Republic of the Philippines
Supreme Court
Baguio City

EN BANC

ANG LADLAD LGBT PARTY represented herein by its Chair, DANTON REMOTO, *Petitioner*,	**G.R. No. 190582**
	Present:
- versus -	PUNO, *C. J.,* CARPIO, CORONA, CARPIO MORALES, VELASCO, JR., NACHURA, LEONARDO-DE CASTRO, BRION, PERALTA, BERSAMIN, DEL CASTILLO, ABAD, VILLARAMA, JR., PEREZ, and MENDOZA, *JJ.*
COMMISSION ON ELECTIONS, *Respondent*.	Promulgated: April 8, 2010

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D E C I S I O N

DEL CASTILLO, *J*.:

> ... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Justice Robert A. Jackson

[1]

West Virginia State Board of Education v. Barnette

One unavoidable consequence of everyone having the freedom to choose is that others may make different choices – choices we would not make for ourselves, choices we may disapprove of, even choices that may shock or offend or anger us. However, choices are not to be legally prohibited merely because they are different, and the right to disagree and debate about important questions of public policy is a core value protected by our Bill of Rights. Indeed, our democracy is built on genuine recognition of, and respect for, diversity and difference in opinion.

Since ancient times, society has grappled with deep disagreements about the definitions and demands of morality. In many cases, where moral convictions are concerned, harmony among those theoretically opposed is an insurmountable goal. Yet herein lies the paradox – philosophical justifications about what is moral are indispensable and yet at the same time powerless to create agreement. This Court recognizes, however, that practical solutions are preferable to ideological stalemates; accommodation is better than intransigence; reason more worthy than rhetoric. This will allow persons of diverse viewpoints to live together, if not harmoniously, then, at least, civilly.

Factual Background

This is a Petition for *Certiorari* under Rule 65 of the Rules of Court, with an application for a writ of preliminary mandatory injunction, filed by *Ang Ladlad* LGBT Party (*Ang Ladlad*) against the Resolutions of the Commission on Elections (COMELEC) dated November 11, 2009 [2] (the First Assailed Resolution) and December 16, 2009 [3] (the Second Assailed Resolution) in SPP No. 09-228 (PL) (collectively, the Assailed Resolutions). The case has its roots in the COMELEC's refusal to accredit *Ang Ladlad* as a party-list organization under Republic Act (RA) No. 7941, otherwise known as the Party-List System Act. [4]

Ang Ladlad is an organization composed of men and women who identify themselves as lesbians, gays, bisexuals, or trans-gendered individuals (LGBTs). Incorporated in 2003, *Ang Ladlad* first applied for registration with the COMELEC in 2006. The application for accreditation was denied on the ground that the organization had no substantial membership base. On August 17, 2009, *Ang Ladlad*

again filed a Petition [5] for registration with the COMELEC.

Before the COMELEC, petitioner argued that the LGBT community is a marginalized and under-represented sector that is particularly disadvantaged because of their sexual orientation and gender identity; that LGBTs are victims of exclusion, discrimination, and violence; that because of negative societal attitudes, LGBTs are constrained to hide their sexual orientation; and that *Ang Ladlad* complied with the 8-point guidelines enunciated by this Court in *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*. [6] *Ang Ladlad* laid out its national membership base consisting of individual members and organizational supporters, and outlined its platform of governance. [7]

On November 11, 2009, after admitting the petitioner's evidence, the COMELEC (Second Division) dismissed the Petition on moral grounds, stating that:

> x x x This Petition is dismissible on moral grounds. Petitioner defines the Filipino Lesbian, Gay, Bisexual and Transgender (LGBT) Community, thus:
>
> > x x x a marginalized and under-represented sector that is particularly disadvantaged because of their sexual orientation and gender identity.
>
> and proceeded to define sexual orientation as that which:
>
> > x x x refers to a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender, of the same gender, or more than one gender."
>
> This definition of the LGBT sector makes it crystal clear that petitioner tolerates immorality which offends religious beliefs. In Romans 1:26, 27, Paul wrote:
>
> > For this cause God gave them up into vile affections, for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet.
>
> In the Koran, the hereunder verses are pertinent:
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> > For ye practice your lusts on men in preference to women "ye are indeed a people transgressing beyond bounds." (7.81) "And we rained down on them a shower (of brimstone): Then see what was the end of those who indulged in sin and crime!" (7:84) "He said: "O my Lord! Help Thou me against people who do mischief" (29:30).
>
> As correctly pointed out by the Law Department in its Comment dated October 2, 2008:
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> > The ANG LADLAD apparently advocates sexual immorality as indicated in the Petition's par. 6F: 'Consensual partnerships or relationships by gays and lesbians who are already of age'. It is further indicated in par. 24 of the Petition which waves for the record:

'In 2007, Men Having Sex with Men or MSMs in the Philippines were estimated as 670,000 (Genesis 19 is the history of Sodom and Gomorrah).

Laws are deemed incorporated in every contract, permit, license, relationship, or accreditation. Hence, pertinent provisions of the Civil Code and the Revised Penal Code are deemed part of the requirement to be complied with for accreditation.

ANG LADLAD collides with Article 695 of the Civil Code which defines nuisance as 'Any act, omission, establishment, business, condition of property, or anything else which x x x (3) shocks, defies; or disregards decency or morality x x x

It also collides with Article 1306 of the Civil Code: 'The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy. Art 1409 of the Civil Code provides that 'Contracts whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy' are inexistent and void from the beginning.

Finally to safeguard the morality of the Filipino community, the Revised Penal Code, as amended, penalizes 'Immoral doctrines, obscene publications and exhibitions and indecent shows' as follows:

Art. 201. Immoral doctrines, obscene publications and exhibitions, and indecent shows. — The penalty of prision mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:

1. Those who shall publicly expound or proclaim doctrines openly contrary to public morals;

2. (a) The authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;

(b) Those who, in theaters, fairs, cinematographs or any other place, exhibit indecent or immoral plays, scenes, acts or shows, it being understood that the obscene literature or indecent or immoral plays, scenes, acts or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which: (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, good customs, established policies, lawful orders, decrees and edicts.

