INTERNATIONAL COMMISSION OF JURISTS

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In the Matter of the Petition for Registration of Ang Ladlad as a Political Party

Amicus Curiae of the International Commission of Jurists

I. Introduction

The International Commission of Jurists is a non-governmental organization that promotes the rule of law for the protection of human rights. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Organization for Education, Science and Culture (UNESCO), the Council of Europe and the African Union.

The International Commission of Jurists (ICJ) works towards full respect of human rights and the end of human rights violations, including those based on the grounds of sexual orientation. We offer legal expertise in international human rights law and work in both country specific and thematic areas. Our mode of operation includes making legal interventions by way of amicus briefs in important and relevant cases of interest.

The subject of sexual orientation and gender identity in international human rights law is an area in which we command expertise and have given focused consideration and study. The ICJ was a co-facilitator of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. It has recently published the Practitioner's Guide to Sexual Orientation, Gender Identity and International Human Rights Law. In addition, the ICJ issues regular compilations of jurisprudence relating to sexual orientation and gender identity from the UN, European and OAS systems. It is for the foregoing reasons that the ICJ is interested in the case of *Ang Ladlad v. Comelec*.

The ICJ understands that Ang Ladlad LGBT Party filed a petition on 17 August 2009 for registration as a sectoral party under the party-list system of representation. On 11 November 2009, in a resolution authored by Presiding Commissioner Nicodemus T. Ferrer, the Commission on Elections (Comelec) dismissed the petition on "moral

grounds." Specifically, Comelec cited Ang Ladlad's definition of the LGBT community as evidence that "petitioner tolerates immorality which offends religious beliefs." As support, Comelec relied on passages from the Bible and the Koran.

The ICJ believes that the refusal to register Ang Ladlad as a political party is a severe interference with the freedom of association of Ang Ladlad's members and thus runs counter to the Philippines's obligations under international law. Freedom of association is guaranteed in all international and regional human rights instruments, and the state must refrain from as well as protect against conduct that interferes with freedom of association. Denying Ang Ladlad registration as a political party on moral grounds is incompatible with international human rights law. Moreover, the use of "public morality" to justify closure in fact constitutes discrimination on the grounds of sexual orientation. Such discrimination is prohibited by international treaties to which the Philippines is a party. For these reasons, Comelec's decision should be reversed by this Court.

This brief will first present an overview of freedom of association under international law. It will then analyze whether public morality is a permissible limitation in this instance. Finally, it will discuss the right to be free from discrimination.

II. Overview of Freedom of Association under International Law

Freedom of association means the freedom of individuals to join and form groups to pursue a common interest or goal. Like the closely related rights to freedom of expression and to freedom of assembly, it is considered essential to a pluralistic and democratic society. Freedom of association "is indispensable for the existence and functioning of democracy, because political interests can be effectively championed only in community with others."[1] Freedom of association is both a right of the individual to found an association with like-minded persons or to join an existing association, and a collective right of an existing association to perform activities in pursuit of the common interests of its members.[2]

Article 20 of the Universal Declaration of Human Rights provides: "Everyone has the right to freedom of peaceful assembly and association." The right to freedom of association is protected in human rights treaty law by the International Covenant on Civil and Political Rights (article 22) as well as by the four regional treaties, the Arab Charter on Human Rights (article 28), the African Charter on Human and People's Rights (article 10), the American Convention on Human Rights (article 16), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 11).[3]

Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which the Philippines signed in 1966 and ratified in 1989, provides:

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

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[1] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel 2005) at 496.

[2] Id. at 498

[3] Certain aspects of freedom of association are also contained in treaties concerning labour rights, such as the International Covenant on Economic, Social and Cultural Rights (article 8) and ILO Convention No. 87 (article 2).

> No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

States' compliance with obligations under Article 22 is reviewed by the UN Human Rights Committee. The judgments of the European Court of Human Rights are also relevant, given that Article 11 of the European Convention uses virtually identical language. Article 11 provides:

> 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.
>
> 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.

