UNUSUAL BUT NOT IMMORAL: PREGNANCY OUTSIDE OF MARRIAGE AND EMPLOYEE DISMISSAL AFTER *LEUS V. SAINT SCHOLASTICA'S COLLEGE WESTGROVE*[*]

NOTE

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The online publication of *Leus v. Saint Scholastica's College Westgrove*[1] last February sparked a furor in mass and social media.[2] The Supreme Court decision was heralded as "[a] [t]riumph of [s]ecularism" by various camps advocating against "arbitrary [...] imposition of [...] moral views."[3] Despite the celebration, however, the novel application of jurisprudence in the decision, as well as the supervening laws and amendments to administrative regulations since the controversy, generate important questions as to the extent of the doctrine expressed in this ruling.

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[1] G.R. No. 187226, Jan. 28, 2015, *at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/187226.pdf [hereinafter "*Leus*"].

[2] *See, e.g.,* Buena Bernal, *Religious schools can't fire pregnant, unmarried workers – SC,* RAPPLER (Feb. 24, 2015), *available at* http://www.rappler.com/nation/84925-sc-religious-schools-cannot-fire-workers-pre-marital-pregnancy; *Pregnancy out of wedlock not grounds for dismissal, says SC*, PHIL. DAILY INQUIRER (Feb. 24, 2015), *available at* http://newsinfo.inquirer.net/675008/pregnancy-out-of-wedlock-not-grounds-for-dismissal-says-sc; Edu Punay, *School can't sack unwed mom – SC*, PHIL. STAR (Feb. 25, 2015), *available at* http://www.philstar.com/headlines/ 2015/02/25/1427381/school-cant-sack-unwed-mom-sc; Tony Umali, *Catholic school nonteaching personnel got pregnant outside marriage, dismissal for immorality not valid*, BUSINESS MIRROR (June 28, 2015), *available at* http://www.businessmirror.com. ph/catholic-school-nonteaching-personnel-got-pregnant-outside-marriage-dismissal-for-immorality-not-valid/.

[3] Sass Rogando Sasot, *A Triumph of Secularism: The Leus Test,* OUTRAGE MAGAZINE (Feb. 25, 2015), *at* http://outragemag.com/a-triumph-of-secularism-the-leus-test. *See also* Ranhilio Aquino, *Secular morality*, MANILA STANDARD TODAY (Feb. 27, 2015), *available at* http://manilastandardtoday.com/2015/02/27/secular-morality ("All over Facebook there were posts, largely approving, on the Supreme Court decision finding fault with St. Scholastica College Westgrove's termination of an employee who had gotten herself pregnant out of wedlock.").

On one hand, the precedents of the decision continue to becloud its full implication in a society that tries to accommodate "each conscience [as] a law unto itself."[4] On the other hand, while laws have been enacted to safeguard the rights of women and strengthen anti-discrimination efforts through positive fiat, gaps in their provisions highlight equivocal policies for non-tenured personnel. In its portrayal of the decision in the backdrop of jurisprudence, this Case Note draws the scope of the *ponencia* with respect to termination of employment on the ground of immorality and more particularly, on the ground of pregnancy outside of marriage as immorality or grave misconduct in the vantage of non-establishment.[5]

After examining the Supreme Court's treatment of the issue, this Case Note argues that although *Leus* does indeed close a gap in Philippine law and jurisprudence, the decision proposes the union of two established doctrines that are incompatible—and hence, *unusable*—if not further elucidated. Despite its seemingly progressive outcome, *Leus* represents a *missed opportunity* to correct gender-based discrimination practices in employment.

I. PREGNANCY OUTSIDE OF MARRIAGE AS A GROUND FOR DISMISSAL

In May 2011, St. Scholastica's College Westgrove ("SSCW"), "a Catholic educational institution,"[6] hired Cheryl Santos Leus ("Leus") as Assistant to SSCW's Director of the Lady Apostolate and Community Outreach Directorate, a non-teaching position.[7] Two years into her employment, she conceived a child outside of marriage and was advised by the school's directress to file a resignation.[8] Leus's refusal to resign[9] was followed by a series of communications that ultimately led to a letter of

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[4] Estrada v. Escritor, A.M. No. P-02-1651, 491 SCRA 1, 54, June 22, 2006; Employment Division v. Smith, 494 U.S. 872, 890 (1990).

[5] *See, e.g.,* Aquino, *supra* note 3 ("[It] is rather simplistic to assume that there is neat divide between secular and religious morality, and that one can tell with certainty that a norm of conduct is secular in provenance, rather than one arising from religious convictions or sectarian allegiances.").

[6] *Leus*, at 1.

[7] *Id.* at 2.

[8] *Id.* ("Sometime in 2003, [Leus] and her boyfriend conceived a child out of wedlock. When SSCW learned of the petitioner's pregnancy, [the] SSCW's Directress, advised her to file a resignation letter[.]")

[9] *Id.* ("In response, [Leus] informed [the SSCW Directress] that she would not resign from her employment just because she got pregnant without the benefit of marriage.")

termination, despite the fact that she had by then already married the child's father.[10]

Throughout their correspondence, SSCW was adamant in its stance that "pre-marital sexual relations between two consenting adults with no impediment to marry, *even if they subsequently married*, amounts to immoral conduct."[11] To SSCW, this policy against what the school sees as contrary to its sectarian value[12] justified her dismissal under Section 94(e) of the *1992 Manual of Regulations for Public Schools* ("1992 MRPS").[13]

This termination resulted in Leus's filing a complaint for illegal dismissal, with her claiming that "SSCW gravely abused its management prerogative as there was no just cause for her dismissal."[14] The Labor Arbiter, subsequently affirmed by the National Labor Relations Commission and the Court of Appeals, deemed the termination a valid exercise of management prerogative.[15] The Labor Arbiter "pointed out that, as an employee of a Catholic educational institution, the petitioner is expected

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[10] *Leus,* at 2-3. ([The SSCW Directress] formally directed the petitioner to explain in writing why she should not be dismissed for engaging in pre-marital sexual relations and getting pregnant as a result thereof, which amounts to serious misconduct and conduct unbecoming of an employee of a Catholic school. [...]Consequently, in her letter dated June 11, 2003, [the SSWC Directress] informed the petitioner that her employment with SSCW is terminated on the ground of serious misconduct.")

[11] *Id.* at 3. (Emphasis supplied.)

[12] *Id.* ("That SSCW, as a Catholic institution of learning, has the right to uphold the teaching of the Catholic Church and expect its employees to abide by the same. [...] [Leus's] indiscretion is further aggravated by the fact that she is the Assistant to the Director of the Lay Apostolate and Community Outreach Directorate, a position of responsibility that the students look up to as role model.")

[13] "Section 94. *Causes of Terminating Employment.* In addition to the just causes enumerated in the Labor Code, the employment of school personnel, including faculty, may be terminated for any of the following causes: [...] (e) Disgraceful or immoral conduct." Dep't of Educ., Culture, and Sports [DECS] Dep't Order No. 92 (1992), § 94(e). 1992 Manual of Regulations for Private Schools.