3. Those who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals.

Petitioner should likewise be denied accreditation not only for advocating immoral doctrines but likewise for not being truthful when it said that it "*or any of its nominees/party-list representatives have not violated or failed to comply with laws, rules, or regulations relating to the elections.*"

Furthermore, should this Commission grant the petition, we will be exposing our youth to an environment that does not conform to the teachings of our faith. Lehman Strauss, a famous bible teacher and writer in the U.S.A. said in one article that "*older practicing homosexuals are a threat to the youth.*" As

an agency of the government, ours too is the State's avowed duty under Section 13, Article II of the Constitution to protect our youth from moral and spiritual degradation.[8]

When *Ang Ladlad* sought reconsideration,[9] three commissioners voted to overturn the First Assailed Resolution (Commissioners Gregorio Y. Larrazabal, Rene V. Sarmiento, and Armando Velasco), while three commissioners voted to deny *Ang Ladlad's* Motion for Reconsideration (Commissioners Nicodemo T. Ferrer, Lucenito N. Tagle, and Elias R. Yusoph). The COMELEC Chairman, breaking the tie and speaking for the majority in his Separate Opinion, upheld the First Assailed Resolution, stating that:

I. The Spirit of Republic Act No. 7941

Ladlad is applying for accreditation as a sectoral party in the party-list system. Even assuming that it has properly proven its under-representation and marginalization, it cannot be said that *Ladlad*'s expressed sexual orientations *per se* would benefit the nation as a whole.

Section 2 of the party-list law unequivocally states that the purpose of the party-list system of electing congressional representatives is to enable Filipino citizens belonging to marginalized and under-represented sectors, organizations and parties, and who lack well-defined political constituencies but who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole, to become members of the House of Representatives.

If entry into the party-list system would depend only on the ability of an organization to represent its constituencies, then all representative organizations would have found themselves into the party-list race. But that is not the intention of the framers of the law. The party-list system is not a tool to advocate tolerance and acceptance of misunderstood persons or groups of persons. Rather, **the party-list system is a tool for the realization of aspirations of marginalized individuals whose interests are also the nation's** – only that their interests have not been brought to the attention of the nation because of their under representation. **Until the time comes when *Ladlad* is able to justify that having mixed sexual orientations and transgender identities is beneficial to the nation, its application for accreditation under the party-list system will remain just that.**

II. No substantial differentiation

In the United States, whose equal protection doctrine pervades Philippine jurisprudence, courts do not recognize lesbians, gays, homosexuals, and bisexuals (LGBT) as a "special class" of individuals. x x x Significantly, it has also been held that homosexuality is not a constitutionally protected fundamental right, and that "nothing in the U.S. Constitution discloses a comparable intent to protect or promote the social or legal equality of homosexual relations," as in the case of race or religion or belief.

x x x x

Thus, even if society's understanding, tolerance, and acceptance of LGBT's is elevated, there can be no denying that *Ladlad* constituencies are still males and females, and **they will remain either male or female protected by the same Bill of Rights that applies to all citizens alike**.

x x x x

IV. Public Morals

x x x There is no question about not imposing on *Ladlad* Christian or Muslim religious practices. Neither is there any attempt to any particular religious group's moral rules on *Ladlad*. Rather, what are being adopted as moral parameters and precepts are generally accepted public morals. They are possibly religious-based, but **as a society, the Philippines cannot ignore its more than 500 years of Muslim and Christian upbringing, such that some moral precepts espoused by said religions have sipped [sic] into society and these are not publicly accepted moral norms.**

V. Legal Provisions

But above morality and social norms, they have become part of the law of the land. Article 201 of the Revised Penal Code imposes the penalty of *prision mayor* upon "Those who shall publicly expound or proclaim doctrines openly contrary to public morals." It penalizes "immoral doctrines, obscene publications and exhibition and indecent shows." *"Ang Ladlad"* apparently falls under these legal provisions. This is clear from its Petition's paragraph 6F: "Consensual partnerships or relationships by gays and lesbians who are already of age' It is further indicated in par. 24 of the Petition which waves for the record: 'In 2007, Men Having Sex with Men or MSMs in the Philippines were estimated as 670,000. Moreoever, Article 694 of the Civil Code defines "nuisance" as any act, omission x x x or anything else x x x which shocks, defies or disregards decency or morality x x x." These are all unlawful. [10]

On January 4, 2010, *Ang Ladlad* filed this Petition, praying that the Court annul the Assailed Resolutions and direct the COMELEC to grant *Ang Ladlad's* application for accreditation. *Ang Ladlad* also sought the issuance *ex parte* of a preliminary mandatory injunction against the COMELEC, which had previously announced that it would begin printing the final ballots for the May 2010 elections by January 25, 2010.

On January 6, 2010, we ordered the Office of the Solicitor General (OSG) to file its Comment on behalf of COMELEC not later than 12:00 noon of January 11, 2010. [11] Instead of filing a Comment, however, the OSG filed a Motion for Extension, requesting that it be given until January 16, 2010 to Comment. [12] Somewhat surprisingly, the OSG later filed a Comment in support of petitioner's application. [13] Thus, in order to give COMELEC the opportunity to fully ventilate its position, we required it to file its own comment. [14] The COMELEC, through its Law Department, filed its Comment on February 2, 2010. [15]

In the meantime, due to the urgency of the petition, we issued a temporary restraining order on January 12, 2010, effective immediately and continuing until further orders from this Court, directing

the COMELEC to cease and desist from implementing the Assailed Resolutions.[16]

Also, on January 13, 2010, the Commission on Human Rights (CHR) filed a Motion to Intervene or to Appear as Amicus Curiae, attaching thereto its Comment-in-Intervention.[17] The CHR opined that the denial of *Ang Ladlad's* petition on moral grounds violated the standards and principles of the Constitution, the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR). On January 19, 2010, we granted the CHR's motion to intervene.

On January 26, 2010, Epifanio D. Salonga, Jr. filed his Motion to Intervene[18] which motion was granted on February 2, 2010.[19]

The Parties' Arguments

Ang Ladlad argued that the denial of accreditation, insofar as it justified the exclusion by using religious dogma, violated the constitutional guarantees against the establishment of religion. Petitioner also claimed that the Assailed Resolutions contravened its constitutional rights to privacy, freedom of speech and assembly, and equal protection of laws, as well as constituted violations of the Philippines' international obligations against discrimination based on sexual orientation.