Because of the similarity of these two freedom of association guarantees, the jurisprudence of the European Court may be used as persuasive authority in interpreting the content of Article 22 of the ICCPR. Indeed, views of the Human Rights Committee on other parallel provisions often echo the reasoning of the European Court.[4]

Political parties are plainly covered by these guarantees of freedom of association. In a number of cases, the European Court has considered complaints by political parties.[5] Moreover, in all cases except one the Court has upheld freedom of association rights against the government restriction.[6] In *United Communist Party of Turkey*, the Court held: "Political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system, there can be no doubt that political parties come within the scope of Article 11."[7] The importance of protecting the freedom of association of political parties is recognized by other regional human rights systems as well. For example, in *Jawara v. The Gambia*, the African Commission held that the banning of

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[4] Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. Richmond Law Review 99 at105-105 & n.22.

[5] *Affaire Linkov c. République Tchèque*, Requête no. 10504/03, Arrêt de 7 décembre 2006 (concerning refusal to register as a political party); *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application no. 23885/94, Judgment dated 8 December 1999 (concerning order by constitutional court dissolving association as contrary to law on political parties); *United Communist Party of Turkey and Others v. Turkey*, Application no. 133/1996/752/951, Judgment dated 30 January 1998 (concerning dissolution of political party as it was preparing to participate in a general election); *Partidul Communistilor (Nepeceristi) and Ungureanu v. Romania*, Application no. 46626/99, Judgment dated 3 February 2005 (concerning group refused registration as a political party); *Parti socialiste de Turquie (STP) et autres c. Turquie*, Requête no. 26482/95, Arrêt de 23 novembre 2003.

[6] The exception is *Refah Partisi (The Welfare Party) and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment dated 13 February 2003. This case is discussed in greater detail in III.B. and n. 32.

[7] *United Communist Party of Turkey* at para. 25.

political parties was a violation of the complainants' rights to freedom of association guaranteed under Article 10(1) of the Charter.[8] In *Diaz et al v. Colombia*, the Inter-American Commission on Human Rights found admissible on freedom of association grounds, among others, a petition alleging that members of a political party had been the target of violent and deadly attacks.[9]

There is a four-prong test to determine whether there has been a violation of freedom of association.[10]

(1) Has there been an interference with freedom of association?
(2) Is the interference prescribed by law?
(3) Does the law have a legitimate aim, meaning is it one of the enumerated aims?
(4) Is the interference necessary in a democratic society?

It is the last prong of the test that has received the most attention. A legitimate aim alone is insufficient. The interference must also be necessary. That is, it must meet a "pressing social need" and be "proportionate to the legitimate aim pursued."[11] The European Court has stated, "Where political parties are concerned, only convincing and compelling reasons can justify restrictions on such parties' freedom of association."[12] The Human Rights Committee has similarly observed that the reference to "necessary in a democratic society" means that "the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose."[13]

Because freedom of association is so closely linked with freedom of expression, and because both are foundations of a democratic society, the Court interprets Article 11 in light of the requirements of Article 10: "The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11."[14] The connection between freedom of expression and freedom of association "applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy."[15] The Human Rights Committee has likewise held that associations that "peacefully promote

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[8] *Jawara v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. Nos. 147/95 and 149/96 (2000), para. 68.

[9] Case 11.227, Report No. 5/97, On Admissibility, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 99 (1997).

[10] For a general description of this test, see Report of the Special Rapporteur on the situation of human rights defenders, 4 August 2009, U.N. Doc. A/64/226, at paras. 26-30.

[11] *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application no. 23885/94, Judgment dated 8 December 1999, at para. 43.

[12] *United Communist Party of Turkey* at para. 46; see also *Freedom and Democracy Party (ÖZDEP)* at para. 44.

[13] *Aleksander Belyatsky et al. v. Belarus*, Communication No. 1296/2004, U.N. Doc. CCPR/C/90/D/1296/2004 at para. 7.3; see also *Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005) at para. 7.2.

[14] *United Communist Party of Turkey* at para. 42; *Vogt v. Germany*, Application No. 7/1994/454/535, Judgment dated 26 September 1995, para. 64.