Being the law in force at the time the case was instituted in 2003, this eighth edition was applied. The Department of Education has since made another issuance in which the equivalent provision states: "Section 76. *Termination of Employment by the School Administration.* School personnel of private schools under permanent status may be removed, reduced in salary, or suspended without pay for the following causes. [...] (e) *Notoriously* disgraceful or immoral conduct." Dep. Ed. Dep't Order No. 88 (2010), § 76(e). 2010 Revised Manual of Regulations for Private Schools in Basic Education. (Emphasis supplied.) The addition of "notoriously" as a modifier suggests that there is now a stricter requirement for dismissal based on this ground.

[14] *Leus*, at 4.

[15] *Id.* at 4-7. In its decision, the Court of Appeals declared that "[Leus's] dismissal is a valid exercise of the employer-school's management prerogative to discipline and impose penalties on erring employees pursuant to its policies, rules and regulations." *Id.* at 7.

to live up to the Catholic values taught by SSCW to its students."[16] The Court of Appeals saw that her "pregnancy prior to marriage is scandalous in itself given the work environment and social milieu she was in."[17] In particular, the court *a quo* declared that "[h]er admitted pre-marital sexual relations was a violation of [SSCW's] prescribed standards of conduct that views pre-marital sex as immoral because sex between a man and a woman must only take place within the bounds of marriage."[18]

Upon review on *certiorari*, the Supreme Court reversed the Court of Appeals' ruling, holding that "viewed against the prevailing norms of conduct, the petitioner's conduct cannot be considered as disgraceful or immoral; such conduct is not denounced by public and secular morality. It may be an *unusual* arrangement, but it certainly is *not disgraceful or immoral within the contemplation of the law.*"[19] That this decision was promulgated at a time of media omnipresence has certainly drawn much attention to the case.[20] Yet, even prior to *Leus*, it was already an established doctrine that pregnancy outside of marriage, *taken on its own*, is not a ground for dismissal -- at least for employees in the civil service.

Over a decade ago, for instance, the Supreme Court ruled in *Concerned Employee v. Mayor*[21] that, with respect to the fact of a single woman giving birth out of wedlock:

> If the father of the child is himself unmarried, the woman is not ordinarily administratively liable for disgraceful and immoral conduct [...] There is no law penalizing such an unmarried mother under those circumstances by reason of her sexual conduct, or for that matter, proscribing the consensual sexual activity between two unmarried persons. Neither does the sexual behavior among single persons contravene any fundamental state policy as contained in the Constitution, a document that accommodates various belief systems irrespective of dogmatic origins.[22]

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[16] *Leus*, at 4.

[17] *Id.* at 6.

[18] *Id.*

[19] *Id.* at 15. (Emphasis supplied.) *Compare with* Concerned Employee v. Mayor, A.M. No. P-02-1564, 443 SCRA 448, 460, Nov. 23, 2004 [hereinafter "*Concerned Employee*"] ("The situation may not be desirable [...] but it does not give cause for administrative sanction.").

[20] *See supra* note 2.

[21] *Concerned Employee*, 443 SCRA 448 (2004).

[22] *Id.* at 460-61.

Hence, the undisputed rule for administrative liability has been that pregnancy outside of marriage is not considered immoral if both parties in the relationship have the capacity to marry.[23] In effect, what is considered reprehensible is the act of adultery and not the pregnancy itself.

The Court in *Leus* cited the same passage as quoted in *Anonymous v. Radam*.[24] Although *Radam* was an administrative case against employees in the civil service,[25] the Court found "no reason not to apply" the doctrine considering that "*Radam* also required the Court to delineate what conducts are considered disgraceful and/or immoral as would constitute a ground for dismissal. More importantly, as in the said administrative cases, the instant case involves an employee's security of tenure."[26]

Apart from a clear line of jurisprudence, statutory prohibitions against gender-discriminatory termination couched in employer prerogative exist to protect the pregnant woman. The Labor Code, for example,

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[23] The doctrine in *Concerned Employee* has been affirmed in, *inter alia*, Abanag v. Mabute, A.M. No. P-11-2922, 647 SCRA 1, 6 n.7, Apr. 4, 2011 ("Mere sexual relations between two unmarried and consenting adults are not enough to warrant administrative sanction for illicit behavior."); Anonymous v. Radam, A.M. No. P-07-2333, 541 SCRA 12, 18-19 n.16-21, Dec. 19, 2007 [hereinafter "*Radam*"] ("There is no law which penalizes an unmarried mother under those circumstances by reason of her sexual conduct or proscribes the consensual sexual activity between two unmarried persons."); Toledo v. Toledo, A.M. No. P-07-2403, 544 SCRA 26, 37 n.17, Feb. 6, 2008 ("In disbarment cases, this Court has ruled that the mere fact of sexual relations between two unmarried adults is not sufficient to warrant administrative sanction for such illicit behavior."); Vitug v. Rongcal, A.C. No. 6313, 501 SCRA 166, 178 n.26, Sept. 7, 2006 ("[I]t is has been held in disbarment cases that the mere fact of sexual relations between two unmarried adults is not sufficient to warrant administrative sanction for such illicit behavior"); City of Manila v. Laguio, G.R. No. 118127, 455 SCRA 308, 337 n.71, Apr. 12, 2005 ("Motel patrons who are single and unmarried may invoke this right to autonomy 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 as contained in the Constitution.").

[24] "[T]wo things may be concluded from the fact that an unmarried woman gives birth out of wedlock: (1) if the father of the child is himself unmarried, the woman is not ordinarily administratively liable for disgraceful and immoral conduct. It may be a not-so-ideal situation and may cause complications for both mother and child but it does not give cause for administrative sanction. There is no law which penalizes an unmarried mother under those circumstances by reason of her sexual conduct or proscribes the consensual sexual activity between two unmarried persons. Neither does the situation contravene any fundamental state policy as expressed in the Constitution, a document that accommodates various belief systems irrespective of dogmatic origins." *Radam,* at 18, *citing Concerned Employee*, at 460-61. (Emphasis omitted.)

[25] *Leus*, at 14.

[26] *Id.* Administrative cases are also ideal bases because the Administrative Code similarly includes "disgraceful and immoral conduct" as a ground for disciplinary action. ADM. CODE OF 1987, bk. 5, § 46 (b)(5).

prohibits the dismissal of a woman on account of her pregnancy, a rule firmly grounded in the policy against gender-based discrimination.[27] Article 135 (formerly Article 137) (a)(2) of the Code states that: "It shall be unlawful for any employer: To discharge such woman on account of her pregnancy, or while on leave or in confinement due to her pregnancy."[28] Despite the absence of qualifying words as to marital status (whether the pregnancy is within our outside of marriage), this prohibition has not been interpreted to extend to include dismissal for pregnancy outside of marriage as a form of disgraceful and immoral conduct.