The OSG concurred with *Ang Ladlad's* petition and argued that the COMELEC erred in denying petitioner's application for registration since there was no basis for COMELEC's allegations of immorality. It also opined that LGBTs have their own special interests and concerns which should have been recognized by the COMELEC as a separate classification. However, insofar as the purported violations of petitioner's freedom of speech, expression, and assembly were concerned, the OSG maintained that there had been no restrictions on these rights.

In its Comment, the COMELEC reiterated that petitioner does not have a concrete and genuine national political agenda to benefit the nation and that the petition was validly dismissed on moral grounds. It also argued ***for the first time*** that the LGBT sector is not among the sectors enumerated by the Constitution and RA 7941, and that petitioner made untruthful statements in its petition when it alleged its national existence contrary to actual verification reports by COMELEC's field personnel.

Our Ruling

We grant the petition.

Compliance with the Requirements of the Constitution and Republic Act No. 7941

The COMELEC denied *Ang Ladlad's* application for registration on the ground that the LGBT sector is neither enumerated in the Constitution and RA 7941, nor is it associated with or related to any of the sectors in the enumeration.

Respondent mistakenly opines that our ruling in *Ang Bagong Bayani* stands for the proposition that only those sectors specifically enumerated in the law or related to said sectors (labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals) may be registered under the party-list system. As we explicitly ruled in *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*,[20] "the enumeration of marginalized and under-represented sectors is not exclusive". The crucial element is not whether a sector is specifically enumerated, but whether a particular organization complies with the requirements of the Constitution and RA 7941.

Respondent also argues that *Ang Ladlad* made untruthful statements in its petition when it alleged that it had nationwide existence through its members and affiliate organizations. The COMELEC claims that upon verification by its field personnel, it was shown that "save for a few isolated places in the country, petitioner does not exist in almost all provinces in the country."[21]

This argument that "petitioner made untruthful statements in its petition when it alleged its national existence" is a new one; previously, the COMELEC claimed that petitioner was "not being truthful when it said that it or any of its nominees/party-list representatives have not violated or failed to comply with laws, rules, or regulations relating to the elections." Nowhere was this ground for denial of petitioner's accreditation mentioned or even alluded to in the Assailed Resolutions. This, in itself, is quite curious, considering that the reports of petitioner's alleged non-existence were already available to the COMELEC prior to the issuance of the First Assailed Resolution. At best, this is irregular procedure; at worst, a belated afterthought, a change in respondent's theory, and a serious violation of petitioner's right

to procedural due process.

Nonetheless, we find that there has been no misrepresentation. A cursory perusal of *Ang Ladlad's* initial petition shows that it never claimed to exist in each province of the Philippines. Rather, petitioner alleged that the LGBT community in the Philippines was estimated to constitute at least 670,000 persons; that it had 16,100 affiliates and members around the country, and 4,044 members in its electronic discussion group.[22] *Ang Ladlad* also represented itself to be "a national LGBT umbrella organization with affiliates around the Philippines composed of the following LGBT networks:"

- Abra Gay Association
- Aklan Butterfly Brigade (ABB) – Aklan
- Albay Gay Association
- Arts Center of Cabanatuan City – Nueva Ecija
- Boys Legion – Metro Manila
- Cagayan de Oro People Like Us (CDO PLUS)
- Can't Live in the Closet, Inc. (CLIC) – Metro Manila
- Cebu Pride – Cebu City
- Circle of Friends
- Dipolog Gay Association – Zamboanga del Norte
- Gay, Bisexual, & Transgender Youth Association (GABAY)
- Gay and Lesbian Activists Network for Gender Equality (GALANG) – Metro Manila
- Gay Men's Support Group (GMSG) – Metro Manila
- Gay United for Peace and Solidarity (GUPS) – Lanao del Norte
- Iloilo City Gay Association – Iloilo City
- Kabulig Writer's Group – Camarines Sur
- Lesbian Advocates Philippines, Inc. (LEAP)
- LUMINA – Baguio City
- Marikina Gay Association – Metro Manila
- Metropolitan Community Church (MCC) – Metro Manila
- Naga City Gay Association – Naga City
- ONE BACARDI
- Order of St. Aelred (OSAe) – Metro Manila
- PUP LAKAN
- RADAR PRIDEWEAR
- Rainbow Rights Project (R-Rights), Inc. – Metro Manila
- San Jose del Monte Gay Association – Bulacan
- Sining Kayumanggi Royal Family – Rizal
- Society of Transexual Women of the Philippines (STRAP) – Metro Manila
- Soul Jive – Antipolo, Rizal
- The Link – Davao City
- Tayabas Gay Association – Quezon
- Women's Bisexual Network – Metro Manila [23]
- Zamboanga Gay Association – Zamboanga City

Since the COMELEC only searched for the names *ANG LADLAD* LGBT or *LADLAD* LGBT, it is no surprise that they found that petitioner had no presence in any of these regions. In fact, if COMELEC's findings are to be believed, petitioner does not even exist in Quezon City, which is registered as *Ang Ladlad's* principal place of business.

Against this backdrop, we find that *Ang Ladlad* has sufficiently demonstrated its compliance with the legal requirements for accreditation. Indeed, aside from COMELEC's moral objection and the belated allegation of non-existence, nowhere in the records has the respondent ever found/ruled that *Ang Ladlad* is not qualified to register as a party-list organization under any of the requisites under RA 7941 or the guidelines in *Ang Bagong Bayani*. The difference, COMELEC claims, lies in *Ang Ladlad's* morality, or lack thereof.

Religion as the Basis for Refusal to Accept Ang Ladlad's Petition for Registration

Our Constitution provides in Article III, Section 5 that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." At bottom, what our non-establishment clause calls for is "government neutrality in religious matters."[24] Clearly, "governmental reliance on religious justification is inconsistent with this policy of neutrality."[25] We thus find that it was grave violation of the non-establishment clause for the COMELEC to utilize the Bible and the Koran to justify the exclusion of *Ang Ladlad*.

