of the same act, which lists sexual orientation as one of the “status as established by human rights standards.” Section 3 reads:

“All individuals are equal as human beings by virtue of the inherent dignity of each human person. **No one, therefore, should suffer discrimination on the basis of ethnicity, gender, age, language, sexual orientation, race, color, religion, political, or other opinion, national, social, or geographical origin, disability, property, birth, or other status as established by human rights standards.**”<sup>62</sup> (Emphasis Added)

The *Magna Carta* also requires the State to pursue measures to eliminate discrimination against women in the military, police and similar services. However, similar to the PNP Reform and Reorganization Act, the anti-discrimination clause under the *Magna Carta* may be construed as applicable only to lesbians, bisexual women, and female-to-male transgenders.

#### *D. Subsequent legislation and regulations results in unequal protection of the laws for LGBTs*

Despite the benefits and protection provided by the preceding laws and regulations to LGBTs, their presence in the books actually raise an equal protection question. What distinguishes LGBTs working in the fields protected by these legislation from others working in sectors with no similar anti-discrimination protection? Does withholding the said guarantees to *some* LGBT workers constitute disparate treatment that can be struck down in an equal protection challenge? Specifically, does the failure of Article 3 of the Labor Code to provide protection to LGBTs amounts to a violation of the equal

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<sup>61</sup> § 4(b).

<sup>62</sup> § 3.

protection of the law in light of cumulative effects of subsequent legislation and regulations protecting *most* workers from sexual orientation and gender identity discrimination?

Like in *Central Bank Employees Association*, we are not looking at the “specific exercise *in and by itself*” of Article 3 of the Labor Code but also “as to the *legal effects* brought about by [subsequent] separate [policy] exercises – albeit indirectly and without intent.”<sup>63</sup>

The laws and regulations that came subsequent to the Labor Code provided protection to substantial members of the LGBT community. In fact, LGBT males in the private sector and in the military, police and similar services are the only ones left without protection against discrimination. These policy changes have resulted in altered conditions that created a subordinate class among LGBTs, who are still left without protection and recourse in law against invidious practices by employers – a case of invidious discrimination.

The discriminatory impact on *some* LGBTs, though it occurred gradually and progressively, cannot stand constitutional muster<sup>64</sup> and ought to be struck down on equal protection grounds, in line with *Central Bank Employees Association*. It follows that Article 3 of the Labor Code can no longer be interpreted in the traditional way as to exclude protection from LGBTs, without running afoul of the Equal Protection Clause.

One may argue that in *Central Bank Employees Association*, all the laws construed by the Court were *special* legislation. In *Central Bank Employees Association*, a law that *specifically* govern the employee remuneration of one organization was interpreted vis-à-vis other laws that specifically cover the employees of *distinct though similar* organizations. Here, we are arguing that the operation of a provision of a *general* law (i.e. the Labor Code) became unconstitutional with the passage of several *special* laws. But a closer reading of *Central Bank* show that the special nature of the laws construed in the case did not play a role in arriving at the Court’s ruling. What mattered was that the laws had an impact on a distinct class of persons and that their progressive effect was that a segment of that class was treated differently from the rest.

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<sup>63</sup> *Central Bank Employees Association*, *supra* note 44.

<sup>64</sup> *Central Bank Employees Assoc.*, *supra* note 12.

### *E. LGBTs as a distinct class*

Questions may also be raised whether or not LGBTs belong to a distinct class that can be given protection via an equal protection challenge. Remember that in *Ang Ladlad*, a plurality of the Supreme Court justices refused to accord a class status to LGBTs.

However, the majority decision did not necessarily close the door to a different finding in the future. Justice Del Castillo said that the Court was “not prepared to single out homosexuals<sup>65</sup> as a separate class meriting special or differentiated treatment. [The Court has] **not received sufficient evidence to this effect, and it simply unnecessarily to make such a ruling**” in the [present] case.<sup>66</sup> (Emphasis Added)

A test case should take advantage of these openings in the majority decision. The record of the case must be filled with studies, statistics and expert testimonies showing that LGBTs constitute a discriminated class and are powerless [under the law] to defend their jobs and their right to a decent life. The Court must also be reminded of its own findings “that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal”<sup>67</sup> and that “through the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval.”<sup>68</sup>

By proving the history and extent of discrimination faced by LGBTs, the group stigma suffered its members, and the urgent need to provide legal remedies for this vulnerable sector, the Court may be pressed into establishing a protected class status for LGBTs, which the majority in *Ang Ladlad* thought unnecessary to do in that instance.

In addition, recent policy developments would show the Court that the legislature has seen it fit to classify LGBTs as belonging to the same class

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<sup>65</sup> It is worth repeating that the Court’s use of “homosexual” and not “LGBTs” seems to be an unintended lapse on the part of the *ponente*, considering that he began the quoted paragraph with reference to the COMELEC’s act of “differentiating LGBTs from heterosexuals.”