The Magna Carta of Women[29] and its Implementing Rules and Regulations[30] also contain provisions expressly proscribing the termination of female faculty and students based on pregnancy outside of marriage:

> SEC. 13. *Equal Access and Elimination of Discrimination in Education, Scholarships, and Training.* (c) Expulsion and non-readmission of women faculty due to pregnancy outside of marriage shall be outlawed. No school shall turn out or refuse admission to a female student solely on the account of her having contracted pregnancy outside of marriage during her term in school.[31]
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> SECTION 16. *Equal Access and Elimination of Discrimination in Education, Scholarships, and Training.* C. Expulsion and non-readmission of women faculty due to pregnancy outside of marriage shall be outlawed. No school shall turn out or refuse admission to a female student solely on account of her being pregnant outside of marriage during her term in school.
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> The [Department of Education], [Commission on Higher Education] and [Technical Educational and Skills Development

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[27] Title III, Chapter I, on the Employment of Women, is the precursor to subsequent pieces of legislation such as the Magna Carta of Women, the Paternity Leave Act, and others. Art. 133 (formerly Art. 135) states that "It shall be unlawful for any employer to discriminate against any woman employee with respect to terms and conditions of employment solely on account of her sex." LAB. CODE, art. 133.

[28] LAB. CODE, art. 135(a). The succeeding paragraph makes it unlawful for any employer to "discharge or refuse the admission of such upon returning to her work for fear that she may again be pregnant."

[29] Rep. Act. No. 9710 (2009). The Magna Carta of Women, *available at* http://pcw.gov.ph/sites/default/files/documents/laws/republic_act_9710.pdf.

[30] The Implementing Rules and Regulations of Rep. Act No. 9710 [hereinafter "IRR"].

[31] Rep. Act. No. 9710 (2009), § 13(c).

> Authority] shall monitor and ensure compliance of educational institutions to the following:
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> 1. *Women faculty who become pregnant outside of marriage* shall not be discriminated by reason thereof. They *shall not be dismissed, separated from work, forced to go on leave, re-assigned or transferred.* They shall have access to work already held with no diminution in rank, pay or status and shall be entitled to all benefits accorded by law and by the concerned learning institutions;
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> 2. *No female student shall be expelled, dismissed, suspended, refused or denied of admission, or forced to take a leave of absence in any educational institution solely on grounds of pregnancy outside marriage* during her school term. When needed, students who are pregnant shall be accorded with a special leave of absence from school upon advice of the attending physician, and be given an opportunity to make up for missed classes and examinations. The *same leave benefits* shall likewise be accorded to pregnant faculty members, and *school personnel and staff*[.]"[32]

Non-teaching employees such as Leus, however, fall beyond the protective reach of these provisions because the coverage of tenurial safeguard against dismissal based on pregnancy outside of marriage was not made to include the rest of the school staff and personnel. To them the law accords only maternity leave benefits "upon the advice of the attending physician."[33] Moreover, the proceedings in *Leus* were instituted in 2003, while the Magna Carta of Women was only signed into law in 2009.[34]

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[32] IRR, § 16 (c)(1)-(2). (Emphasis supplied.)

[33] The originally proposed versions of House Bill No. 4273 and Senate Bill No. 2396 of the Fourteenth Congress outlawed only the "expulsion, non-readmission, prohibiting the enrollment and other related discrimination of women students and faculty due to pregnancy outside of marriage." H. No. 4273, 14th Cong, 2nd Sess., at § 9(c) (June 5, 2008), *available at* http://www.congress.gov.ph/ download/ billtext_14/hbt04273.pdf; S. No. 2396, 14th Cong, 1st Sess., at § 9(c) (June 11, 2008), *available at* http://www.senate.gov.ph/lisdata/76626894!.pdf.

[34] *But see* Nunga, Jr. v. Nunga III, G.R. No. 178306, 574 SCRA 760, 779, Dec. 18, 2008; Philippine Society for the Prevention of Cruelty to Animals v. Comm'n on Audit, G.R. No. 169752, 534 SCRA 112, 127, Sept. 25, 2007 ("Statutes can be given retroactive effect in the following cases [...] in case of laws creating new rights."); Frivaldo v. COMELEC, G.R. No. 120295, 257 SCRA 727, 754, June 28, 1996 ("'[L]aws shall have no retroactive effect, unless the contrary is provided.' But *there are settled exceptions to this general rule*, such as when the statute is *curative* or *remedial* in nature or when it *creates new rights*.") (Citations omitted; emphasis supplied); Rattan Art & Decorations, Inc. v. Coll. of Int. Rev., G.R. No. L-17744, 13 SCRA 626, 632, Apr. 30, 1965 ("While it is true that a law creating new rights may be given retroactive effect, the same can only be made possible if the new right does not prejudice or impair any vested right.").

Leus directly remedies this gap in the law. The decision has extended the protection against termination on the ground of pregnancy outside of marriage to cover non-teaching personnel—and arguably *all unmarried employees in the school system* —by conclusively holding that "pre-marital sexual relations between two consenting adults who have no impediment to marry each other, and, consequently, conceiving a child out of wedlock, gauged from a purely public and secular view of morality, does not amount to a disgraceful or immoral conduct under Section 94(e) of the 1992 MRPS."[35] This should be similarly applicable under the current regulations, considering that the *2010 Revised Manual* imposes a stricter standard for dismissal.[36] Following *Leus*, schools will no longer be able to invoke Section 94(e) of the 1992 MRPS to dismiss unmarried employees found to have engaged in consensual sexual activity.

II. THE PREVAILING NORMS OF CONDUCT TEST

Jurisprudence has applied and supplied various standards to determine whether certain acts constitute disgraceful and immoral conduct deserving of administrative sanction.[37] In reaching its conclusion that Leus's conduct was not disgraceful or immoral, the Court put forth as its basis the "prevailing norms of conduct", a jurisprudential standard that finds origin in *Chua Qua v. Clave*.[38] Decided prior to the issuance of the 1992 MRPS, *Chua-Qua* dealt with the dismissal of a teacher who "allegedly violated the Code of

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[35] *Leus*, at 15.

[36] *See* DECS Dep't Order No. 92 (1992).

[37] Immoral conduct "refers to an act which violates the basic norms of decency, morality and decorum abhorred and condemned by the society." Civil Service Commission Memorandum Circular No. 15 (2010), *Amending Certain Provisions on the Administrative Offense of Disgraceful and Immoral Conduct*, § 1, *available at* http://web.csc.gov.ph/cscsite2/phocadownload/userupload/itduser/mc15s2010.pdf, *cited in* Diomampo v. Laribo Jr., A.M. No. SB-12-18-P, 672 SCRA 53, June 13, 2012. *See also* Elape v. Elape, A.M No. P-08-2431, 553 SCRA 403, 57-58, Apr. 16, 2008 ("Immoral conduct is conduct which is 'willful, flagrant or shameless conduct showing moral indifference to opinions of respectable members of the community, and as an inconsiderate attitude toward good order and public welfare.'"); *In Re* Salvador, A.M. No. 2008-20-SC, 615 SCRA 186, 199, Mar. 15, 2010, *citing* Reyes v. Wong, A.M. No. 547, 63 SCRA 667, 673, Jan. 29, 1975 ("What is grossly immoral must be so corrupt and false as to constitute a criminal act or so unprincipled as to be reprehensible to a high degree."); Magno v. Ct. of Appeals, G.R. No. 96132, 210 SCRA 471, 479, June 26, 1992 ("[I]mmoral, i.e. which are detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society.").

[38] G.R. No. 49549, 189 SCRA 117, Aug. 30, 1990 [hereinafter "*Chua-Qua*"].