Rather than relying on religious belief, the legitimacy of the Assailed Resolutions should depend, instead, on whether the COMELEC is able to advance some justification for its rulings beyond mere conformity to religious doctrine. Otherwise stated, government must act for secular purposes and in ways that have primarily secular effects.[26] As we held in *Estrada v. Escritor*:

> x x x The morality referred to in the law is public and necessarily secular, not religious as the dissent of Mr. Justice Carpio holds. "Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms." Otherwise, if government relies upon religious beliefs in formulating public policies and morals, the resulting policies and morals would require conformity to what some might regard as religious programs or agenda. The non-believers would therefore be compelled to conform to a standard of conduct buttressed by a religious belief, i.e., to a "compelled religion," anathema to religious freedom. Likewise, if government based its actions upon religious beliefs, it would tacitly approve or endorse that belief and thereby also tacitly disapprove contrary religious or non-religious views that would not support the policy. As a result,

> government will not provide full religious freedom for all its citizens, or even make it appear that those whose beliefs are disapproved are second-class citizens.
>
> In other words, government action, including its proscription of immorality as expressed in criminal law like concubinage, must have a secular purpose. That is, the government proscribes this conduct because it is "detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society" and not because the conduct is proscribed by the beliefs of one religion or the other. Although admittedly, moral judgments based on religion might have a compelling influence on those engaged in public deliberations over what actions would be considered a moral disapprobation punishable by law. After all, they might also be adherents of a religion and thus have religious opinions and moral codes with a compelling influence on them; the human mind endeavors to regulate the temporal and spiritual institutions of society in a uniform manner, harmonizing earth with heaven. Succinctly put, a law could be religious or Kantian or Aquinian or utilitarian in its deepest roots, but it must have an articulable and discernible secular purpose and justification to pass scrutiny of the religion clauses. x x x Recognizing the religious nature of the Filipinos and the elevating influence of religion in society, however, the Philippine constitution's religion clauses prescribe not a strict but a benevolent neutrality. Benevolent neutrality recognizes that government must pursue its secular goals and interests but at the same time strive to uphold religious liberty to the greatest extent possible within flexible constitutional limits. Thus, although the morality contemplated by laws is secular, benevolent neutrality could allow for accommodation of [27]
> morality based on religion, provided it does not offend compelling state interests.

Public Morals as a Ground to Deny Ang Ladlad's Petition for Registration

Respondent suggests that although the moral condemnation of homosexuality and homosexual conduct may be religion-based, it has long been transplanted into generally accepted public morals. The COMELEC argues:

> Petitioner's accreditation was denied not necessarily because their group consists of LGBTs but because of the danger it poses to the people especially the youth. Once it is recognized by the government, a sector which believes that there is nothing wrong in having sexual relations with individuals of the same gender is a bad example. It will bring down the standard of morals we cherish in our civilized society. Any [28]
> society without a set of moral precepts is in danger of losing its own existence.

We are not blind to the fact that, through 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. Nonetheless, we recall that the Philippines has not seen fit to criminalize homosexual conduct. Evidently, therefore, these "generally accepted public morals" have not been convincingly transplanted

[29]
into the realm of law.

The Assailed Resolutions have not identified any specific overt immoral act performed by *Ang Ladlad*. Even the OSG agrees that "there should have been a finding by the COMELEC that the group's members have committed or are committing immoral acts."[30] The OSG argues:

> x x x A person may be sexually attracted to a person of the same gender, of a different gender, or more than one gender, but mere attraction does not translate to immoral acts. There is a great divide between thought and action. *Reduction ad absurdum*. If immoral thoughts could be penalized, COMELEC would have its hands full of disqualification cases against both the "straights" and the gays."[31]
>
> Certainly this is not the intendment of the law.

Respondent has failed to explain what societal ills are sought to be prevented, or why special protection is required for the youth. Neither has the COMELEC condescended to justify its position that petitioner's admission into the party-list system would be so harmful as to irreparably damage the moral fabric of society. We, of course, do not suggest that the state is wholly without authority to regulate matters concerning morality, sexuality, and sexual relations, and we recognize that the government will and should continue to restrict behavior considered detrimental to society. Nonetheless, we cannot countenance advocates who, undoubtedly with the loftiest of intentions, situate morality on one end of an argument or another, without bothering to go through the rigors of legal reasoning and explanation. In this, the notion of morality is robbed of all value. Clearly then, the bare invocation of morality will not remove an issue from our scrutiny.

We also find the COMELEC's reference to purported violations of our penal and civil laws flimsy, at best; disingenuous, at worst. Article 694 of the Civil Code defines a nuisance as "any act, omission, establishment, condition of property, or anything else which shocks, defies, or disregards decency or morality," the remedies for which are a prosecution under the Revised Penal Code or any local ordinance, a civil action, or abatement without judicial proceedings.[32] A violation of Article 201 of the Revised Penal Code, on the other hand, requires proof beyond reasonable doubt to support a criminal conviction. It hardly needs to be emphasized that mere allegation of violation of laws is not proof, and a mere blanket invocation of public morals cannot replace the institution of civil or criminal proceedings and a judicial determination of liability or culpability.

As such, we hold that moral disapproval, without more, is not a sufficient governmental interest to justify exclusion of homosexuals from participation in the party-list system. The denial of *Ang Ladlad's* registration on purely moral grounds amounts more to a statement of dislike and disapproval of homosexuals, rather than a tool to further any substantial public interest. Respondent's blanket justifications give rise to the inevitable conclusion that the COMELEC targets homosexuals themselves as a class, not because of any particular morally reprehensible act. It is this selective targeting that implicates our equal protection clause.