<sup>66</sup> *Ang Ladlad*, *supra* note 4, at 65.

<sup>67</sup> Silverio, *supra* note 2.

<sup>68</sup> *Ang Ladlad*, *supra* note 4, at 60.

and meriting special state protection. Section 6 of Republic Act 9851 (Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes Against Humanity), for instance, includes among other crimes against humanity “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, **sexual orientation** or other grounds that are universally recognized as impermissible under international law...” (Emphasis Added) It shows that the State is of the opinion that LGBTs can be targeted or suffer harm as part of a distinct group.

### SEX STEREOTYPES AGAINST LGBTs: PROSCRIBED UNDER ARTICLE 3 OF THE LABOR CODE

As said earlier, the Labor Code only uses the word “sex” in its anti-discrimination clause (“The State shall...ensure equal work opportunities regardless of *sex*, race or creed...”).<sup>69</sup> In its dictionary definition, sex is a categorization based on physiological attributes “such as sex chromosomes, gonads, sex hormones, internal reproductive structures, and external genitalia.”<sup>70</sup>

Indeed, there are cognate provisions of the Labor Code that prohibits discrimination based on *biological* distinctions. For instance, the Code makes it illegal to discharge a woman on account of her pregnancy or while on leave or in confinement due to her pregnancy.<sup>71</sup> It is also illegal to discharge or refuse admission of such woman upon returning to her work for fear that she may be pregnant again.<sup>72</sup> Contractual stipulations against marriage – unlawful under Article 136 of the Labor Code<sup>73</sup> – have also been used to discriminate against

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<sup>69</sup> Pres. Dec. No. 442, art. 3.

<sup>70</sup> American Psychological Association Task Force on Gender Identity, Gender Variance, and Intersex Conditions, Answers to Your Questions About Transgender Individuals and Gender Identity 1(2006).

<sup>71</sup> Pres. Dec. No. 442, art. 137(2).

<sup>72</sup> Art. 137(3).

<sup>73</sup> Philippine Telegraph and Telephone Co. v. National Labor Relations Commission (hereinafter “Philippine Telegraph”), G.R. No. 118978, May 23, 1997. *cf.* Glaxo Duncan Association of Detailman-PTGW v. Glaxo Welcome Inc. (hereinafter “Glaxo Duncan Association”), G.R. No. 162994, September 17, 2004 where the Supreme Court upheld a company rule that disallows the employees of Glaxo from having personal or marital relationships with employees of competitor companies. Glaxo’s policy passed the

women, who may become fact that women have uteri; whereas men have none. However, to say that the Article 3 only prohibits discrimination based on biological attributes is incorrect.

### *A. Discrimination Due to Sex Stereotyping*

Statistics do provide evidence of discrimination rooted in biological attributes. Government data show that unemployment among women aged 15-34 is higher compared to men. These point to an implied bias against women, most likely due to higher costs incur by employers in paying for maternity benefits, paid leaves and other benefits associated with motherhood.<sup>74</sup>

However, “biology provides little insight into the boundaries of sex discrimination. Plaintiffs can rarely claim discrimination on the basis of actual body parts; cases involving the woman’s uterus seem to be the only examples. Stereotypes at the heart of sex discrimination...cannot be explained by descriptions of a plaintiff’s genitalia alone.”<sup>75</sup>

Biology does not fully explain why women face discrimination in hiring and why they are often the first to get laid off.<sup>76</sup> It would not explain why men<sup>77</sup> would be banned from being hired as flight attendants<sup>78</sup> or why

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*reasonableness test* used by the Court – the policy protects the company against the possibility that a competitor company will gain access to its secrets and procedures.

<sup>74</sup> ASIAN DEVELOPMENT BANK, COUNTRY GENDER ASSESSMENT PHILIPPINES 42 (2004).

<sup>75</sup> Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 (1) HARV. C.R.-C.L. L. REV. 277, 280-281 (2005). [Citations omitted.]

<sup>76</sup> See findings in BUREAU OF WOMEN AND MINORS, NATIONAL PLANNING WORKSHOP CONCERNING WOMEN AND YOUNG WORKERS (PROCEEDINGS JUNE-AUGUST 1986) 7 (1986). More recent studies are cited in the next paragraphs.

<sup>77</sup> Men are also protected against sex discrimination under Article 3 of the Labor Code. When the law does not distinguish, we should not distinguish.

<sup>78</sup> See *Diaz v. Pan American World Airways Inc.*, 442 F.2d 385 (1971). The US 6<sup>th</sup> Circuit Court of Appeals said that Pan Am violated Title VII of the 1964 Civil Rights Act for not hiring Celio Diaz as a flight steward on the ground of his sex. “The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an

women were disallowed entry to the Philippine Military Academy before 1993.<sup>79</sup> It would not entirely explain why it is difficult for the members of one sex to penetrate an industry where the other sex is prominent.