Ethics for teachers"[39] by marrying her sixteen-year-old student in a civil ceremony later ratified according to the rites of their religion.[40] The Supreme Court's statement, also quoted in *Leus*, reads: "To constitute immorality, the circumstances of each particular case must be holistically considered and evaluated in the light of prevailing norms of conduct and the applicable law."[41]

The standard, as originally laid down in *Chua-Qua*, can be subdivided into three components: (a) a holistic consideration of circumstances, in light of (b) prevailing norms of conduct, and (c) the applicable law. In the end, however, the Supreme Court chose not to apply the standard in the case, pointing out instead the Labor Arbiter's admitted finding that "there was no direct evidence to show that immoral acts were committed"[42] and that the school's affidavits showed a "complete absence of specific immoral acts allegedly committed."[43] The Supreme Court's ruling in *Chua-Qua*, then, was based not based on a finding that the acts alleged did not constitute immorality based on the prevailing norms of conduct, but on the lack of substantial evidence of specific immoral acts.[44]

The standard proposed by *Chua-Qua* was inherently majoritarian in character; it inescapably involved taking into account the "attitudes of the majority or even of a sizeable minority,"[45] considering that norms are situated in society's accepted standards of behavior, or as the Court in *Leus* put it, "conduct that is generally accepted by society as respectable or moral." This test is problematic. In the United States, for instance, majoritarian standards necessitate "empirical data such as polls, interviews, and surveys," or in the absence thereof, courts turn to "a review of history,

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[39] *Chua-Qua*, 189 SCRA at 123 ("[She was charged] with having allegedly violated the Code of Ethics for teachers the pertinent provision of which states that a "school official or teacher should never take advantage of his/her position to court a pupil or student.").

[40] *Id.* at 118.

[41] *Id.* at 124.

[42] *Id.* at 125.

[43] *Id.*

[44] The Court did mention that "[t]he deviation of the circumstances of their marriage from the usual societal pattern cannot be considered as a defiance of contemporary social mores" with reference to the relationship being characterized by a "disparity in their ages and academic levels," but this can hardly be considered an application of the standard, there being no evaluation of "contemporary social mores" by which to assess the parties' conduct. *Id.* at 126.

[45] *See* Samantha Arrington, *Expansion of the Katz Reasonable Expectation of Privacy Test Is Necessary to Perpetuate a Majoritarian View of the Reasonable Expectation of Privacy in Electronic Communications to Third Parties,* 90 U. DET. MERCY L. REV. 179, 183 (2013).

legislative actions, jury verdicts, and other indicia of popular will."[46] *Chua-Qua* did not specify possible sources or indicia of "prevailing norms of conduct," probably because it did not need to apply the test in the first place.

A categorical application of the prevailing norms of conduct standard was made in *Santos, Jr. v. National Labor Relations Commission*,[47] likewise a dismissal case. *Santos, Jr.* involved two teachers who had engaged in an extramarital affair. As in *Leus*, the petitioner in *Santos, Jr.* was dismissed for disgraceful and immoral conduct under Section 94(e) of the 1992 MRPS. In addition to the *Chua-Qua* standard,[48] *Santos* cited American case law:

> On the outset, it must be stressed that to constitute immorality, the *circumstances of each particular case must be holistically considered and evaluated in light of the prevailing norms of conduct and applicable laws.* American jurisprudence has defined *immorality as a course of conduct which offends the morals of the community and is a bad example to the youth* whose ideals a teacher is supposed to foster and to elevate, the same including sexual misconduct. Thus, in petitioner's case, the gravity and seriousness of the charges against him stem from his being a married man and at the same time a teacher.[49]

The Supreme Court then proceeded to specify certain norms and laws which would buttress the finding that the petitioner's conduct amounted to immorality, such as: extra-marital affairs being an affront to the sanctity of marriage; Article 68 of the Family Code;[50] Section 2 of Article XV of the Constitution;[51] Article 1 of the Family Code;[52] teachers serving as an example to their students; and teachers standing *in loco parentis* and possessing substitute and special parental authority under Article 218 of the

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[46] Arrington, *supra* note 45, at 183.

[47] G.R. No. 115795, 287 SCRA 117, Mar. 6, 1998 [hereinafter "*Santos, Jr.*"]. In this case, applying § 94(e) of the 1992 MRPS, the Court here upheld the dismissal of a married teacher who engaged in an extra-marital affair with another married teacher.

[48] *Id.* at 123 n.12.

[49] *Id.* at 123-24. (Citations omitted; emphasis supplied.)

[50] "The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support."

[51] "Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State."

[52] "Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation[.]"

Family Code.[53] This patchwork of factors fails to definitively supply a uniform measure for determining what "prevailing norms of conduct" actually are.

From the discussion, it would seem that the Court would be free to name what it surmised as having passed the definition of a prevailing norm, which would welcome arbitrary pronouncements. This is completely antagonistic to the establishment of a standard in the first place.

Leus broke the *Chua-Qua* standard down into a "two-step process":[54]

> In *Chua-Qua v. Clave*, the Court stressed that to constitute immorality, the circumstances of each particular case must be holistically considered and *evaluated in light of the prevailing norms of conduct and applicable laws*. Otherwise stated, it is not the totality of the circumstances surrounding the conduct *per se* that determines whether the same is disgraceful or immoral, but the conduct that is generally accepted by society as respectable or moral. If the conduct does not conform to *what society generally views as respectable or moral*, then the conduct is considered as disgraceful or immoral. Tersely put, substantial evidence must be presented, which would establish that a particular conduct, viewed in light of the prevailing norms of conduct, is considered disgraceful or immoral.
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> Thus, the determination of whether a conduct is disgraceful or immoral involves a *two-step process: first, a consideration of the totality of the circumstances surrounding the conduct*; and second, an assessment of the said circumstances vis-à-vis the prevailing norms of conduct, *i.e.*, what the society generally considers moral and respectable.[55]

More than that, *Leus* sought to provide what *Chua-Qua* and *Santos, Jr.* failed to supply: a means to determine what the prevailing norms of conduct

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[53] "We cannot overemphasize that having an extra-marital affair is an affront to the sanctity of marriage, which is a basic institution of society. Even our Family Code provides that husband and wife must live together, observe mutual love, respect and fidelity. This is rooted in the fact that both our Constitution and our laws cherish the validity of marriage and unity of the family. Our laws, in implementing this constitutional edict on marriage and the family underscore their permanence, inviolability and solidarity.

"As a teacher, petitioner serves as an example to his pupils, especially during their formative years and stands in *loco parentis* to them. To stress their importance in our society, teachers are given substitute and special parental authority under our laws." *Santos, Jr.*, 287 SCRA at 124-25. (Citations omitted.)

[54] *Leus*, at 11.