Equal Protection

Despite the absolutism of Article III, Section 1 of our Constitution, which provides "*nor shall any person be denied equal protection of the laws*," courts have never interpreted the provision as an absolute prohibition on classification. "Equality," said Aristotle, "consists in the same treatment of similar persons."[33] The equal protection clause guarantees that no person or class of persons shall be deprived of the same protection of laws which is enjoyed by other persons or other classes in the same place and in like circumstances.[34]

Recent jurisprudence has affirmed that if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the classification as long as it bears a rational relationship to some legitimate government end.[35] In *Central Bank Employees Association, Inc. v. Banko Sentral ng Pilipinas*,[36] we declared that "[i]n our jurisdiction, the standard of analysis of equal protection challenges x x x have followed the 'rational basis' test, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution."[37]

The COMELEC posits that the majority of the Philippine population considers homosexual conduct as immoral and unacceptable, and this constitutes sufficient reason to disqualify the petitioner. Unfortunately for the respondent, the Philippine electorate has expressed no such belief. No law exists to criminalize homosexual behavior or expressions or parties about homosexual behavior. Indeed, even if we were to assume that public opinion is as the COMELEC describes it, the asserted state interest here – that is, moral disapproval of an unpopular minority – is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause. The COMELEC's differentiation, and its

unsubstantiated claim that *Ang Ladlad* cannot contribute to the formulation of legislation that would benefit the nation, furthers no legitimate state interest other than disapproval of or dislike for a disfavored group.

From the standpoint of the political process, the lesbian, gay, bisexual, and transgender have the same interest in participating in the party-list system on the same basis as other political parties similarly situated. State intrusion in this case is equally burdensome. Hence, laws of general application should apply with equal force to LGBTs, and they deserve to participate in the party-list system on the same basis as other marginalized and under-represented sectors.

It bears stressing that our finding that COMELEC's act of differentiating LGBTs from heterosexuals insofar as the party-list system is concerned does not imply that any other law distinguishing between heterosexuals and homosexuals under different circumstances would similarly fail. We disagree with the OSG's position that homosexuals are a class in themselves for the purposes of the equal protection clause.[38] We are not prepared to single out homosexuals as a separate class meriting special or differentiated treatment. We have not received sufficient evidence to this effect, and it is simply unnecessary to make such a ruling today. Petitioner itself has merely demanded that it be recognized under the same basis as all other groups similarly situated, and that the COMELEC made "an unwarranted and impermissible classification not justified by the circumstances of the case."

Freedom of Expression and Association

Under our system of laws, every group has the right to promote its agenda and attempt to persuade society of the validity of its position through normal democratic means.[39] It is in the public square that deeply held convictions and differing opinions should be distilled and deliberated upon. As we held in *Estrada v. Escritor:*[40]

> In a democracy, this common agreement on political and moral ideas is distilled in the public square. Where citizens are free, every opinion, every prejudice, every aspiration, and every moral discernment has access to the public square where people deliberate the order of their life together. Citizens are the bearers of opinion, including opinion shaped by, or espousing religious belief, and these citizens have equal access to the public square. In this representative democracy, the state is prohibited from determining which convictions and moral judgments may be proposed for public deliberation. Through a constitutionally designed process, the people deliberate and decide. Majority rule is a necessary principle in this democratic governance. Thus, when public deliberation on moral judgments is finally crystallized into law, the laws will largely reflect the beliefs and preferences of the majority, i.e., the mainstream or median

> groups. Nevertheless, in the very act of adopting and accepting a constitution and the limits it specifies – including protection of religious freedom "not only for a minority, however small – not only for a majority, however large – but for each of us" – the majority imposes upon itself a self-denying ordinance. It promises not to do what it otherwise could do: to ride roughshod over the dissenting minorities.

Freedom of expression constitutes one of the essential foundations of a democratic society, and this freedom applies not only to those that are favorably received but also to those that offend, shock, or disturb. Any restriction imposed in this sphere must be proportionate to the legitimate aim pursued. Absent any compelling state interest, it is not for the COMELEC or this Court to impose its views on the populace. Otherwise stated, the COMELEC is certainly not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one.

This position gains even more force if one considers that homosexual conduct is not illegal in this country. It follows that both expressions concerning one's homosexuality and the activity of forming a political association that supports LGBT individuals are protected as well.

Other jurisdictions have gone so far as to categorically rule that even overwhelming public perception that homosexual conduct violates public morality does not justify criminalizing same-sex conduct.[41] European and United Nations judicial decisions have ruled in favor of gay rights claimants on both privacy and equality grounds, citing general privacy and equal protection provisions in foreign and international texts.[42] To the extent that there is much to learn from other jurisdictions that have reflected on the issues we face here, such jurisprudence is certainly illuminating. These foreign authorities, while not formally binding on Philippine courts, may nevertheless have persuasive influence on the Court's analysis.

In the area of freedom of expression, for instance, United States courts have ruled that existing free speech doctrines protect gay and lesbian rights to expressive conduct. In order to justify the prohibition of a particular expression of opinion, public institutions must show that their actions were caused by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[43]

With respect to freedom of association for the advancement of ideas and beliefs, in Europe, with its vibrant human rights tradition, the European Court of Human Rights (ECHR) has repeatedly stated that a political party may campaign for a change in the law or the constitutional structures of a state if it

uses legal and democratic means and the changes it proposes are consistent with democratic principles. The ECHR has emphasized that political ideas that challenge the existing order and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of association, even if such ideas may seem shocking or unacceptable to the authorities or the majority of the population. [44] A political group should not be hindered solely because it seeks to publicly debate controversial political issues in order to find solutions capable of satisfying everyone concerned. [45] Only if a political party incites violence or puts forward policies that are incompatible with democracy does it fall outside the protection of the freedom of association guarantee. [46]

We do not doubt that a number of our citizens may believe that homosexual conduct is distasteful, offensive, or even defiant. They are entitled to hold and express that view. On the other hand, LGBTs and their supporters, in all likelihood, believe with equal fervor that relationships between individuals of the same sex are morally equivalent to heterosexual relationships. They, too, are entitled to hold and express that view. However, as far as this Court is concerned, our democracy precludes using the religious or moral views of one part of the community to exclude from consideration the values of other members of the community.

Of course, none of this suggests the impending arrival of a golden age for gay rights litigants. It well may be that this Decision will only serve to highlight the discrepancy between the rigid constitutional analysis of this Court and the more complex moral sentiments of Filipinos. We do not suggest that public opinion, even at its most liberal, reflect a clear-cut strong consensus favorable to gay rights claims and we neither attempt nor expect to affect individual perceptions of homosexuality through this Decision.