[15] *United Communist Party of Turkey* at para. 43; see also *Linkov* at para. 34; *Partidul Comunistilor (Nepeceristi)* at para. 44.

ideas not necessarily favourably received by the government or the majority of the population" are within Article 22 protection.[16]

In light of the above, it is clear that under international law individuals have the right to come together to pursue a common purpose, including a political purpose. Any interference with that right must be provided for by law, based on one of the enumerated aims, and necessary in a democratic society. Because the right to freedom of association is closely linked to freedom of expression, and both are essential for democracy and pluralism, even associations that espouse ideas not favourably received by the majority or by the government are protected.

III. "Public Morals" Cannot Justify Comelec's Refusal to Register Ang Ladlad

The ICCPR and the European Convention both refer to "public morality" as one of the permissible grounds for limiting freedom of association. Although Comelec's decision refers to religion as well, the ICJ assumes that the objection to Ang Ladlad was in fact made on moral grounds. Under international law, religion is not one of the permissible aims of state action that interferes with freedom of association rights.

Nevertheless, decisions by both the European Court and the Human Rights Committee demonstrate that "public morality" cannot justify the interference with the freedom of association rights of the members of Ang Ladlad. First, under the relevant jurisprudence, public morality must be narrowly construed. The European Court and the Human Rights Committee have repeatedly rejected public morality as justification for state conduct that impairs fundamental rights, including the right to privacy and the right to freedom of peaceful assembly. Second, even when public morality is a legitimate aim, its application here does not meet the test of being necessary in a democratic society because it does not respond to a pressing social need and is not proportionate.

A. Careful Scrutiny of Public Morality as a Claimed Justification

Any exception to the general right of freedom of association must be interpreted narrowly. The European Court of Human Rights has repeatedly indicated that "the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association."[17] In *Lee v. Republic of Korea*, the Human Rights Committee emphasized that the interference could only be justified by a "real and not hypothetical danger."

European Convention jurisprudence reveals a clear trend towards a very narrow role for public morality justifications. In the freedom of expression case of *Open Door and Dublin Well Woman v. Ireland*, applicants challenged a law banning health care facilities from providing any information about the availability of abortion services outside Ireland.[18] Ireland argued that it could ban such information for the protection of morals because the majority of people held the view that abortion was morally wrong. The Court disagreed.

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[16] *Viktor Korneenko et al. v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006), paras. 7.3 – 7.7.

[17] *Siridopoulos and Others* at para. 40; see also *United Communist Party of Turkey* at para. 46; *Freedom and Democracy Party (ÖZDEP)* at para. 44; *Linkov c. République Tchèque*, Requête no. 10504/03, Arrêt de 7 décembre 2006, para. 35.

[18] *Open Door and Dublin Well Woman v. Ireland*, Application No. 14234/88; 14235/88, Judgment, 29 October 1992.

Although it accepted that public morality was the legitimate aim, it concluded that the ban on information was not necessary in a democratic society and thus violated Article 10.[19]

In the 1981 case of *Dudgeon v. United Kingdom* and *Norris v. Ireland*, the European Court held that laws criminalizing consensual same-sex sexual conduct violated Article 8 (right to privacy) of the Convention. In doing so, it took note of "the moral climate . . . in sexual matters."[20] The *Dudgeon* Court, for example, accepted that there was "a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society."[21] It nevertheless found that the penal laws in question did not meet a "pressing social need" and were disproportionate to the aim pursued: "In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent."[22]

The Human Rights Committee and national courts have come to similar conclusions. In *Toonen v. Australia*, the Human Rights Committee rejected the notion that public morality might justify a law criminalizing same-sex conduct.[23] In decisions from states as diverse as Fiji[24], Hong Kong[25], India[26], South Africa[27], and the United States[28], courts have held that the moral views of the majority were not sufficient justification for laws that criminalized same-sex conduct. As the High Court of Delhi stated recently, "Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights . . . Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on sifting and subjective notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be 'constitutional' morality and not 'public morality."[29] In referring to "constitutional morality" the High Court meant the human rights values enshrined in the Constitution.