[55] *Id.* (Citations omitted; emphasis supplied.)

consider disgraceful or immoral, despite admitting that "determining what the prevailing norms of conduct [consider] disgraceful or immoral is *not an easy task*"[56] Because "[a]n individual's perception of what is moral or respectable is a confluence of a myriad of influences, such as religion, family, social status, and a cacophony of others."[57] The attempt was embodied in the statement that "*[p]ublic and secular morality should determine the prevailing norms of conduct, not religious morality*,"[58] thereby incorporating the Court's ruling in *Estrada v. Escritor*.[59] In effect, *Leus* joined two standards – *Chua-Qua* and *Estrada* – that were previously distinct determinants of morality.[60]

Estrada highlighted "the distinction between public and secular morality as expressed – albeit not exclusively – in the law, on the one hand, and religious morality, on the other [...] because the jurisdiction of the Court extends only to public and secular morality."[61] While *Estrada* pointed out that "public and secular morality" is not exclusively expressed in the law, it named no other sources from which secular morality can be drawn. Without further discussion on such sources, the concept of "public and secular morality" remains nebulous. What makes *Estrada* even more problematic as a standard is that in reality, it *gives no standard*; it seemed to recommend that each conduct be taken at a case-to-case basis:

> [T]he more difficult task is determining which immoral acts under this public and secular morality fall under the phrase 'disgraceful and immoral conduct' [...] [b]ut the case at bar does not require us to comprehensively delineate between those immoral acts [...]. Only one conduct is in question before this Court[.][62]

In any case, *Estrada*'s public and secular morality standard, which aims to be objective in character, is incongruent with *Chua-Qua*'s inherently majoritarian prevailing norms of conduct standard. Similarly, *Leus* relied only upon the indicators as expressed in jurisprudence in assessing pregnancy outside of marriage against the prevailing norms of conduct. The Court merely mentioned that "[Leus's] conduct is not considered by *law* as disgraceful or immoral" and did not discuss other possible indicators of such

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[56] *Leus*, at 12. (Emphasis supplied.)

[57] *Id.*

[58] *Id.* (Emphasis supplied.)

[59] A.M. No. P-02-1651, 408 SCRA 1, 180, Aug. 4, 2003 [hereinafter "*Estrada*"].

[60] *See* Leus, at 12 ("[T]he Court's ratiocination in *Estrada v. Escritor* [455 Phil. 411 (2003)] is instructive.").

[61] *Estrada*, 408 SCRA at 183. (Emphasis omitted.)

[62] *Id.* at 184. It must also be pointed out that in *Estrada,* the Court ruled in favor of the respondent who invoked her religious freedom. If the case were to be paralleled to *Leus*, it should be SSCW which would benefit from the *Estrada* ruling.

public and secular morality despite its description of disgraceful and immoral conduct as "what society generally views as respectable or moral."[63]

The flow of argument would then be: that an act must be disgraceful or immoral to merit dismissal under the 1992 MRPS and statutes similarly providing such a ground; that morality is determined by prevailing norms of conduct; that prevailing norms of conduct are determined by public and secular morality; and that public and secular morality is determined largely by law, although as far as Philippine jurisprudence is concerned, law and jurisprudence have been the only expressed indicators of public and secular morality.

This could lead to the conclusion that *in order for an act to be considered immoral, it must be expressly proscribed by law, statute, or ruling.* In such a milieu, there arises an incompatibility between the standards in *Chua-Qua* and *Estrada*, considering that "prevailing norms" are not always embodied in the law, nor do laws always embody norms or conducts that are still prevailing. Even *Chua-Qua* saw fit to separate "prevailing norms of conduct" and "the applicable law" as factors,[64] although the latter was dropped in *Leus*.

This incompatibility can be remedied by a subsequent pronouncement indicating other sources of public and secular morality that would also take in to account the so-called prevailing norms of conduct. As they stand, the two standards are incompatible; joined together, they are unworkable and bear no added value to Philippine jurisprudence. The absence of a standard for gross and immoral conduct can result in arbitrary pronouncements which would deny fairness to a number of workers, considering that this ground for dismissal is found not only in regulations for private schools, but in the Administrative Code as well.

III. CLASHING CONSTITUTIONAL GUARANTEES

Not put squarely before the Court—and hence unsettled—in *Leus* are the inevitable interface of certain constitutionally protected rights, among them: the free exercise of religion, academic freedom, non-impairment of contracts, and security of tenure. These rights are inextricably linked to the issue of dismissal due to pregnancy outside of marriage, existing as undercurrents in the facts of the case.

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[63] *Leus*, at 18. (Emphasis supplied.)
[64] *Chua-Qua*, 189 SCRA at 124.

A. Freedom of Religion and Academic Freedom in Sectarian Schools

1. Freedom of Religion

The inclusion of Section 13(c)[65] in the Magna Carta of Women was met with opposition from Catholic educational institutions, which sought exemption based on religious and academic freedom.[66] The free exercise of religion is protected under Article III, Section 5, of the 1987 Constitution.[67] In *Leus*, there was no express indication of SSCW's invocation of a religious exemption in its favor, although there was mention in the facts of SSCW's assertion that "as a Catholic institution of learning, [it] has the right to uphold the teaching of the Catholic Church and expect its employees to abide by the same."[68]

Had it so invoked the exemption, the Court would have had to apply the "'compelling state interest' test from a benevolent neutrality stance"[69] and to determine the following:

(1) Whether the school's right to religious freedom has been burdened, which would involve an examination of its sincerity of belief;
(2) Whether there is a compelling State interest that would override such a right; and
(3) Whether the State has used the least intrusive means possible.[70]

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[65] "Expulsion and non-readmission of women faculty due to pregnancy outside of marriage shall be outlawed. No school shall turn out or refuse admission to a female student solely on the account of her having contracted pregnancy outside of marriage during her term in school." *See also* IRR, § 16(C)(1) ("Expulsion and non-readmission of women faculty due to pregnancy outside of marriage shall be outlawed. [...]Women faculty who become pregnant outside of marriage shall not be discriminated by reason thereof. They shall not be dismissed, separated from work, forced to go on leave, re-assigned or transferred. They shall have access to work already held with no diminution in rank, pay or status and shall be entitled to all benefits accorded by law and by the concerned learning institutions").

[66] Philip Tubeza, *Catholic schools seek women's law exemption,* INQUIRER GLOBAL NATION, Nov. 17, 2009, *available at* http://globalnation.inquirer.net/news/breakingnews/view/20090917-225651/Catholic-schools-seeks-womens-law-exemption.

[67] CONST., art. III, § 5 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.").

[68] *Leus*, at 3.

[69] *Estrada*, 408 SCRA at 188.

[70] *See Estrada*, 408 SCRA at 188-91 (application of benevolent neutrality and the compelling state interest test).

Interestingly, freedom of religion was invoked and applied as a defense in favor of the employee in *Estrada*.[71] Had SSCW alleged and proved that Leus's conduct was contrary to a central dogma of the Catholic faith and that there was no compelling state interest being protected (or that if there were, that the State was not using the least intrusive means), then a discussion might have been ensued regarding a sectarian institution's religious exemption.

The Court seemed to dismiss possible invocations of religious freedom or exemption in saying that "the Court will assess the matter from a strictly neutral and secular point of view" and "[t]hat the petitioner was employed by a Catholic educational institution per se does not absolutely determine whether her pregnancy out of wedlock is disgraceful or immoral."[72] In employing *Chua Qua's* prevailing norms of conduct standard, it was stating that the yardstick to be used would be societal, and not religious, ideals. In incorporating *Estrada's* "public and secular morality," it *excluded* religious morality.[73]

In the United States, where we lifted the freedom of religion and non-establishment clauses,[74] sectarian educational institutions can invoke defenses found in statutory exemptions or in their constitutional rights. Such statutory exemptions are provided in Title VII of the Civil Rights Act of 1964:[75]

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[71] *Estrada*, 408 SCRA at 58-61 ("Escritor reiterate[d] the validity of her conjugal arrangement with Quilapio [her partner] based on the belief and practice of her religion, the Jehovah's Witnesses.").

