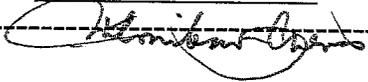


EN BANC

A.M. No. 21-06-20-SC – RE: DISTURBING SOCIAL MEDIA POSTS
OF LAWYERS/LAW PROFESSORS

Promulgated:

April 11, 2023

X----------X

SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur. Atty. Noel V. Antay, Jr., Atty. Ernesto A. Tabujara III, Atty. Israel P. Calderon, Atty. Morgan Rosales Nicanor, and Atty. Joseph Marion Peña Navarrete (respondents) should be disciplined by this Court for their Facebook posts.

In *Falcis v. Civil Registrar General*,¹ this Court introduced a definition of the concept of “sexual orientation”:

Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 AMERICAN PSYCHOLOGIST 832, 862 (2015), available at <<https://www.apa.org/practice/guidelines/transgender.pdf>> (last visited on September 2, 2019), provides:

Sexual orientation: a component of identity that includes a person’s sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.²

“Gender identity” and “gender expression” were defined as:

SECTION 3. Definition of Terms. — As used in this Act:

.....

(f) Gender identity and/or expression refers to the personal sense of identity as characterized, among others, by manner of clothing, inclinations, and behavior in relation to masculine or feminine conventions. A person may have a male or female identity with physiological characteristics of the opposite sex, in which case this person is considered transgender[.]

¹ G.R. No. 217910, September 3, 2019 [Per J. Leonen, *En Banc*].

² *Id.*, footnote 102.



Gender identity has also been defined in Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 AMERICAN PSYCHOLOGIST 832, 862 (2015), available at <<https://www.apa.org/practice/guidelines/transgender.pdf>> (last visited on September 2, 2019), as follows:

Gender identity: a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral) that may or may not correspond to a person's sex assigned at birth or to a person's primary or secondary sex characteristics. Because gender identity is internal, a person's gender identity is not necessarily visible to others. "Affirmed gender identity" refers to a person's gender identity after coming out as [transgender and gender non-conforming] or undergoing a social and/or medical transition process.

Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review, ARC INTERNATIONAL, THE INTERNATIONAL BAR ASSOCIATION AND THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION 14 (2016), available at <https://ilga.org/downloads/SOGIESC_at_UPR_report.pdf> (last visited on September 2, 2019), provides:

Gender expression: External manifestations of gender, expressed through one's name, pronouns, clothing, haircut, behavior, voice, or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine and feminine changes over time and varies by culture. Typically, transgender people seek to make their gender expression align with their gender identity, rather than the sex they were assigned at birth.³

Further, *Falcis* recognized that our Constitution is "capable of accommodating a contemporaneous understanding of sexual orientation, gender identity and expression, and sex characteristics"⁴ in its provisions. As such, this Court has noted that the term "marriage" in Article XV, Section 2 is textually not defined or restricted based on sex, gender, sexual orientation, gender identity or expression.⁵

Similarly, our Constitution is equally capable of accommodating a contemporaneous understanding of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) in Article II, Section 11:

SECTION 11. The State values the dignity of every human person and guarantees full respect for human rights.

Respect is at the core of human dignity, and this includes respect for each person's SOGIESC.

³ *Id.*, footnote 103.

⁴ *Id.*

⁵ *Id.*

It is often wrongly assumed that only people who are lesbian, gay, bisexual, transgender, queer or similar (LGBTQ+) have a SOGIESC. The truth is that all persons have SOGIESC. When LGBTQ+ persons seek respect for their SOGIESC, they are only asking for the same respect and dignity afforded to persons whose SOGIESC are in the majority or the so-called mainstream—heterosexual, or a sexual orientation defined by sexual and romantic attraction to persons of the opposite sex; cisgender, or gender identity that corresponds to their sex assigned at birth or their primary or secondary sex characteristics; and gender expression that conforms to conventional or traditional ideas of masculinity and femininity. Many heterosexual, cisgender, and gender-conforming persons have no need to seek respect for their SOGIESC because their identities are respected without question, with their SOGIESC already aligned with social and cultural expectations. But for people whose SOGIESC are outside what is perceived to be the norm, respect is not so much a given, as it is often a struggle: a life-long struggle, both internally—for a person to accept who they are—and externally—for others to accept them. As noted in *Falcis*:

Cultural hegemony often invites people to conform to its impositions on their identities. Yet, there are some who, despite pressures, courageously choose to be authentic to themselves. This case is about the assurance of genuine individual autonomy within our constitutional legal order. It is about the virtue of tolerance and the humane goal of non-discrimination. It is about diversity that encourages meaningful—often passionate—deliberation. Thus, it is about nothing less than the quality of our freedom.⁶

I agree with the ponencia in that LGBTQ+ people's freedom to be themselves and expression of who they are is part of their constitutionally-granted right of freedom of expression.⁷ But more than that, LGBTQ+ people's struggle for respect goes hand in hand with the defense of their right to exist. As with other marginalized peoples, LGBTQ+ people have been historically perceived to be undeserving of being treated with dignity. To this day, their dehumanization and othering persist. Treating LGBTQ+ people as though they are subhuman or "the other" too often becomes license for the deprivation, time and time again, of their fundamental human rights, including their right to life.

The duty of recognition and protection of human rights is incumbent upon all people, as members of a common human society. And the faithful discharge of that duty is all the more demanded from members of the Philippine Bar, who have taken an oath to uphold the Constitution and its provisions. When lawyers use discriminatory and derogatory language, they not only disrespect the specific lawyers and judges to whom the language is

⁶ *Id.*

⁷ *Ponencia*, p. 9.

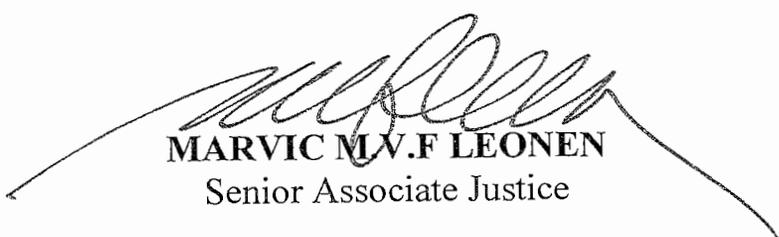
directed, but also demonstrate their disrespect for the inherent dignity and rights of an entire group of marginalized peoples. I agree with the *ponencia* in this:

It is not a defense that the discriminatory language was uttered in what was seemingly intended to be private exchanges among the macho men. The fact that their exchanges became public trumps whatever intention they may have had to keep their communications private. Seekers of righteousness cannot seek cover under a pledge of anonymity when the[ir] actions are brought to light for everyone's scrutiny. Here, this was what happened. Unfortunately or fortunately, respondents' true character came to light. Their secret codes divulged. This was their undoing. Their conversations became public and have become a public proceeding by the turn of events, as if they were uttered in a public discourse such as a court hearing.⁸

The fitness to practice law is not only a matter of competence, but also of character. Respondents' acts are in violation of Rule 7.03 of the Code of Professional Responsibility, and they must be disciplined accordingly.

ACCORDINGLY, I vote as follows:

- 1) **REPRIMAND** Atty. Morgan Rosales Nicanor, Atty, Joseph Marion Peña Navarrete, Atty. Noel V. Antay, Jr. and Atty. Israel P. Calderon for violation of Rule 7.03 of the Code of Professional Responsibility, with **STERN WARNING** that a repetition of the same or similar offense will be dealt with more severely; and
- 2) **IMPOSE A FINE** in the amount of PHP 25,000.00 on Atty. Ernesto A. Tabujara III for violation of Rule 7.03 of the Code of Professional Responsibility, with **STERN WARNING** that a repetition of the same or similar offense will be dealt with more severely.



MARVIC M.V.F LEONEN
Senior Associate Justice

⁸ *Id.* at 16.