

**THE RAINBOW-COLORED ELEPHANT IN THE ROOM:
A COMMENTARY ON
LGBT JURISPRUDENCE***

NOTE

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On April 8, 2014, the Supreme Court, in *Imbong v. Ochoa*,¹ upheld the constitutionality of Republic Act No. 10354, otherwise known as the Responsible Parenthood and Reproductive Health Act of 2012 (“RH Law”). While this decision’s implications for the future landscape of Philippine jurisprudence are almost endless in quantity and unprecedented in scale, its impact on the general public—that is, people whose lives are blissfully unfettered by the formal study of law—has to be considered. Indeed, the impact of *Imbong* is not fully appreciated if its consequences on a national scale are not considered. While the Court has penned multiple landmark cases in recent memory, *Disini v. Secretary of Justice*² and *Araullo v. Aquino*³ for example, few have received the same widespread attention or were as closely watched as *Imbong*.

For individuals who do not make it their business to examine the inner workings and nuances of the law, it is probable that their primary takeaway from *Imbong* is that it is an occasion when the State pursued a stance notwithstanding the Catholic Church’s staunch opposition to the same. This shift in the State’s attitude will likely have surprised most, considering the remarkable influence of the Catholic Church in the crystallization of national policies throughout history. For instance, the Philippines and Vatican City are the only states in the world

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¹ G.R. No. 204819, Apr. 8, 2014.

² G.R. No. 203335, Feb. 11, 2014; on the constitutionality of the Cybercrime Prevention Act.

³ G.R. No. 209287, July 1, 2014; on the constitutionality of the Disbursement Acceleration Program.

that do not have a divorce law.⁴ It can hardly be argued that such a glaring distinction from the rest of the world has nothing to do with the fact that divorce is not recognized by the Catholic Church. That being the case, it becomes easy to appreciate just why exactly the *Imbong* ruling has limitless ramifications even in the eyes of the general public. When will the State, through the Court, next render a decision that runs counter to long-held beliefs of the Catholic Church?

It is within this context that we deemed it appropriate to examine significant pieces of jurisprudence that relate to a group of people whose interests too often contradict the stance of the Catholic Church—the Lesbian, Gay, Bisexual and Transgender (“LGBT”) community. This review will focus on three cases, namely: *Silverio v. Republic of the Philippines*,⁵ *Republic of the Philippines v. Cagandaban*,⁶ and *Ang Ladlad LGBT Party v. Commission on Elections*.⁷ It is believed that these cases will paint a complete picture of the state of Philippine LGBT jurisprudence because two of them, *Silverio* and *Cagandaban*, involved LGBT issues on an individual level, while one, *Ang Ladlad*, dealt with LGBT issues on an institutional level.

On October 22, 2007, the Court, speaking through Justice Corona, denied the petition of Rommel Silverio for a change of the name and sex that were indicated in his birth certificate. The petitioner, a transsexual, alleged that although he was male anatomically speaking, he “feels, thinks and acts as a female.”⁸ Consistent with this allegation, Silverio underwent extensive hormone therapy and had sexual reassignment surgery performed on his body. On the basis of the fact that his physical body finally matched his internal state of mind, the petitioner argued that changing his name to “Mely”⁹ and his sex to “female”¹⁰ would actually be beneficial not only to himself but to the general public because it would avoid confusion—one of the grounds for a valid change of name under Republic Act No. 9048. The trial court granted the petition not on the basis of any particular piece of substantive law but on the basis of equity:

Firstly, the [c]ourt is of the opinion that granting the petition would be more in consonance with the principles of justice and equity. With his

⁴ Carlos Conde, *Philippines Stands All but Alone in Banning Divorce*, THE NEW YORK TIMES, June 17, 2011, available at http://www.nytimes.com/2011/06/18/world/asia/18iht-philippines18.html?_r=0.

⁵ G.R. No. 174689, 537 SCRA 373, Oct. 22, 2007 [hereinafter “*Silverio*”].

⁶ G.R. No. 166676, 565 SCRA 72, Sep. 12, 2008 [hereinafter “*Cagandaban*”].

⁷ G.R. No. 190582, 618 SCRA 32, Apr. 8, 2010 [hereinafter “*Ang Ladlad*”].

⁸ *Silverio*, 537 SCRA at 380.

⁹ *Id.* at 381.

¹⁰ *Id.*

sexual [re-assignment], petitioner, who has always felt, thought and acted like a woman, now possesses the physique of a female. Petitioner's misfortune to be trapped in a man's body is not his own doing and should not be in any way taken against him.