Norris, *Dudgeon,* and *Toonen* concern the role of public morality in limiting *conduct* that the majority deems contrary to public morality. The same reasoning, however, applies to freedoms of expression, association and assembly. If same-sex conduct is protected – and the decisions of the European Court, the Human Rights Committee, and numerous national courts make clear that it is – both expression about same-sex conduct and the expressive activity of forming an association that supports LGBT individuals are protected as well.

B. The Interference is not Necessary in a Democratic Society

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[19] Id. at para. 70.
[20] *Dudgeon v. United Kingdom*, Application No. 7525/76, Judgment dated 22 October 1981, at para. 57.
[21] Id.
[22] Id. at para. 61.
[23] *Toonen v. Australia*, U.N. Doc. CCPR/50/D/488/1992, 4 April 1994, at paras. 8.4 & 8.6.
[24] *Nadan & McCosker v. State*, Criminal Appeal Case Nos. HAA 85 & 86 of 2005, 26 August 2005 (High Court of Fiji).
[25] *Leung T.C. William Roy v. Secretary for Justice*, CACV317/2005, 20 September 2006 (Court of Appeal of the High Court of Hong Kong).
[26] *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No. 7455/2001, 2 July 2009 (High Court of Delhi at New Delhi).
[27] *National Coalition for Gay and Lesbian Equality v. Minister of Justice* et al, Case CCT 11/98, 9 October 1998 (Constitutional Court of South Africa).
[28] *Lawrence v. Texas*, 539 U.S. 558, 26 June 2003 (U.S. Supreme Court).
[29] *Naz Foundation* at para. 79.

Any interference on the exercise of freedom of association must not only be for a legitimate aim, but also must be necessary in a democratic society. That means it must meet a pressing social need and be proportionate to the aim pursued. This is so even when public morality is claimed as the legitimate purpose of the interference. For example, in the case of *Norris v. Ireland*, the Government of Ireland argued that restrictions imposed for the protection of morals could not be measured by the criteria of being "necessary in a democratic society" and that States should enjoy a wider "scope of appreciation."[30] The European Court firmly rejected this line of reasoning. A contested measure that pursues "the legitimate aim of protecting morals" must still meet the requirements of "a pressing social need" and "proportionality."[31] As is demonstrated below, the refusal to register Ang Ladlad as a political party neither meets a pressing social need nor is proportionate.

First, Ang Ladlad seeks to represent the views of LGBT Filipinos and their supporters. Consensual same-sex sexual activity is not unlawful in the Philippines. Given that same-sex conduct is not illegal, it is hard to understand how refusal to register a political party that seeks to represent LGBT individuals responds to any pressing social need. In *Open Door and Dublin Well Woman v. Ireland*, the European Court found significant that it was not illegal in Ireland for a pregnant woman to travel abroad to obtain an abortion. The Court emphasized, "Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society."[32] Since homosexuality is not illegal in the Philippines, the limitation on freedom of association at issue in this case is incompatible with a democratic society.

In its case law, the European Court has consistently held that a political party may campaign for a change in the law or the legal and constitutional structures of a state if it uses legal and democratic means and if the changes it proposes are consistent with democratic principles.[33] Only if a political party incites violence or puts forward policies that are incompatible with democracy or aimed at the destruction of democracy does it fall outside the protection of the freedom of association guarantee. For example, the European Court found no violation of Article 11 where a political party planned to introduce *sharia* law, which the Court held was incompatible with democratic principles.[34] But where, as here, the political party does not advocate violence or unlawful means and there is no indication that its goals are aimed at the destruction of a democratic system of governance, there is no pressing social need to refuse to register it. As the European Court held in *ÖZDEP*, "Democracy thrives on freedom of expression. From that point of view there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."[35]

Second, where there is no pressing social need, the refusal to register Ang Ladlad as a political party is disproportionate. The refusal is based solely on Ang Ladlad's own statements about its purpose and thus directly implicates core freedom of expression

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[30] *Norris v. Ireland*, Application No. 10581/83, Judgment dated 26 October 1988, at para. 43.
[31] Id. at 44.
[32] Id. at para. 72.
[33] *Linkov* at para. 36; *Partidul Comunistilor (Nepeceristi)* at para. 46.
[34] *Refah Partisi (The Welfare Party) v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98, 41344/98, Judgment dated 13 February 2003, at paras. 123, 132, 135-136.
[35] *Freedom and Democracy Party (ÖZDEP)* at para. 44.