These forms of discrimination are actually grounded on society's expectations of women and men – their *gender*<sup>80</sup> *roles*. *Gender roles* refer to “socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women”.<sup>81</sup> Over time, societies have developed *stereotyped roles or characteristics* assigned to each sex, “a set of unexamined images people hold of [each] group; in many cases, those images do not hold true for individual members.”<sup>82</sup> Men are traditionally viewed as strong, rational, brave, aggressive, independent and other possessive of other traits considered masculine.<sup>83</sup> Women on the other hand are considered weak, emotional, timid, and indecisive<sup>84</sup>; attuned to their feelings; soft in their movements; obsessed with having children; etc.

Women, more than men, are prone to sex stereotyping or what Justice Regalado calls the “hubristic conceit that women constitute the inferior sex.”<sup>85</sup> Women usually occupy the lower positions in both private and public sectors and women in the same occupational group receive lower compensation than their male counterparts. “The stereotyping of male-female jobs influences employment policies and practices, which not even high educational attainment has succeeded in overcoming.”<sup>86</sup>

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airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.”

<sup>79</sup> It was only through the passage of Republic Act 7192 (Women in Nation Building Act) that women were allowed to get into the military academy.

<sup>80</sup> Richard Posner states that “gender” is one “borrowed from grammar to designate the sexes as viewed as *social* rather than *biological* classes.” R. Posner, *Sex and Reason*, 24-25 (1992) *quoted in* Smith v. City of Salem, 378 F. 3d 566, 568 (6<sup>th</sup> Cir. 2004).

<sup>81</sup> World Health Organization, *What do we mean by "sex" and "gender"?*, available at <http://www.who.int/gender/whatisgender/en/> (last visited: March 1, 2011). “Gender” is often found in many anti-discrimination policy issuances and regulations. Due to the lack of widespread understanding of the term’s meaning, it is likely that implementers would confuse gender-based discrimination with sex-based discrimination.

<sup>82</sup> ROWENA GUANZON ET AL., *ENGENDERING THE PHILIPPINE JUDICIARY* 39 (2006).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Philippine Telegraph, *supra* note 79.

<sup>86</sup> IRENE CORTES, *DISCRIMINATION AGAINST WOMEN AND EMPLOYMENT POLICIES* 39 (1981). Professor Irene Cortes (later Dean of the University of the Philippines College of Law and Justice of the Supreme Court) was the Vice Chairperson of the National

In addition, sex stereotyping can create an invincible line that relegates women to particular job descriptions. For instance, the Asian Development Bank cited data which showed industry level segregation of employment along gender lines. Its 2004 *Philippine Country Gender Assessment* noted that the segregation “follows the socially ascribed roles and responsibilities of women and men.” Women were found dominant in industries, where the work seems to be an extension of their social reproduction function in the home (e.g. teaching, health and social work, and domestic/housekeeping jobs).<sup>87</sup>

A purely biological interpretation of rules against sex-based discrimination leaves workers, who experience discrimination due to sex stereotypes without remedy. It would make our present anti-discrimination rules such as the Labor Code’s Article 3 almost useless in light of present realities.

*B. Sex discrimination clause also protect against sex stereotyping*

In *Price Waterhouse v. Hopkins*<sup>88</sup>, the United States Supreme Court effectively set aside the purely “biological approach” to sex discrimination.<sup>89</sup> It also established that discrimination arising from sex stereotypes is prohibited by Title VII of the Civil Rights Act of 1964<sup>90</sup>, which has language similar to Article 3 of our Labor Code.

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Commission on the Role of Filipino Women when she presented this paper. Her findings in 1981 resonate three decades later as shown by a recent study by the Institute of Labor Studies-Department of Labor and Employment. See Philippine Senate, *Strengthening Anti-discrimination Policy*, available at [http://www.senate.gov.ph/press\\_release/2011/0127\\_estrada1.asp](http://www.senate.gov.ph/press_release/2011/0127_estrada1.asp) (last visited: January 27, 2011).

<sup>87</sup> Asian Development Bank, *supra* note 80.

<sup>88</sup> *Price Waterhouse v. Hopkins* (hereinafter “Price Waterhouse”), 490 US 228 (1989). [Citations omitted.]

<sup>89</sup> Ling, *supra* note 81, at 282 (2005).

<sup>90</sup> “It shall be an unlawful employment practice for an employer -

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

Hopkins, a senior manager at Price Waterhouse was denied consideration for partnership. Apparently, some partners did not deem Hopkins feminine enough. One partner described her as “macho”; another suggested that she was “overcompensated for being a woman”; and another advised her to “take a course at a charm school.” The partner, who was given the responsibility of explaining to Hopkins why she would not be considered for partnership, suggested that she “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”

Hopkins filed a discrimination claim under Title VII, which provides that a worker’s race, color, religion, *sex*, or national origin is not relevant in the hiring, evaluation and compensation of said worker. Under Title VII, it is unlawful employment practice to discriminate on such grounds. (It can be said that Title VII serves the same purpose as Article 3 of our Labor Code.)