Likewise, the [c]ourt believes that no harm, injury [or] prejudice will be caused to anybody or the community in granting the petition. On the contrary, granting the petition would bring the much-awaited happiness on the part of the petitioner and her [fiancé] and the realization of their dreams.¹¹

The Supreme Court, however, reversed the trial court's decision. It held that contrary to Silverio's claim, changing his name and gender will cause more confusion and "may only create grave complications in the civil registry and the public interest."¹² The tenor of the Court's ruling in this case is that there is no existing piece of legislation that can grant the relief prayed for by Silverio. Notably, both the trial court and the Supreme Court had this point in agreement. The difference, however, lies with the conclusion of the Court that it cannot sustain the petition based on equity alone. While our jurisprudence is replete with cases where the Court has granted petitions based on considerations of equity and compassionate justice,¹³ the Court in *Silverio* declined to pursue a similar line of reasoning and decided to take the more conservative view.

Interestingly, the first words of the case were not penned by Justice Corona but were passages from the book of Genesis from the Christian Bible.¹⁴ Optimistically, the use of such text could have been justified by the literary flavor it gave the decision; pessimistically, it demonstrates a clear bias by the State's highest judicial body in favor of an institution from which it is supposed to be independent.

Almost a year later, on September 12, 2008, the Court promulgated another ruling that touched on the issue of LGBT rights in the form of *Republic v. Cagandahan*.¹⁵ The Court, speaking through Justice Quisumbing, granted the petition of Jennifer Cagandahan to change the entries in her birth certificate that formerly read as "Jennifer Cagandahan" and indicated her sex as "female" to

¹¹ *Id.* at 382.

¹² *Id.* at 387.

¹³ See *Soco v. Mercantile Corp. of Davao*, G.R. No. 53364, 148 SCRA 526, Mar. 16, 1987; *Engineering Equipment, Inc. v. Nat'l Lab. Rel. Comm'n*, G.R. No. 59221, 133 SCRA 752, Dec. 26, 1984; and *New Frontier Mines, Inc. v. Nat'l Lab. Rel. Comm'n*, G.R. No. L-51578, 129 SCRA 502, May 29, 1984.

¹⁴ "When God created man, He made him in the likeness of God; He created them male and female." *Genesis* 5:1-2, cited in *Silverio*, 537 SCRA 373

¹⁵ G.R. No. 166676, 565 SCRA 72, Sept. 12, 2008.

“Jeff Cagandahan” and “male”, respectively.¹⁶ Cagandahan had a medical condition called Congenital Adrenal Hyperplasia (CAH), which means that she possesses both male and female characteristics.¹⁷ At first blush, this decision seems to suggest that the Court has abandoned its stance in *Silverio*, but a closer examination will reveal that the Court merely carved out a very narrow and specific exception to the doctrine that it enunciated in *Silverio*. In fact, notwithstanding the difference in the ruling of the Court in *Cagandahan* as compared to *Silverio*, the Court’s line of reasoning remained resoundingly similar.

As in the *Silverio* decision, the Court pointed out the absence of a law that would explicitly allow it to grant the petition. Having admitted that it had no secure basis in law that could justify a favorable ruling, the Court limited the area of its consideration and the rationale of its decision strictly to the presence or absence of CAH and the various pieces of medical testimony that were presented by the petitioner. In effect, the decision of the Court to grant the petition in this case turned upon the fact that Jennifer Cagandahan was diagnosed with CAH. The Court, in this case, took pains to distance its ruling from the exercise of its own judgment through this statement:

Respondent here has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with. And accordingly, he has already ordered his life to that of a male. Respondent could have undergone treatment and taken steps, like taking lifelong medication, to force his body into the categorical mold of a female but he did not. He chose not to do so. Nature has instead taken its due course in respondent’s development to reveal more fully his male characteristics.¹⁸

The above-quoted statement may be compared with the pronouncement of the Court in *Silverio* in a footnote: “[m]oreover, petitioner’s female anatomy is all man-made. The body that he inhabits is a male body in all aspects other than what the physicians have supplied.”¹⁹ Taken together, *Silverio* and *Cagandahan* suggest that, insofar as the Supreme Court is concerned, there is a distinction between a natural and a “man-made” sex change, wherein the former will warrant a change of name and sex while the latter will not. This attitude is undeviating from the Court’s repeated practice of refusing to rule on the basis of its own judgment.

¹⁶ *Id.* at 76.

¹⁷ *Id.* at 76-77.

¹⁸ *Id.* at 87.

¹⁹ *Silverio*, 537 SCRA at 392 n.31.