concerns. Yet freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society."[36] This means that even if Comelec is offended, shocked or disturbed, it cannot legitimately restrict Ang Ladlad's rights to freedom of association and expression. In the case of *UMO Ilinden and Others v. Bulgaria*, the Government argued that the association harboured separatist views and would pose a danger to the territorial integrity of the country. The Court made clear that unpopular expression could not justify the interference with Article 11 rights. "However shocking and unacceptable certain views or words used might have appeared to the authorities and the majority of the population . . . their suppression does not seem warranted in the circumstances of the case."[37]

Thus even speech that is shocking, offensive or disturbing is protected. Unpopular expression is protected. Regardless of the popularity of Ang Ladlad's viewpoints or the activities of its members, the members have a right to express those views and to form a political party for that purpose. In *Linkov*, the European Court held that the rejection of an application to register a political party was a "radical measure that could not be applied except for the most serious cases."[38] There the Court held that the refusal to accept the application for registration as a political party violated freedom of association. Similarly, refusing to recognize Ang Ladlad as a political party is a drastic interference with freedom of association and one that cannot be justified by the claim of public morality.

IV. "Public Morality" Cannot Excuse Prohibited Discrimination

Even limitations on freedom of association that are expressly permitted under international law may not be applied for a discriminatory purpose. The Siracusa Principles, adopted by a conference of international law experts in 1984, provides: "No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1" of the ICCPR.[39] Similarly, in discussing the permissible restrictions on the freedom to manifest religion or belief (Article 18), the Human Rights Committee stated: "In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. . . Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[40]

Individual members of Ang Ladlad have the right to be free from discrimination on the basis of their sexual orientation. Article 26 of the ICCPR and Article 14 of the European Convention contain guarantees of the right to non-discrimination.[41] Although these

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[36] *UMO Ilinden and Others v. Bulgaria*, Application no. 59491/00, Judgment dated 19 January 2006, at para. 60; *Freedom and Democracy Party (ÖZDEP)* at para. 37; *United Communist Party of Turkey and Others* at para. 43.

[37] *UMO Ilinden and Others* at para. 76.

[38] *Linkov* at para. 45 ("Il convient enfin de noter que la Cour a déjà jugé que le rejet de la demande d'enregistrement éetait une mesure radicale qui ne pouvait s'appliquer qu'aux cas les plus graves.").

[39] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1984/4 (1984), Principle 9.

[40] General Comment 22 on The Right to Freedom of Thought, Conscience and Religion, U.N. Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993.

[41] Article 14 of the European Convention provides: "The enjoyment of the rights and freedoms set forth in this 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

provisions do not list "sexual orientation" as an enumerated ground, both the European Court and the Human Rights Committee have held that "sexual orientation" is a prohibited ground of discrimination.[42] In addition other treaty bodies as well as reports of the U.N. special rapporteurs and working groups have made clear that "gender identity" is also a prohibited ground of discrimination.[43]

Thus, in *Toonen v. Australia*, *Young v. Australia*, and *X v. Columbia*, the Human Rights Committee held that "sexual orientation" is protected by Article 26 of the ICCPR.[44] Relying on Articles 17 and 26 of the Covenant, the Human Rights Committee has also urged states to repeal laws that criminalized homosexuality.[45] In the case of *Salgueiro da Silva Mouta v. Portugal*, which concerned the denial of custody to a father living in a same-sex relationship, the European Court held that sexual orientation was "a concept which is undoubtedly covered by Article 14 of the Convention."[46] "Just like differences based on sex. . . differences based on sexual orientation require particularly serious reasons by way of justification."[47] Where there is no proportional relationship between the aim and the means employed, difference in treatment based on sexual orientation is discriminatory. [48]

Baçzkowski and Others v. Poland is also instructive here.[49] The applicants, members of LGBT associations wishing to organize a parade to promote equality, challenged the denial of a permit by the Mayor of Warsaw. They contended that the denial violated their freedom of assembly, in violation of Article 11, and was discriminatory, in violation of Article 14. The Court noted that on the same day the authorities permitted other assemblies to be held and that these assemblies had titles such as "Against propaganda for partnerships" and "Against adoption of children by homosexual couples." Furthermore, in an interview with a

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national minority, property, birth or other status." Article 26 of the ICCPR provides: "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." Thus Article 26 is a free-standing non-discrimination provision, while Article 14 only applies when some other right guaranteed by the European Convention has been infringed.