The OSG argues that since there has been neither prior restraint nor subsequent punishment imposed on *Ang Ladlad*, and its members have not been deprived of their right to voluntarily associate, then there has been no restriction on their freedom of expression or association. The OSG argues that:

> There was no utterance restricted, no publication censored, or any assembly denied. [COMELEC] simply exercised its authority to review and verify the qualifications of petitioner as a sectoral party applying to participate in the party-list system. This lawful exercise of duty cannot be said to be a transgression of Section 4, Article III of the Constitution.
>
> x x x x

> A denial of the petition for registration x x x does not deprive the members of the petitioner to freely take part in the conduct of elections. Their right to vote will not be hampered by said denial. In fact, the right to vote is a constitutionally-guaranteed right which cannot be limited.
>
> As to its right to be elected in a genuine periodic election, petitioner contends that the denial of Ang Ladlad's petition has the clear and immediate effect of limiting, if not outrightly nullifying the capacity of its members to fully and equally participate in public life through engagement in the party list elections.
>
> This argument is puerile. The holding of a public office is not a right but a privilege subject to limitations imposed by law. x x x [47]

The OSG fails to recall that petitioner has, in fact, established its qualifications to participate in the party-list system, and – as advanced by the OSG itself – the moral objection offered by the COMELEC was not a limitation imposed by law. To the extent, therefore, that the petitioner has been precluded, because of COMELEC's action, from publicly expressing its views as a political party and participating on an equal basis in the political process with other equally-qualified party-list candidates, we find that there has, indeed, been a transgression of petitioner's fundamental rights.

Non-Discrimination and International Law

In an age that has seen international law evolve geometrically in scope and promise, international human rights law, in particular, has grown dynamically in its attempt to bring about a more just and humane world order. For individuals and groups struggling with inadequate structural and governmental support, international human rights norms are particularly significant, and should be effectively enforced in domestic legal systems so that such norms may become actual, rather than ideal, standards of conduct.

Our Decision today is fully in accord with our international obligations to protect and promote human rights. In particular, we explicitly recognize the principle of non-discrimination as it relates to the right to electoral participation, enunciated in the UDHR and the ICCPR.

The principle of non-discrimination is laid out in Article 26 of the ICCPR, as follows:

> **Article 26**
>
> 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.

In this context, the principle of non-discrimination requires that laws of general application relating to elections be applied equally to all persons, regardless of sexual orientation. Although sexual orientation is not specifically enumerated as a status or ratio for discrimination in Article 26 of the ICCPR, the ICCPR Human Rights Committee has opined that the reference to "sex" in Article 26 should be construed to include "sexual orientation."[48] Additionally, a variety of United Nations bodies have declared discrimination on the basis of sexual orientation to be prohibited under various international agreements.[49]

The UDHR provides:

> Article 21.
>
> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Likewise, the ICCPR states:

> **Article 25**
> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

As stated by the CHR in its Comment-in-Intervention, the scope of the right to electoral participation is elaborated by the Human Rights Committee in its General Comment No. 25 (Participation in Public Affairs and the Right to Vote) as follows:

> 1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the

people and in conformity with the principles of the Covenant.

x x x x

15. The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.[50]

We stress, however, that although this Court stands willing to assume the responsibility of giving effect to the Philippines' international law obligations, the blanket invocation of international law is not the panacea for all social ills. We refer now to the petitioner's invocation of the *Yogyakarta Principles* (the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity),[51] which petitioner declares to reflect binding principles of international law.

At this time, we are not prepared to declare that these *Yogyakarta Principles* contain norms that are obligatory on the Philippines. There are declarations and obligations outlined in said Principles which are not reflective of the current state of international law, and do not find basis in any of the sources of international law enumerated under Article 38(1) of the Statute of the International Court of Justice.[52] Petitioner has not undertaken any objective and rigorous analysis of these alleged principles of international law to ascertain their true status.

We also hasten to add that not everything that society – or a certain segment of society – wants or demands is automatically a human right. This is not an arbitrary human intervention that may be added to or subtracted from at will. It is unfortunate that much of what passes for human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims that international law obliges states to sanction these innovations. This has the effect of diluting real human rights, and is a result of the notion that if "wants" are couched in "rights" language, then they are no longer controversial.

Using even the most liberal of lenses, these *Yogyakarta Principles*, consisting of a declaration formulated by various international law professors, are – at best – *de lege ferenda* – and do not constitute

binding obligations on the Philippines. Indeed, so much of contemporary international law is characterized by the "soft law" nomenclature, *i.e.*, international law is full of principles that promote international cooperation, harmony, and respect for human rights, most of which amount to no more than well-meaning desires, without the support of either State practice or *opinio juris*. [53]

As a final note, we cannot help but observe that the social issues presented by this case are emotionally charged, societal attitudes are in flux, even the psychiatric and religious communities are divided in opinion. This Court's role is not to impose its own view of acceptable behavior. Rather, it is to apply the Constitution and laws as best as it can, uninfluenced by public opinion, and confident in the knowledge that our democracy is resilient enough to withstand vigorous debate.

WHEREFORE, the Petition is hereby **GRANTED**. The Resolutions of the Commission on Elections dated November 11, 2009 and December 16, 2009 in SPP No. 09-228 (PL) are hereby **SET ASIDE.** The Commission on Elections is directed to **GRANT** petitioner's application for party-list accreditation.

SO ORDERED.

MARIANO C. DEL CASTILLO
Associate Justice

WE CONCUR:

REYNATO S. PUNO
Chief Justice

ANTONIO T. CARPIO
Associate Justice

RENATO C. CORONA
Associate Justice

NCHITA CARPIO MORALES
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

ONIO EDUARDO B. NACHURA
Associate Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE P. PEREZ
Associate Justice

JOSE C. MENDOZA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

REYNATO S. PUNO
Chief Justice

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[1] 319 U.S. 624, 640-42 (1943).

[2] *Rollo*, pp. 33-40.

[3] Id. at 41-74.

[4] An Act Providing For The Election Of Party-List Representatives Through The Party-List System, And Appropriating Funds Therefor (1995).

[5] *Rollo*, pp. 89-101.

[6] 412 Phil. 308 (2001).