The U.S. Supreme Court found that Hopkins experienced sex stereotyping, which can be remedied under Title VII. “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women *resulting from sex stereotypes.*”<sup>91</sup> (Emphasis Added)

But does protection against sex stereotypes extend to LGBTs and other gender non-conforming individuals (i.e. those who deviate from traditional gender roles)?

*C. LGBTs also suffer from discrimination arising out of sex stereotypes; hence, covered by prohibition against sex-based discrimination*

Although sexual orientation and gender identity was not an issue in *Price Waterhouse*, LGBT plaintiffs, who can show that they experienced

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otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

<sup>91</sup> *Price Waterhouse*, *supra* note 88.

discrimination as a result of similar gender stereotyping, may also have a cause of action under anti-sex discrimination rules.<sup>92</sup>

LGBTs also “reject traditional assumptions about the proper relationship between men and women” and they “cast doubt about the validity of accepted male and female roles.” They are “people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention.”<sup>93</sup> Discrimination against LGBTs “therefore constitutes gender discrimination because it penalizes individuals who do not conform to stereotypical ideas about the way men and women should behave.”<sup>94</sup> A transgender woman,<sup>95</sup> for example, face discrimination because of her physical appearance and behavior (e.g. clothing, manner of speaking, occupation) do not conform to society’s expectation of males and for not identifying as male in accord with her biological attributes (i.e. male sex).

In *Smith v. City of Salem*,<sup>96</sup> the plaintiff was a lieutenant in the Salem City fire department, with 7 years of service under his belt. Smith, who was born male, was diagnosed with Gender Identity Disorder (i.e. there is a disjunction between a person’s sexual organs and sexual identity). Smith began “expressing a more feminine appearance on a full-time basis”<sup>97</sup> and [her] co-workers began questioning [her] appearance, commenting that Smith’s appearance and mannerisms were not “masculine enough”.<sup>98</sup> Smith talked to [her] immediate supervisor about her diagnosis and treatment so that the latter can address the comments and questions from [her] colleagues. The supervisor, despite promising not to divulge the substance of his discussion with Smith, informed the fire department chief. The latter met with the city Law Director, “with the intention of using Smith’s transsexualism and its manifestations as a basis for terminating [her] employment.”<sup>99</sup> The fire

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<sup>92</sup> Robert Mison et al., *Sexual Orientation in the Workplace: A Reference Guide*, 2(1) National Journal of Sexual Orientation Law 34, 36 (1996).

<sup>93</sup> Silverio, *supra* note 2.

<sup>94</sup> *Developments in Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1554, 1580-81 (1989).

<sup>95</sup> A male-to-female (MTF) transsexual or transgender person.

<sup>96</sup> *Smith v. City of Salem*, 378 F. 3d 566, 568 (6<sup>th</sup> Cir. 2004). This decision of the Court of Appeals (6<sup>th</sup> Circuit) is the highest federal court ruling on the application of Title VII protection and the ruling in *Price Waterhouse v. Hopkins*, *supra* note 94 to transgender persons.

<sup>97</sup> *Id.* at 568.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 569.

department chief and supervisor then met with the city's executive body to "devise a plan for terminating [her] employment."<sup>100</sup> In the meeting, they decided to require Smith to undergo three separate psychological evaluations, hoping that the humiliation would force her to resign or not to comply. In case of the latter, the City can fire Smith for insubordination.<sup>101</sup> Smith got wind of the plan and filed a Title VII complaint against the city.

A US district court denied Smith's claim and ruled that the sex discrimination prohibition under Title VII did not cover transsexual persons. The US Court of Appeals reversed the decision in a landmark ruling. The 6<sup>th</sup> Circuit noted the holding in *Price Waterhouse* that the reference to "sex" in Title VII "encompasses both biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."<sup>102</sup> Under *Price Waterhouse*, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, *irrespective of the cause of that behavior*, a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>103</sup> (Emphasis Added)

The finding that discrimination due to gender non-conformity is impermissible "*regardless of the cause of that behavior*" means that gender non-conformity whether due to a person's sexual orientation, gender identity, or even medical condition, would be covered by sex discrimination prohibitions.

This finding of the *Smith* court prevents a doughnut hole in the protection against sex-based discrimination. M. A. Case observed that "[e]ven if legislative protection from discrimination on grounds of homosexuality could be achieved, this would not solve the problem of effeminate heterosexuals ... Moreover, even with protection for sexual orientation, employers may still discriminate between effeminate and non-effeminate gay as well as straight males."<sup>104</sup> On the other hand, if there is gender discrimination protection only, a lesbian who is masculine-gendered may be protected from discrimination but the same person may not be protected against dismissal due

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Smith v. City of Salem*, 2004 FED App. 0262A (6<sup>th</sup> Cir.), 1, 12.