[72] *Leus,* at 11.

[73] *Estrada*, 408 SCRA at 183 ("*[T]he jurisdiction of the Court extends only to public and secular morality* [...] For as long as [Escritor's] conduct is being judged within this realm, she will be accountable to the state. But in so ruling, the Court does not and cannot say that her conduct should be made reprehensible in the realm of her church where it is presently sanctioned and that she is answerable for her immorality to her Jehovah God nor that other religions prohibiting her conduct are correct.").

[74] "Considering the American origin of the Philippine religion clauses and the intent to adopt the historical background, nature, extent and limitations of the First Amendment of the U.S. Constitution when it was included in the 1935 Bill of Rights, it is not surprising that nearly all the major Philippine cases involving the religion clauses turn to U.S. jurisprudence in explaining the nature, extent and limitations of these clauses." *See Estrada*, at 133.

[75] 78 Stat. 241 (July 2, 1964). Called the "workhorse of discrimination litigation," Title VII outlaws the discharge or discrimination of an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin [...]" Mawdsley, *infra,* at 282 n.6. It has also been described as legislation "designed to ensure that administrators in faith-based schools should

(1) When the institution has fifteen (15) or more employees;
(2) When "religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise";
(3) When what is involved is "employment of individuals of a particular religion to perform work connected with the carrying on [a] such corporation, association, educational institution, or society of its activities" (commonly known as the ministerial exception); and
(4) When the institution is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution [...] is directed toward the propagation of a particular religion."[76]

The tension between this facet of fair labor standards and policies and the sectarian nature of employer-institutions, especially those educational in nature, have drawn considerable discussion across jurisdictions. The contention centers on how religious liberty translates into "[u]sing [r]eligion to [d]iscriminate" against women.[77] "Religious schools and universities," or sectarian educational institutions, can, for example, "claim a ministerial exemption under the Free Exercise Clause in making employment decisions even though those decisions are discriminatory, the rationale being that courts cannot inquire into an institution's qualifications for those who perform religious functions."[78]

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not have to compromise their beliefs when hiring staff." Russo, *infra,* at 467. Title VII was amended to incorporate the Pregnancy Discrimination Act of 1978. Fisher, *infra,* at 531.

[76] Charles J. Russo, *Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow Their Beliefs in Hiring,* 45 U. TOL. L. REV. 457, 461-65 (2014). (Citations omitted.)

[77] *See, e.g.,* American Civil Liberties Union, *Discrimination against women* (2015), *available at* https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/discrimination-against-women (last accessed Aug. 15, 2015) ("We are seeing instances across the country where religion is being used to discriminate against women [...] In employment, we have seen a recent spate of cases in which religiously affiliated schools have fired women for getting pregnant while single or for using IVF. These cases are suggestive of a past when women were routinely pushed out of the workplace because of pregnancy. Such discrimination is now illegal, even if religiously motivated.").

[78] Ralph D. Mawdsley, *Employment, Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have a Protected Right to Discriminate in the Selection and Discharge of Employees?,* 2011 BYU EDUC. & L.J. 279, 286.

For the exemption to apply, "authorities in religious institutions must prove that the nexus between teaching and/or other duties of staff members are so integrally related to furthering their spiritual and pastoral missions that they can be treated as ministerial employees."[79] In *Leus*, there was this attempt on the part of SSCW to assert that Leus's post as an Assistant to the Director of the Lay Apostolate and Community Outreach Directorate is "a position of responsibility that the students look up to as role model."[80] While no such express ministerial exemption is provided under Philippine law, this defense is not precluded under the present jurisprudence[81] and in effect, "[t]hough schools [may] claim that their teachers [...] serve as comprehensive, full-time role models for their students, it would be difficult for any school to enforce this policy in a gender-neutral way that does not infringe on the privacy rights of its teachers."[82]

2. Academic Freedom

Academic freedom,[83] on the other hand, has been traditionally ruled to be composed of the following "essential rights": (1) who may teach; (2) who may be taught; (3) how lessons shall be taught; and (4) who may be admitted to study.[84] The Court has also held that the authority to set standards for hiring takes root not only in academic freedom, but also in the exercise of management prerogative.

> The same academic freedom grants the school the *autonomy to decide for itself the terms and conditions for hiring its teacher*, subject of

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[79] Russo, *supra* note 76, at 462.

[80] *Leus*, at 3.

[81] In *Estrada*, the Court requires that "[t]he state [achieve] its legitimate purposes us[ing] the least intrusive means possible so that the free exercise is not infringed any more than necessary to achieve the legitimate goal of the state." *Estrada*, 408 SCRA at 128. The defense may be had upon showing that their free exercise of religion "is substantially burdened by government."

[82] Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 529, 557 (2010).

[83] "Academic freedom shall be enjoyed in all institutions of higher learning." CONST. art. XIV, § 5(2).

[84] Mercado v. AMA Computer College Parañaque, G.R. No. 183572, 618 SCRA 218, 236, Apr. 13, 2010 [hereinafter "*Mercado*"]; Garcia v. The Faculty Admission Committee, Loyola Sch. of Theology, G.R. L-40779, 68 SCRA 277, 285 n.15, Nov. 28, 1975, *citing* Sweezy v. New Hampshire, 354 U.S. 234, 236 (1957) (Frankfurter, *J., concurring*) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

> course to the overarching limitations under the Labor Code. [...] The authority to hire is likewise covered and protected by its management prerogative—the right of an employer to regulate all aspects of employment, such as hiring, the freedom to prescribe work assignments, working methods, process to be followed, regulation regarding transfer of employees, supervision of their work, *lay-off and discipline, and dismissal and recall of workers.*[85]

The right to academic freedom has not yet been invoked in dismissing teaching personnel due to a school's sectarian character in the Philippines. As noted, in this jurisdiction, academic freedom as corollary to management prerogative of dismissing employees applies to pedagogical standards and professional qualifications. [86] Foreign leading cases are, however, illustrative in understanding this collision between two constitutionally accorded rights.

In *Casagrande v. Hinton Roman Catholic Separate School District No. 155*,[87] a Canadian case before the Alberta Court of Queen's Bench, it was held that "[t]he constitutional rights granted to separate schools involved more than a guarantee of the right to establish separate schools. The right to establish such schools necessarily included the right to maintain the denominational character of the school and *included the right to dismiss teachers for denominational causes.*"[88]

The rationale for this policy is succinctly put by constitutional law scholar Prof. Michael W. McConnell:

> The effect of forcing religious schools to disregard religion in the hiring, tenuring, and disciplining of faculty would be to destroy

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[85] *Mercado*, at 221. (Emphasis supplied.)