[7] *Ang Ladlad* outlined its platform, *viz:*

As a party-list organization, *Ang Ladlad* is willing to research, introduce, and work for the passage into law of legislative measures under the following platform of government:

a) introduction and support for an anti-discrimination bill that will ensure equal rights for LGBTs in employment and civil life;
b) support for LGBT-related and LGBT-friendly businesses that will contribute to the national economy;
c) setting up of micro-finance and livelihood projects for poor and physically challenged LGBT Filipinos;
d) setting up of care centers that will take care of the medical, legal, pension, and other needs of old and abandoned LGBTs. These centers will be set up initially in the key cities of the country; and
e) introduction and support for bills seeking the repeal of laws used to harass and legitimize extortion against the LGBT community. *Rollo*, p. 100.

[8] Id. at 36-39. Citations omitted. Italics and underscoring in original text.

[9] Id. at 77-88.

[10] Id. at 50-54. Emphasis and underscoring supplied.

[11] Id. at 121.

[12] Id. at 129-132.

[13] Id. at 151-283.

[14] Id. at 284.

[15] Id. at 301-596.

[16] Id. at 126.

[17] Id. at 133-160.

[18] Id. at 288-291.

[19] Id. at 296.

[20] Supra note 6.

[21]

It appears that on September 4, 2009, the Second Division directed the various COMELEC Regional Offices to verify the existence, status, and capacity of petitioner. In its Comment, respondent submitted copies of various reports stating that ANG LADLAD LGBT or LADLAD LGBT did not exist in the following areas: Batangas (October 6, 2009); Romblon (October 6, 2009); Palawan (October 16, 2009); Sorsogon (September 29, 2009); Cavite, Marinduque, Rizal (October 12, 2009); Basilan, Maguindanao, Lanao del Sur, Sulu, Tawi Tawi (October 19, 2009); Biliran, Leyte, Southern Leyte, Samar, Eastern Samar, Northern Samar (October 19, 2009); Albay, Camarines Sur, Camarines Norte, Catanduanes, Masbate, Sorsogon (October 25, 2009); Ilocos Sur, Ilocos Norte, La Union, Pangasinan (October 23, 2009); North Cotabato, Sarangani, South Cotabato, Sultan Kudarat (October 23, 2009); Aklan, Antique, Iloilo and Negros Occidental (October 25, 2009); Bohol, Cebu, Siquijor (October 24, 2009); Negros Oriental (October 26, 2009); Cordillera Administrative Region (October 30, 2009); Agusan del Norte, Agusan del Sur, Dinagat Islands, Surigao del Norte, Surigao del Sur (October 26, 2009); Cagayan de Oro, Bukidnon, Camiguin, MIsamis Oriental, Lanao del Norte (October 31, 2009); Laguna (November 2, 2009); Occidental Mindoro, Oriental Mindoro (November 13, 2009); Quezon (November 24, 2009); Davao City, Davao del Sur, Davao del Norte, Compostela Valley, Davao Oriental (November 19, 2009); Caloocan, Las Pinas, Makati, Mandaluyong, Manila, Marikina, Muntinlupa, Navotas, Paranaque, Pasay, Pasig, Pateros, Quezon City, San Juan, Taguig, Valenzuela (December 16, 2009). *Rollo*, pp.323-596.

[22]

Id. at 96.

[23]

Id. at 96-97.

[24]

BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 346 (2009).

[25]

Estrada v. Escritor, 455 Phil. 411 (2003), citing Smith, S., "*The Rise and Fall of Religious Freedom in Constitutional Discourse*", 140 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 149, 160 (1991).

[26]

455 Phil. 411 (2003).

[27]

Id. at 588-589.

[28]

Rollo, p. 315.

[29]

In Anonymous v. Radam, A.M. No. P-07-2333, December 19, 2007, 541 SCRA 12, citing *Concerned Employee v. Mayor*, A.M. No. P-02-1564, 23 November 2004, 443 SCRA 448, we ruled that immorality cannot be judged based on personal bias, specifically those colored by particular mores. Nor should it be grounded on "cultural" values not convincingly demonstrated to have been recognized in the realm of public policy expressed in the Constitution and the laws. At the same time, the constitutionally guaranteed rights (such as the right to privacy) should be observed to the extent that they protect behavior that may be frowned upon by the majority.

[30]

Rollo, pp. 178.

[31]

Id. at 179-180.

[32]

CIVIL CODE OF THE PHILIPPINES, Art. 699.

[33]

POLITICS VII. 14.

[34]

Ibakada Guro Party v. Executive Secretary, G.R. No. 168056, September 1, 2005, 2005, 469 SCRA 1, 139.

[35]

In BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 139-140 (2009), Fr. Joaquin Bernas, S.J. writes:

> For determining the reasonableness of classification, later jurisprudence has developed three kinds of test[s] depending on the subject matter involved. The most demanding is the strict scrutiny test which requires the government to show that the challenged classification serves a compelling state interest and that the classification is necessary to serve that interest. This [case] is used in cases involving classifications based on race, national origin, religion, alienage, denial of the right to vote, interstate migration, access to courts, and other rights recognized as fundamental.
>
> Next is the intermediate or middle-tier scrutiny test which requires government to show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest. This is applied to suspect classifications like gender or illegitimacy.
>
> The most liberal is the minimum or rational basis scrutiny according to which government need only show that the challenged classification is rationally related to serving a legitimate state interest. This is the traditional rationality test and it applies to all subjects other than those listed above.

[36]

487 Phil. 531, 583 (2004).

[37]

Id. at 584. *See also Mid-States Freight Lines v. Bates*, 111 N.Y.S. 2d 568.

[38]

The OSG argues that "[w]hile it is true that LGBTs are immutably males and females, and they are protected by the same Bill of Rights that applies to all citizens alike, it cannot be denied that as a sector, LGBTs have their own special interests and concerns." *Rollo*, p. 183.

[39]

Article III, Section 4 of the Constitution provides that "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

[40]

Supra note 26.

[41]

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the US Supreme Court first upheld the constitutionality of a Georgia sodomy law that criminalized oral and anal sex in private between consenting adults when applied to homosexuals. Seventeen years later the Supreme Court directly overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that "*Bowers* was not correct when it was decided, and it is not correct today."

In *Lawrence*, the US Supreme Court has held that the liberty protected by the Constitution allows homosexual persons the right to choose to enter into intimate relationships, whether or not said relationships were entitled to formal or legal recognition.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

In similar fashion, the European Court of Human Rights has ruled that the avowed state interest in protecting public morals did not justify interference into private acts between homosexuals. In *Norris v. Ireland,* the European Court held that laws criminalizing same-sex sexual conduct violated the right to privacy enshrined in the European Convention.