<sup>103</sup> *Id.* at 15.

<sup>104</sup> Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 57 (1996).

to her sexual relations with another woman in the absence of protection against sexual orientation discrimination. In other words, the expansion of *Hopkins* in *Smith* protects homosexuals, bisexuals, transgender people, *as well as* heterosexual persons. No one is left behind.

A similar reading of the Labor Code is apropos, if our courts were to have a clear understanding of the interconnections between sex discrimination and sex stereotypes. Such construction of the Code will make its anti-discrimination provisions operative and effective<sup>105</sup> in dealing with the roots of sex discrimination. It is also in line with the policy adopted by our courts to extend the Labor Code's applicability "to a greater number of employees to enable them to avail the benefits of the law, in consonance with the avowed state policy to give maximum aid and protection to labor."<sup>106</sup>

It helps that in a number of cases, our Supreme Court had found US courts' interpretation of Title VII persuasive when dealing with sex discrimination cases.<sup>107</sup> Moreover, sex stereotyping as a form of discrimination, may not really an entirely novel concept for our highest court. For example, in an administrative issuance (on sexual harassment), the Supreme Court recognized the link between sex stereotyping and discrimination. In discussing the rationale for the issuance, the Court noted that the Philippines is a party to the Convention on the Elimination of all Forms of Discrimination against Women, which end is "to achieve elimination of all prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on *stereotyped roles for men and women*."<sup>108</sup> (Emphasis Added) Interestingly, the Court added that Article 3 of the Labor Code complies with this mandate.

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<sup>105</sup> It is a familiar rule in statutory construction that "(t)he legal provision being therefore susceptible of two interpretations, we adopt the one in consonance with the presumed intention of the legislature to give its enactments the most reasonable and beneficial construction, the one that will render them operative and effective and harmonious with other provisions of law." [*Javellana v. Tayo*, 6 SCRA 1042, 1050, (1962)].

<sup>106</sup> CESARIO A. AZUCENA, *THE LABOR CODE WITH COMMENTS AND CASES*, 26 (2010 ed.) [Case citations omitted.]

<sup>107</sup> See *Philippine Telegraph supra* note 79; *Glaxo Duncan Association, supra* note 79.

<sup>108</sup> *Rules on Administrative Procedure in Sexual Harassment Cases and Guidelines on Proper Work Decorum in the Judiciary*, A.M. No. 03-03-13-SC 2004-12-14, December 14, 2004.

**OBLIGATIONS UNDER INTERNATIONAL LAW TO PROTECT LGBTs***A. Yogyakarta Principles*

On 26 March 2007, a group of international human rights experts (including UN special rapporteurs on various aspects of international political, economic, social and cultural rights), jurists, academics and civil society advocates launched *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.<sup>109</sup>

According to Michael O’Flaherty, the rapporteur for the experts’ meetings that resulted in the Yogyakarta Principles, “the Principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity.”<sup>110</sup> The experts, who participated in the drafting of the Principles, agree that the Principles reflected the existing state of international human rights law with respect to gender identity and sexual orientation discrimination but the same may have to be revised as states incur more obligations in the evolution of human rights law.<sup>111</sup>

Principle 12 (Right to Work) states:

**Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.**

States shall:

- a) Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;

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<sup>109</sup> The complete document *available at* [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

<sup>110</sup> O’Flaherty *supra* note 24.

<sup>111</sup> *Id.* at 235-236.

- b) Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

In *Ang Ladlad*, however, the Supreme Court refused “at this time” to declare the Yogyakarta Principles as containing norms binding on the Philippines. “There are declarations and obligations outlined in the said Principles which are not reflective of the current state of international law, and do not find basis in any sources of international law enumerated under Article 38(1) of the Statute of the International Court of Justice.”<sup>112</sup>

This holding does not absolutely bar the application of the Yogyakarta principles in a case, involving employment discrimination.

First, the Court did not say that all the declarations and obligations in the Principles are not reflective of the current state of international law and have no basis under Article 38(1) of the ICJ Statute. In fact, it only cited Principle 3 (The Right of Recognition Before the Law) as one such non-binding norm. This is found in footnote 52 of the decision. In the footnote, the Court highlighted subparagraphs b and c of Principle 3, which say that it shall be the obligation of states to “take all necessary legislative, administrative and other measures” to implement the principle. Since the subparagraphs still call for subsequent state enactments, the Court may have interpreted them to mean that the Principle 3 is not immediately binding to the Courts. (I will argue later that Court’s view on Principle 3 is not applicable to Principle 12, in view of its past decisions.)