[86] *See also* Herrera-Manaois v. St. Scholastica's College, G.R. No. 188914, 712 SCRA 418, 433, Dec. 11, 2013 ("In line with academic freedom and constitutional autonomy, an institution of higher learning has the discretion and prerogative to impose standards on its teachers and determine whether these have been met. Upon conclusion of the probation period, the college or university, being the employer, has the sole prerogative to make a decision on whether or not to re-hire the probationer. The probationer cannot automatically assert the acquisition of security of tenure and force the employer to renew the employment contract."); Peña v. National Labor Relations Commission, G.R. No. 100629, 258 SCRA 65, 67, July 5, 1996 ("It is the prerogative of the school to set high standards of efficiency for its teachers since quality education is a mandate of the Constitution. As long as the standards fixed are reasonable and not arbitrary, courts are not at liberty to set them aside. Schools cannot be required to adopt standards which barely satisfy criteria set for government recognition."). (Citations omitted.)

[87] 38 D.L.R. (4th) 382 (1987) [hereinafter "*Casagrande*"].

[88] *Id.* at 388. (Emphasis supplied.)

> the distinctive character of these intellectual communities. If we assume that sectarian ideas and approaches to knowledge are worth preserving (if only as a challenge to predominant secular ideology), it is a mistake to destroy the very institutions responsible for developing, preserving, and presenting those ideas.[89]

The silence of the decision is a Damocles sword over persons in similar circumstances as Leus. *Leus* did not take away schools' right to dismiss based on denominational causes, founded on the right to academic freedom. The rationale behind the same is not non-transplantable in Philippine context, especially since the concept of academic freedom traces its way in common law.[90] What essentially prevented SSCW to cause Leus' termination was the sole basis it cited: disgraceful and immoral conduct under the 1992 MRPS.[91] With the Court having found Leus's acts as not constitutive of such conduct, the school was in effect left without a ground on which to base her termination. Had SSCW shown that she had violated some school policy that proscribed her conduct, Leus could have been dismissed on the ground of serious misconduct or willful disobedience under Article 288(a) of the Labor Code.[92]

3. Non-Impairment of Contract

The *ponencia* did not disallow schools from imposing termination as a penalty for pregnancy outside of wedlock. This policy can also be contained in an agreement such as an employment contract or collective bargaining agreement.[93] The Constitution, after all, protects citizens from

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[89] Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities,* 53 L. & CONTEMP. PROBS. 303, 303 (1990).

[90] *See* Pacifico A. Agabin, *Academic Freedom and the Larger Community*, 52 PHIL. L.J. 336 , 336-37 (1977) ("The European concept of immunity of the university has been exported to Latin America, where university have become, by tradition, sanctuaries for the political opposition.")

[91] The facts made mention of the then-pending promulgation of a "Support Staff Handbook." In the meantime, the 1992 MRPS would govern. *Leus,* at 2. It is worth noting that conditions in the 1992 MRPS are "deemed impliedly written in the employment con tracts between private educational institutions and prospective faculty members." Herrera-Manaois v. St. Scholastica's College, 712 SCRA at 437.

[92] LAB. CODE, art. 288. *Termination by Employer.* – An employer may terminate an employment for any of the following causes: (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work.

[93] A proposed amendment to the Labor Code "replaces analogous causes as just cause of termination, with 'act or omission specified in the company rules and regulations or collective bargaining agreement'." Dep't of Lab. and Employment, *Labor Code amendments on*

the impairment of obligation of contracts, an intrusion likely to happen if the law and the Court were to declare dismissal on the ground of pre-marital sexual relations invalid despite an express agreement allowing it.

Although the issue of impairment of contracts was not brought before the Court in *Leus*, the decision must be understood to respect the existence of prior agreements between the parties. The Court made mention of the fact that

> SSCW, at the time of the controversy, [did] not have any policy or rule against an employee who engages in pre-marital sexual relations and conceives a child as a result thereof. There being no valid basis in law or even in SSCW's policy and rules, SSCW's dismissal of the petitioner is despotic and arbitrary and, thus, not a valid exercise of management prerogative.[94]

This pronouncement confirms that had there been an existing policy or rule against the conduct, the act of dismissal would have been deemed a valid exercise of SSCW's management prerogative. It would also imply that despite the fact of the passage of the Magna Carta of Women in the meantime, a standing company policy or rule allowing termination based on an employee's pregnancy outside of marriage remains valid.

The Supreme Court missed an opportunity to make a distinction as to the type of employee concerned. Under the Magna Carta of Women, only non-teaching school personnel and staff are not accorded protection against dismissal based on pregnancy outside of marriage.[95] The Court did not clarify whether the dismissal of a student or faculty member may be validly enforced after the Magna Carta's passage notwithstanding a prior school rule or policy on the matter.

This circumvention is not impossible as "[i]n the case of pregnancy discrimination against a sectarian school teacher, the school [can] assert that the teacher failed to satisfy a [bonafide occupational qualification] either because she *failed to abide by a particular moral code* or because she *failed in her capacity as a role model*"[96] and as was alleged by SSCW in *Leus*. The defense of non-impairment of contract was, however, unavailable to the school by

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track Congress support critical, available at http://www.gov.ph/2015/05/19/labor-code-amendments-on-track-congress-support-critical/ (last visited June 11, 2015).

[94] *Leus*, at 18.

[95] *See* DECS Dep't Order No. 92 (1992).

[96] Fisher, *supra* note 82, at 551-552. Based on *Leus*, this rule equally applies to non-teaching staff.

virtue of the absence of a standing policy or rule against the act. Fisher further observes that the two grounds are "often conflated [although] they are actually and their usage as defense mechanisms has quite different implications":[97]

> Claiming that a woman failed to satisfy a [bonafide occupational qualification] because she didn't abide by a written moral code is relatively straightforward: because she failed to follow the rules laid out in her employment contract, employee handbook, or manual, she disqualified herself with her behavior. This is, in its simplest form, a breach of contract claim, and if it is enforced equally across the sexes, then it does not appear unfair.[98]

It must be emphasized that to be non-discriminatory, such a policy or rule must prohibit an act that is equally enforceable across the sexes. As discussed below, the ground cannot simply be pregnancy outside of marriage because this cannot be equally enforced.

B. Workers' Rights to Equality in Employment and Security of Tenure

1. Gender-Based Discrimination

The Supreme Court could have condemned Leus's dismissal as an act of gender-based discrimination prohibited under the Labor Code and the Magna Carta of Women. After all, "it is often only with pregnancy that a breach of a requirement to abstain from sexual activity outside marriage will become known to the employer. [...] Where a decision to dismiss a member of staff is related to pregnancy, it will amount to sex discrimination."[99] Indeed, in other jurisdictions, any dismissal based on pregnancy – whether within our outside marriage – is deemed "per se sex discrimination,"[100] considering that *"only* women can *ever* be fired for being pregnant without benefit of marriage. Thus, women would be subject to termination for something that men would not be, and that is sex discrimination, regardless of the justification put forth for the disparity."[101]

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[97] *Id.* at 552.

[98] *Id.* (Citations omitted.)

[99] LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 166 (2008).

[100] Vigars v. Valley Christian Center of Dublin, Cal., 805 F. Supp. 802, 808 (1992).