In a more recent case promulgated on April 8, 2010, *Ang Ladlad LGBT Party v. Commission on Elections*,²⁰ the advocacies of the LGBT community was raised for the first time in a legal forum. The LGBT's right to political representation was asserted by Ang Ladlad LGBT Party on behalf of its estimated 670,000 members and 34 affiliate organizations.²¹ While the Court directed the Commission on Elections ("COMELEC") to grant Ang Ladlad's petition for registration, the decision fell short of recognizing the LGBT community as a distinct class of individuals who are discriminated against and therefore entitled to a specific set of rights. By failing to do so, the Court missed the opportunity to set a precedent on the extent of LGBT rights and create positive (or negative) expectations on the future attitude of the Court in deciding LGBT cases. Notwithstanding the lack of an explicit declaration that the case was *sui generis*, it may be said that it was in fact the intention of the Court to make it one.

In that case, Ang Ladlad, an organization composed of men and women who identify themselves as LGBT, applied for registration as a party-list before the COMELEC. Ang Ladlad claimed that it complied with the guidelines laid down by the Supreme Court in *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*,²² particularly that (1) the LGBT community is a marginalized and underrepresented sector and (2) Ang Ladlad has a platform of governance that will contribute to the formulation and enactment of appropriate legislation:

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:

²⁰ G.R. No. 190582, 618 SCRA 32, Apr. 8, 2010.

²¹ 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, and Zamboanga Gay Association – Zamboanga City.

²² G.R. No. 147589, 359 SCRA 698, June 26, 2001.

- 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.²³

In support of its averment of marginalization, Ang Ladlad argued that the LGBT community is a victim of exclusion, discrimination and violence because of its members' sexual orientation and gender identity. The Second Division of the COMELEC dismissed Ang Ladlad's petition on moral and religious grounds, citing passages from the Bible and the Koran. This decision was later upheld by the COMELEC on a motion for reconsideration.

On a petition for certiorari, the Supreme Court directed the COMELEC to grant Ang Ladlad's application. In the *en banc* decision penned by Justice Del Castillo, the Court ruled in favor of Ang Ladlad based on its compliance with the requirements of the Constitution and of Republic Act No. 7941²⁴ and the validity of its exercise of freedom of expression and of association.

First, the Court said that Ang Ladlad had "sufficiently demonstrated its compliance with the legal requirements for accreditation"²⁵ and that the COMELEC's denial based on public morals and religion had no legal mooring. In relation to equal protection, the Court applied the rational basis test in ruling that "moral disapproval of an unpopular minority [...] is not a legitimate state interest that is sufficient to satisfy rational basis"²⁶ and concluded that "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."²⁷ In effect, the Court eradicated the class created by the COMELEC that was based on the alleged immorality; at the same time, it

²³ *Ang Ladlad*, 618 SCRA at 47 n.7.

²⁴ An Act Providing For The Election Of Party-List Representatives Through The Party-List System, And Appropriating Funds Therefor.

²⁵ *Ang Ladlad*, 618 SCRA at 58.

²⁶ *Id.* at 64.

²⁷ *Id.* at 64-65.

denied that the LGBT is a special class. No discrimination against or in favor of the LGBT was sanctioned by the Court.

In rebuttal of the OSG's position that LGBT is a separate class, the Court elaborated:

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.'²⁸

Second, the Court declared that the organization of Ang Ladlad was a legitimate exercise of the LGBT's freedom of expression and of 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. It is in the public square that deeply held convictions and differing opinions should be distilled and deliberated upon.²⁹

* * *

[H]omosexual 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.³⁰

* * *

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. 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.³¹

²⁸ *Id.* at 65.

²⁹ *Id.*

³⁰ *Id.* at 66. -

³¹ *Id.* at 67-69.

While the Court extended protection to the right of LGBTs to express their sentiments in a political forum, the nature of the protection it extended seemed to suggest that being an LGBT is akin to holding an opinion. This is contrary to the fact that being an LGBT goes into the very nature of an individual's life—well past the point of opinions and personal advocacies. The tailend of the Court's statement that acknowledged the recognition of LGBT rights in foreign jurisdictions was tempered by the qualification that such were illuminating at best. The import, therefore, of these statements is that in the Philippines, LGBT rights on an institution level are limited to freedom of expression and association. Any uprising of hope that this decision had laid the groundwork for substantial progress in the field of LGBT rights in the eyes of the law as affirmed by the Court will have been sufficiently sobered by the Court's disclaimer:

[N]one 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.³²

The import of this statement, at the very best, is that the Court remains undecided on the issue of LGBT rights. A negative take on the aforementioned statement, since it was couched in negative terms, would be that the attitude of the Court in future LGBT cases will likewise be negative. Given another LGBT case, the Court may very well rule in favor of, or against, the LGBT litigant. Such ambivalent attitude seems to be consistent with the *Silverio* and *Cagandahan* cases.