Second, the Court also pointed out that its holding on the non-binding nature [of *some*] of the Yogyakarta Principles may have been due to lapses on the part of the petitioner. “Petitioner has not undertaken any objective and rigorous analysis of these principles of international law to ascertain their true status.”<sup>113</sup>

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<sup>112</sup> *Ang Ladlad supra* note 4.

<sup>113</sup> *Id.* at 79.

*B. Principle 12 (Right to Work)*

A future test case grounded on Principle 12 of the Yogyakarta Principles, should take the cues provided by the holding in *Ang Ladlad*.

Principle 12, like Principle 3, also contains a “take all necessary legislative, administrative and other measures” clause, which the Court may again construe as basis for declaring the Principle 12 as non-binding.

However, it should be pointed out that the nothing in the Principles and the accompanying recommendations “should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as **recognised in international, regional or national law or standards.**”<sup>114</sup> Second, Principle 12 is grounded on international covenants such as the ICESCR (which the Philippines has ratified) and general principles of international law already recognized by Supreme Court as part of the law of the land:

**International law, which springs from general principles of law, likewise proscribes discrimination.** General principles of law include principles of equity, *i.e.*, the general principles of fairness and justice, based on the test of what is reasonable. The Universal Declaration of Human Rights, the **International Covenant on Economic, Social, and Cultural Rights**, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the **Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation** — all embody the general principle against discrimination, the very antithesis of fairness and justice. **The Philippines, through its Constitution, has incorporated this principle as part of its national laws.**<sup>115</sup> (Emphasis Added)

It follows that Principle 12 has basis among sources of international law enumerated under Article 38(1)<sup>116</sup> of the Statute of the International Court

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<sup>114</sup> Last Paragraph, Yogyakarta Principles.

<sup>115</sup> *International School Alliance of Educators v. Quisumbing*, G.R. No. 128845, June 1, 2000.

<sup>116</sup> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

of Justice, unlike the findings of the Court in *Ang Ladlad*, with respect to Principle 3.

Specific attention should be given to the Court's recognition of the non-discrimination principle in the International Convention on Economic, Social, and Cultural Rights, which the Philippines signed on 19 December 1966 and ratified on 7 June 1974.<sup>117</sup>

In General Comment No. 18, the UN Committee on Economic, Social and Cultural Rights opined that Article 2(2)<sup>118</sup> of the Convention and Article 3<sup>119</sup>, in relation to the Right to Work under Article 6<sup>120</sup> of the Convention – “prohibits any discrimination in *access* to and *maintenance* of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation*, or civil, political, social or other status, *which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.*”<sup>121</sup> (Emphasis Added)

Article 2.2, which lists invidious categories of discrimination as including ‘sex’ and ‘other status’. Presumably, since the CESCR distinguishes ‘sex’ and ‘sexual orientation’ in its General Comments, it locates sexual

a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. **the general principles of law recognized by civilized nations;**

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (Emphasis Added)

<sup>117</sup> See United Nations Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited: 20 January 2012).

<sup>118</sup> “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>119</sup> “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

<sup>120</sup> Par. 1: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

<sup>121</sup> General Comment No. 18 (24 November 2005).

orientation within the rubric of ‘other status’. The CESCR, in the General Comments, also invokes the article addressing equal rights of men and women, Article 3, as a basis for its prohibition of sexual orientation-related discrimination. This linkage of the categories of sex and sexual orientation-related discrimination is discussed subsequently in the context of the practice of the Human Rights Committee (HRC).<sup>122</sup>

In recognizing General Comment No. 18, the Court would not be breaking new ground. Comments of UN committees with regard international human rights instruments were already given weight by the Supreme Court in *Ang Ladlad*. It accepted the opinion of the Human Rights Committee in *Toonen v Australia* that the reference to “sex” in Article 26<sup>123</sup> of the International Convention on Civil and Political Rights should be construed to include “sexual orientation”. The Court used the Committee’s opinion to support its decision to allow the participation of *Ang Ladlad* LGBT party in the 2010 elections. The Court said that the decision is in accord with the Philippines’ international obligation to uphold the principle of non-discrimination expressed in Article 26.<sup>124</sup> The Court also identified other UN bodies that have declared sexual orientation discrimination as prohibited under various international instruments, even including General Comment No. 18.<sup>125</sup>

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<sup>122</sup> O’Flaherty *supra* note 24, at 215.

<sup>123</sup> “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>124</sup> *Ang Ladlad*, *supra* note 4.

<sup>125</sup> It also cited Committee on Economic, Social and Cultural Rights General Comment No. 15: The right to water, E/C.12/2002/11.26, (November 26 2002); General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, (August 11 2000). Interestingly, the footnotes in the Court’s discussion on “Non-Discrimination and International Law” (618 SCRA 75-77) are verbatim restatements of Section 2(A) of O’Flaherty *supra* note 27.