The Government are in effect saying that the Court is precluded from reviewing Ireland's observance of its obligation not to exceed what is necessary in a democratic society when the contested interference with an Article 8 (Art. 8) right is in the interests of the "protection of morals". The Court cannot accept such an interpretation. x x x.

x x x The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate x x x.

x x x Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. (*Norris v. Ireland* (judgment of October 26, 1988, Series A no. 142, pp. 20-21, § 46); *Marangos v. Cyprus* (application no. 31106/96, Commission's report of 3 December 1997, unpublished)).

The United Nations Human Rights Committee came to a similar conclusion in *Toonen v. Australia* (Comm. No. 488/1992 U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/c/50/D/488/1992 (1994)), involving a complaint that Tasmanian laws criminalizing consensual sex between adult males violated the right to privacy under Article 17 of the International Covenant on Civil and Political Rights. The Committee held:

> x x x it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy' x x x any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

[42]

See Toonen v. Australia, (Comm. No. 488/1992 U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/c/50/D/488/1992 (1994)); *Dudgeon v. United Kingdom*, 45 Eur. H.R. Rep. 52 (1981) (decision by the European Court of Human Rights, construing the European Convention on Human Rights and Fundamental Freedoms); *Norris v. Ireland,* 13 Eur. Ct. H.R. 186 (1991); *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993).

See also, *L. and V. v Austria* (2003-I 29; (2003) 36 EHRR 55) and *S.L. v Austria* (2003-I 71; (2003) 37 EHRR 39), where the European Court considered that Austria's differing age of consent for heterosexual and homosexual relations was discriminatory; it 'embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority', which could not 'amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour'.

[43]

See *Fricke v. Lynch*, 491 F. Supp. 381 (1980) and *Gay Student Services v. Texas A&M University*, 737 F. 2d 1317 (1984).

[44]

Case of the United Macedonian Organisation Ilinden and Others v. Bulgaria Application No. 5941/00; Judgment of January 20, 2006. Note that in *Baczkowski and Others v. Poland*, Application No. 1543/06; Judgment of May 3, 2007, the ECHR unanimously ruled that the banning of an LGBT gay parade in Warsaw was a discriminatory violation of Article 14 of the ECHR, which provides:

> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property,

birth or other status.

It also found that banning LGBT parades violated the group's freedom of assembly and association. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

[45]

Case of Freedom & Democracy Party (OZDEP) v. Turkey, Application No. 23885/94; Judgment of December 8, 1999.

[46]

Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively.

* Note that while the state is not permitted to discriminate against homosexuals, private individuals cannot be compelled to accept or condone homosexual conduct as a legitimate form of behavior. In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (515 U.S. 557 (1995)), the US Supreme Court discussed whether anti-discrimination legislation operated to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group. The court held that private citizens organizing a public demonstration may not be compelled by the state to include groups that impart a message the organizers do not want to be included in their demonstration. The court observed:

> "[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals x x x. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."

So, too, in *Boy Scouts of America v. Dale* (530 U.S. 640 [2000]), the US Supreme Court held that the Boy Scouts of America could not be compelled to accept a homosexual as a scoutmaster, because "the Boy Scouts believe that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior."

When an expressive organization is compelled to associate with a person whose views the group does not accept, the organization's message is undermined; the organization is understood to embrace, or at the very least tolerate, the views of the persons linked with them. The scoutmaster's presence "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

[47]

Rollo, pp. 197-199.

[48]

In *Toonen v. Australia,* supra note 42, the Human Rights Committee noted that "in its view the reference to 'sex' in Articles 2, paragraph 2, and 26 is to be taken as including sexual orientation."

[49]

The Committee on Economic, Social and Cultural Rights (CESCR) has dealt with the matter in its General Comments, the interpretative texts it issues to explicate the full meaning of the provisions of the Covenant on Economic, Social and Cultural Rights. In General Comments Nos. 18 of 2005 (on the right to work) (Committee on Economic, Social and Cultural Rights, General Comment No. 18: The right to work, E/C.12/GC/18, November 24, 2005), 15 of 2002 (on the right to water) (Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, E/C.12/2002/11, November 26, 2002) and 14 of 2000 (on the right to the highest attainable standard of health) (Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, August 14, 2000), it has indicated that the Covenant proscribes any discrimination on the basis of, inter-alia, sex and sexual orientation.

The Committee on the Rights of the Child (CRC) has also dealt with the issue in a General Comment. In its General Comment No. 4 of 2003, it stated that, "State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (Article 2), including with regard to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". These grounds also cover [inter alia] sexual orientation". (Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, July 1, 2003, CRC/GC/2003/4).

The Committee on the Elimination of Discrimination Against Women (CEDAW), has, on a number of occasions, criticized States for discrimination on the basis of sexual orientation. For example, it also addressed the situation in Kyrgyzstan and recommended that, "lesbianism be

reconceptualized as a sexual orientation and that penalties for its practice be abolished" (Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan, February 5, 1999, A/54/38 at par. 128).

[50]

General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) December 16, 1996. CCPR/C/21/Rev.1/Add.7.

[51]

The *Yogyakarta Principles* on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity is a set of international principles relating to sexual orientation and gender identity, intended to address documented evidence of abuse of rights of lesbian, gay, bisexual, and transgender (LGBT) individuals. It contains 29 Principles adopted by human rights practitioners and experts, together with recommendations to governments, regional intergovernmental institutions, civil society, and the United Nations.

[52]

One example is Principle 3 (The Right to Recognition Before the Law), which provides:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

b) **Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;**

c) **Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;**

d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

e) Ensure that changes to identity documents will be recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment. (Emphasis ours)

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See *Pharmaceutical and Health Care Association of the Philippines v. Secretary of Health*, G.R. No. 173034, October 9, 2007, 535 SCRA 265, where we explained that "soft law" does not fall into any of the categories of international law set forth in Article 38, Chapter III of the 1946 Statute of the International Court of Justice. It is, however, an expression of non-binding norms, principles, and practices that influence state behavior. Certain declarations and resolutions of the UN General Assembly fall under this category.