[42] For decisions of the Human Rights Committee see n.42. For decisions of the European Court, see *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment dated 21 December 1999; *E.B. v. France*, Application No. 43546/02, Judgment dated 22 January 2008.

[43] See, e.g., Committee on Economic, Social and Cultural Rights, General Comment 20, U.N. Doc. E/C.12/GC/20, 10 June 2009, at para. 32 (holding that gender identity is recognized as among the prohibited grounds of discrimination); Committee Against Torture, General Comment 2, U.N. Doc. CAT/C.GC.2/CRP.1/Rev.4, 23 November 2007, at para. 21; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. E/CN.4/2002/76, 27 December 2001 (noting that discrimination on the grounds of sexual orientation or gender identity may contribute to the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place); Report of the Independent Expert on Minority Issues, U.N. Doc. E/CN.4/2006/74, 6 January 2006, at para. 28 (noting discrimination based on gender, gender expression, gender identity and sexual orientation as an issue of multiple forms of discrimination); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/64/211, 3 August 2009, at para. 21.

[44] *Toonen v. Australia*, U.N. Doc. CCPR/50/D/488/1992, 4 April 1994, para 8.7; *Young v. Australia*, U.N. Doc. CCPR/C/78/D/941/2000, 18 September 2003, para. 10.4; *X v. Colombia*, U.N. Doc. CCPR/C/89/D/1361/2005, 14 May 2007, para. 7.2.

[45] See U.N. Doc. CCPR/CO/83/KEN, 28 March 2005, at para. 27 (Kenya).

[46] *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment dated 21 December 1999.

[47] *S.L. v. Austria*, Application No. 45330/99, Judgment dated 9 January 2003.

[48] *Salgueiro da Silva Mouta* at para. 36.

[49] Application No. 1543/06, Judgment dated 24 September 2007.

newspaper, the mayor of Warsaw had stated that "there will be no public propaganda about homosexuality. . . .In my view, propaganda about homosexuality is not the same as exercising one's freedom of assembly."[50] Given this context, the Court concluded that the parade organizers' rights to freedom of assembly and non-discrimination were both violated.

As these cases make clear, discrimination on the basis of sexual orientation is prohibited under international law. Comelec's decision to deny Ang Ladlad registration as a political party violates the internationally-guaranteed right of non-discrimination.

V. Conclusion

Freedom of association is protected by the Universal Declaration of Human Rights and the ICCPR as well as by all the regional human rights treaties. Together with freedom of expression and freedom of assembly, it is considered essential to the functioning of a democracy. Any interference with freedom of association must be not only provided for by law and have a legitimate aim, it must also be necessary in a democratic society. That means the interference must meet a pressing social need and be proportionate to the legitimate aim pursued. This is a strict test and one that Comelec's decision regarding Ang Ladlad cannot meet.

There is no pressing social need to interfere with the freedom of association rights of Ang Ladlad or its members, especially given that homosexuality is not banned in the Philippines. Peaceful political expression is the hallmark of a functioning democracy, and the right of Ang Ladlad to exercise its freedom of association by participating in the political process is well defined in international law.

Public morality, moreover, cannot be invoked by Comelec to excuse what is actually discrimination on the basis of sexual orientation and gender identity. While it does not run counter to international human rights law for an individual to espouse a "private" morality that disapproves of LGBT people or same-sex sexual activity, such a morality cannot be the basis for state action that intrudes on fundamental rights. To do so is discrimination, and that is in violation of international law.

Geneva, Switzerland
27 November 2009

Allison Jernow
Sexual Orientation & Gender Identity Project

[50] Id. at para. 27 & para. 97.