## FINAL WORDS

### *A. The Need for Test Cases*

*Brown v. Education*<sup>126</sup> brought the demise of school segregation in the United States. “In the field of public education, the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal”, said the unanimous Court. With *Brown*, the almost six decade precedent, *Plessy v. Fergusson*,<sup>127</sup> was set aside in favor of a fairer and more equal society. But reading through the decision, we missed out the story behind the case and the people who struggled to make it happen.

In 1931, the National Association for the Advancement of Colored People (NAACP) asked Nathan Margold, a *protégé* of Harvard Professor and later US Supreme Court Justice Felix Frankfurter, to come up with a report on how to legally challenge school segregation. He came up with a 219-page document which became the battle plan for NAACP counsels led by Thurgood Marshall (also appointed to the US Supreme Court as the first African-American justice) in filing *multiple* lawsuits against states with segregation policies, a process that culminated in *Brown*.<sup>128</sup> To pursue the strategy, the NAACP had to recruit plaintiffs in various school districts “who had the courage and fortitude to face hostility from whites and delays in court.”<sup>129</sup> They found this in Linda Brown and her family.

The *Brown* story tells us that to attack the very heart of discrimination is a formidable task. And it can only be possible, if there are people, who are willing to stand up and go through the difficult process of litigating for their rights.

Germaine Leonin of the Rainbow Rights Project laments the dearth of cases being filed by LGBTs, who are discriminated in their workplaces. Fear of reprisals and embarrassment and the costs of pursuing litigation are daunting factors for prospective plaintiffs, according to her.<sup>130</sup> But these are hindrances that are not insurmountable. Already, there are groups and networks that can

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<sup>126</sup> 347 U.S. 483 (1954).

<sup>127</sup> 163 U.S. 537 (1896).

<sup>128</sup> PETER IRONS, A PEOPLE’S HISTORY OF THE SUPREME COURT, 369-370 (1999).

<sup>129</sup> *Id.* at 370.

<sup>130</sup> Interview with Germaine Leonin, Rainbow Rights Project (Jan. 20, 2010).

provide legal support for aggrieved LGBT workers; there are also organizations that can provide social support and networks.

But perhaps the biggest fetter to testing the legal waters – the elephant in the room – is society’s prejudices against LGBTs. “If gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with St. Bernards and to nailbiters,” said Anita Bryant, who, among other things campaigned for a law banning homosexuals from teaching in California schools. Our labor arbiters, judges and justices may not be entirely immune from similar biases.

### *B. Changing Judicial Attitudes Toward LGBTs*

Recent decisions of the Supreme Court, however, should encourage LGBT litigants. The decision in *Ang Ladlad*, which recognized an LGBT party’s equal right to participate in the political process, is especially significant. It is the first equal protection challenge involving LGBT rights that was upheld by the Supreme Court, using *both* international law and domestic legislation.

The *Ang Ladlad* court, in line with *Estrada v. Escritor*, also said that religious and personal moral beliefs, which more often than not, are the roots of gender stereotyping of and discrimination against LGBTs<sup>131</sup>, cannot be a basis for a public policy that furthers disparate treatment of its members. “[G]overnment must act for secular purposes and act in ways that have primarily secular effects.”<sup>132</sup>

The *Ang Ladlad* court is clearly of the opinion that there is no secular and public policy to support discrimination against LGBTs. “[T]he Philippines has not seen fit to criminalize homosexuality. Evidently, therefore, these ‘generally accepted public morals’ [as asserted in the assailed decision of the

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<sup>131</sup> Our own courts also recognize this link. “It is not difficult to imagine the reasons behind this censure [against LGBTs] – *religious beliefs, convictions about the preservation of marriage, family and procreation*, even dislike or distrust of homosexuals themselves and their perceived lifestyle. (Emphasis Added) See *Ang Ladlad supra* note 4. See also B. Williams, *Religion, Politics and Gay and Lesbian Rights*, Fitchburg State University, October 8, 2010 available at <http://falcon.fsc.edu/~bnogueira/gaylesbian.htm>; Judith Plaskow, *Sexual Orientation and Human Rights: A Progressive Jewish Perspective* in 1998 *Sexual Orientation and Human Rights in American Religious Discourse* as cited by B. Williams, *supra*.

<sup>132</sup> *Ang Ladlad supra* note 4.