[101] *Id.*

An exception to the above rule is if dismissal were not based on the fact of pregnancy outside of marriage, but on failure to comply with a certain religious standard necessary for employment, and that dismissal would equally be meted out if it were to be discovered that a man had failed to comply with religious standards.[102] But "[a] woman's inability to keep private her extramarital sex resulting in pregnancy, coupled with a man's ability to do just that, gives men a clear upper hand in avoiding morality-based termination. Such a distinction is gender discrimination, and should not be tolerated."[103]

Stated otherwise, "[m]en and women *will never be* 'similarly situated' with respect to morality requirements such as the ones these private schools claim to require, because women are biologically more disposed to show the outward manifestations of what a private religious school might view as immoral behavior."[104]

To this end, American jurisprudence employs the *McDonnell Douglas* test to determine whether the plaintiff in a discrimination suit has established a *prima facie* claim. The four prongs of this test, as applied to pregnancy discrimination, are:

> (1) The plaintiff must prove that she was pregnant; and
> (2) She must prove that she was meeting the requirements of her job; and
> (3) She must prove that she was terminated, or otherwise suffered an adverse employment action; and
> (4) She must prove that the circumstances of her termination give rise to an inference of discrimination.[105]

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[102] *See, e.g.* Boyd v. Harding Academy of Memphis, 88 F.3d 410 (1996) ("[D]efendant [school] articulated a legitimate, non-discriminatory reason by stating that it fired plaintiff Boyd not because she was pregnant, but for engaging in sex outside of marriage, and that plaintiff Boyd did not meet her burden to prove by a preponderance of the evidence that this articulated reason was actually a pretext for illegal discrimination."). *See also Casagrande,* 38 D.L.R. (4th) 382 (1987) where the Alberta Court of Queen's Bench noted that the school's policy against participation in sexual intercourse outside the marriage sacrament applied equally to Catholic teachers, both male and female. It has also been rationalized that "pregnancy was an indicator of this inappropriate lifestyle, but it was the lifestyle that was objectionable, not the pregnancy." James R. Covert, *Creating a Professional Standard of Moral Conduct for Canadian Teachers: A Work in Progress*, 18 CAN. J. OF EDUC. 429, 438 (1993).

[103] Fisher, *supra* note 82, at 556.

[104] *Id.* at 560. (Emphasis supplied.)

[105] *Id.* at 535.

Establishing the presence of all four prongs shifts the burden of proof to the employer "who must proffer a legitimate, nondiscriminatory reason for termination."[106] This is different from the rule in Philippine jurisprudence that in illegal dismissal cases, "the *onus probandi* rests on the employer to prove that its dismissal of an employee is for a valid cause,"[107] because the four prongs contemplate a situation where the dismissed employee institutes an action against the employer on the ground of discrimination. Nevertheless, the same prongs can be used in alleging the employer's act of pregnancy discrimination in Philippine illegal dismissal cases.

2. Marriage-Based Discrimination

The Labor Code prohibits stipulations against marriage and makes it unlawful to "dismiss, discharge, discriminate, or otherwise prejudice a woman employee merely by reason of her marriage."[108] This provision, however, only protects married women and is not a complete safeguard against discrimination based on marital status. Granting married employees certain benefits that cannot be enjoyed by unwed employees for the sole reason that the latter are unmarried still constitutes an act of discrimination based on marital status. The Magna Carta of Women provides a more comprehensive coverage:

> (b) "Discrimination Against Women" refers to any 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.[109]

Dismissal due solely to pregnancy outside marriage can arguably be considered an act of discrimination based on marital status. As one lawyer has creatively argued, "If they (school officials) [are] going to single her out because she conceived prior to marriage, but allow people to remain

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[106] *Id.*

[107] Javier v. Fly Ace Co., G.R. No. 192558, 666 SCRA 383, 393, Feb. 15, 2012; Real v. Sangu Phil., Inc., G.R. No. 168757, 640 SCRA 67, 90, Jan. 19, 2011; Pepsi Cola Products Phil., Inc. v. Santos, G.R. No. 165968, 551 SCRA 245, 252, Apr. 14, 2008; R.P. Dinglasan Construction, Inc. v. Atienza, G.R. No. 156104, 433 SCRA 263, 269, June 29, 2004.

[108] LAB. CODE, art. 134.

[109] Rep. Act. No. 9710 (2009), § 4(b), par. 1. (Emphasis supplied.)

employed who conceived during marriage, isn't that discriminating against her based on her marital status?"[110] A particular route available to unions without marriage would be to invoke the prohibition against discrimination based on marital status embodied in the Magna Carta, considering that in some jurisdictions, the definition of marital status includes living with a person "in a conjugal relationship outside marriage."[111]

3. Security of Tenure

The right to security of tenure is not only protected by the Labor Code,[112] it "is a paramount right of every employee that is held sacred by the Constitution [because] labor is deemed to be 'property' within the meaning of constitutional guarantees."[113] In the United States, immoral conduct "can constitute sufficient cause for terminating or suspending tenured teachers or teachers under a definite term contract."[114] In the 1992 MRPS, disgraceful and immoral conduct (or *notoriously* disgraceful and immoral conduct under the 2010 Revised Manual) is only one of the various additional just causes for the termination of the employment of school personnel.

Leus aimed to clarify the scope and applicability of this ground for dismissal. In doing so, the Court affirmed the doctrine in administrative case law that pregnancy outside of marriage, resulting from sexual union between two consenting adults who have no impediment to marry, does not *per se* constitute disgraceful immoral conduct. *Leus* in effect extended the coverage of the said doctrine to all employees covered by the 1992 MRPS (and statutes similarly providing that ground, such as the Administrative Code), unexpectedly bridging gaps present in the law and jurisprudence.

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[110] Mawdsley, *supra* note 78, at 281. (Citations omitted.)

[111] *See, e.g.,* HUM. RTS. CODE (ONTARIO, CANADA) (1962), ¶ 10(1) *available at* http://www.ontario.ca/laws/ statute/90h19.

[112] LAB. CODE, art. 285. "In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title…"

[113] Sagales v. Rustan's Comm'l Corp., G.R. No. 166554, 572 SCRA 89, 100, Nov. 27, 2008. (Citations omitted.)

[114] Marka B. Fleming, Amanda Harmon Cooley, and Gwendolyn McFadden-Wade, *Morals Clauses in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns,* 2009 BYU EDUC. & L.J. 67, 72 (2009).

IV. CONCLUSION

In attempting to set a novel standard by which to assess morality, *Leus* proposed the coalescence of the "prevailing norms of conduct" test in *Chua-Qua v. Clave* and the "public and secular morality" test in *Estrada v. Escritor*. The result is less than ideal, considering the incompatibility between the two standards: *Chua-Qua* treated the law separately from the prevailing norms of conduct, while *Estrada* emphasized public and secular morality drawn largely from the law. These points must be reconciled if the "*Leus* test" is to be effectively applied in the future.

Moreover, the Court missed its opportunity to declare dismissals based on pregnancy outside of marriage as an act of discrimination in employment, which could have further safeguarded the security of tenure of female workers. As such, unless a similar controversy is raised before the Court, it is up to Congress to weigh the wisdom and necessity of extending the prohibition against dismissal based solely on pregnancy outside of marriage to cover not just the faculty (and students), but all female workers.

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