Commission on Elections, grounded on Judeo-Christian and Muslim morality] have not been convincingly transplanted into the realm of law.”<sup>133</sup>

For many of people who do not hold favourable views of LGBTs, theirs involved deep and profound moral and religious convictions, which are covered by constitutional protections on the free exercise their faith<sup>134</sup> and free speech.<sup>135</sup> But as the US Supreme Court said when it struck down a Texas sodomy law in *Lawrence v. Texas*<sup>136</sup>, “[t]hese considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the...law. Our obligation is to define the liberty of all, not to mandate our own moral code.” “Some people may find homosexuality and bisexuality devious, odious, and offensive. Nevertheless, private discrimination, however, unfounded, cannot be attributed or ascribed to the State.”<sup>137</sup>

### *C. Recognition of LGBT Privacy Rights and their Right to Personal Dignity*

Finally, the Court had been invalidating government regulations that infringed on the sexual relations of consenting adults, saying that these violated the privacy rights and personal dignity of individuals.<sup>138</sup>

In *City of Manila v. Laguio, Jr.*<sup>139</sup>, the Court invalidated a city ordinance prohibiting the operations of motels and inns and similar establishments. Citing *Lawrence v. Texas*, the Court said that there are intimate and personal

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<sup>133</sup> Ang Ladlad *supra* note 4.

<sup>134</sup> CONST. art. III, § 5.

<sup>135</sup> CONST. art. III, § 4.

<sup>136</sup> (Hereinafter “Lawrence”) 539 U.S. 558 (2003). [Citations omitted].

<sup>137</sup> Ang Ladlad *supra* note 4. (J. Puno, Separate Concurring Opinion).

<sup>138</sup> In Philippine jurisprudence, the right to privacy was first discussed in *Morfe v. Mutuc*, G.R. No. L-20387, January 31, 1968. “The concept of liberty would be emasculated,” writes Justice Fernando, “if it does not likewise compel respect for his personality as a unique individual whose claim to privacy and interference demands respect”

*Morfe*, a case of first impression, adopted the findings in *Griswold v. Connecticut* [381 U.S. 479 (1965)] that there are zones of privacy protected by the bill of rights. In *Griswold*, US Supreme Court invalidated a Connecticut statute which made the use of contraceptives a criminal offense on the ground of its amounting to an unconstitutional invasion of the right of privacy of married persons.

<sup>139</sup> G.R. No. 118127, 455 SCRA 308, 337, April 12, 2005.

choices, including matters like sexual intimacy, that the State should not encroached upon in line with the constitutional protection of the person's autonomy. "Motel patrons who are single and unmarried may invoke this right to consummate their bonds in intimate sexual conduct within the motel's premises be it stressed that their consensual sexual behavior does not contravene any fundamental state policy. **Adults have a right to forge such relationships with others in the confines of their own private lives and still retain their dignity as a person. The liberty protected by the Constitution allows persons to make this choice.**"

This holding was reiterated in *White Light Corporation v. City of Manila*, where the Supreme Court invalidated another Manila City ordinance, which prohibited short-time admission and rate in hotels, motels, inns and similar establishments. The ordinance was premised on the curtailment of certain sexual behavior, including prostitution, adultery and fornications. "Whether or not this depiction of a *mise-en-scene* of vice is accurate, it cannot be denied that **legitimate sexual behavior among willing married or consenting single adults is constitutionally protected.**"<sup>140</sup> (Emphasis Added)

The reference to *Lawrence v. Texas*<sup>141</sup> made by the Court in *City of Manila v. Laguio, Jr.* should be highlighted by equality advocates. *Lawrence* is important for its acknowledgment that homosexual relationships are protected from State intrusion on the same privacy ground as those in heterosexual relationships. "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [Due Process Clause]. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' **Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.**"<sup>142</sup> If employers are allowed to fire workers for their sexual relationships with persons of the same or both sexes and state agencies uphold such dismissals, are not they in essence infringing on the right of their employees to autonomy on matters deeply personal? In upholding such dismissals, does not the State become an accomplice to these intrusions into people's bedrooms?

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<sup>140</sup> G.R. No. 122846, January 20, 2009.

<sup>141</sup> *Lawrence*, *supra* note 136.

<sup>142</sup> *Lawrence*, *supra* note 136. The quotation used by the *Lawrence* Court is taken from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

Indeed, jurisprudence during the first decade of 21<sup>st</sup> century is turning out to be a watershed for LGBT advocacies. For the first time, LGBT group rights as well as individual rights of its members have been discussed by our courts. In the future, courts are wont to turn a blind eye on the travails of LGBTs. After all, the recently promulgated ethical guidelines for the Judiciary calls on judges “*to be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.*”<sup>143</sup>

“If I have seen further it is by standing on the shoulders of giants,” wrote Isaac Newton in 1675.<sup>144</sup> In the field of law, we stand on precedents. We stand on the shoulders of Linda Brown, the activists of *Ang Ladlad* LGBT Party, and others like them who had succeeded in making judges and the law see further. Oh, where are the rest of them?

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<sup>143</sup> New Code of Judicial Conduct for the Philippine Judiciary (2004), canon 5, § 1.

<sup>144</sup> Letter of Isaac Newton to Robert Hooke (Feb. 5, 1675).

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