In all three of the cases discussed, the Court had what appeared to be ample opportunities to discuss in greater detail the specific rights due to LGBT groups and individuals under the law. At first blush, it is natural to feel that at the very least, the Court should have—even if such statements would have to be considered as *obiter*—touched upon the issue of what the status of LGBT rights is under its interpretation of the current law. Yet the decisions of the Court are, for lack of a better term, sanitized of any indication of their present inclinations as regards the topic of LGBT rights. The Court has consistently deflected the issue of LGBT rights under the law whenever it has appeared before it. This also

³² *Id.* at 72-73.

is initially perplexing because while the Court maintains a taciturn façade as regards the issue, it has, in the same breath, recognized the trend in foreign jurisdictions in favor of granting and expanding LGBT rights. Notably, at around the time that these decisions were written, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity was gaining international recognition. Given the existence of local cases that were intimately related to the issue of LGBT rights and international recognition of the same, the question to be asked is this: why has the Court deliberately maintained its silence?

The likeliest explanation for the Court's reticence is the concept of judicial restraint. The case of *Francisco v. House of Representatives*³³ provides the requirements that the Court must deem to have been fulfilled before it exercises its power of judicial review, namely:

1. Actual case or controversy calling for the exercise of judicial power[;]
2. The person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement[;]
3. The question of constitutionality must be raised at the earliest possible opportunity[; and]
4. The issue of constitutionality must be the very *lis mota* of the case.³⁴

While this enumeration of elements is usually applied in cases where the issue is whether or not the Court may look into the constitutionality of an act of the other two branches of government, its general rationale is that the Court will not, as a rule, settle the issue of a case on the basis of its own judgment and proclivities when it may be settled on the basis of justifications that are, within the judicial context, neutral and objective—laws, for example.

Applying these elements to the three reviewed cases, it is clear that while the first two elements may have been met for the Court to exercise its power of judicial review over the issue of LGBT rights, the last two elements have not been satisfied. The issue of LGBT rights was never explicitly raised nor was the

³³ G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

³⁴ *Id.*

determination of those rights necessary in order for the Court to arrive at a judgment that was in consonance with existing laws. Resultantly, finding fault with the decision of the Supreme Court to adhere to the principle of judicial restraint in this context appears to be an exercise in vain.

In spite of the fact that the Supreme Court is justified in not delving any further into the issue of LGBT rights in the cases that they have heretofore decided, it is still necessary to probe what little jurisprudence exists as regards these rights because it is only a matter of time before the Court will have to pass upon these issues. As of the time of this case review's writing, the brutal murder of Jennifer Laude has placed the issue of LGBT rights at the center of public attention and presents a unique commingling of the various branches of law under the shadow of LGBT rights. A cursory examination of the issues involved reveals that it involves international, criminal, and civil law. As such, it is necessary to synthesize what the Court has said (or not said) regarding LGBT rights.

First, the silence of the Supreme Court regarding LGBT rights should not be automatically interpreted as a portent of unfavorable rulings when its justices finally define LGBT rights within what the law may provide. There is a slight but not insignificant difference between saying that something is impossible and saying that something is not possible at the moment. To our minds, it is the latter that the Supreme Court has regularly implied in its decisions—an errant biblical quotation notwithstanding. It is not unlikely that the Court is merely waiting for something to compel them to exercise their adjudicatory authority over the issue of LGBT rights. It may be a new piece of legislation: the 2014 UNDP-USAID Philippines Country LGBT report specifically mentions the absence of an anti-discrimination bill in Philippine law.³⁵ Alternatively, it could conceivably be a novel argument based on existing laws that gives the Court no opportunity to deflect or sidestep the issue. In retrospect, the Court's refusal to grant the petition in *Silverio* on the basis of equity may ultimately work to the advantage of LGBT advocates because a ruling on the basis of such is easily assailable and far from secure.

Second, based on the rulings of the Court in the three reviewed cases, it is clear that they are separate pieces of jurisprudence that are incapable of coming together to form an unbroken string of precedents. Each was decided solely within the boundaries of each case and, as earlier noted, no decision spent

³⁵ UNITED NATIONS DEVELOPMENT PROGRAMME & USAID, BEING LGBT IN ASIA: THE PHILIPPINES COUNTRY REPORT 8, 22, 23 (2014), available at <http://www.usaid.gov/sites/default/files/documents/1861/2014%20UNDP-USAID%20Philippines%20LGBT%20Country%20Report%20-%20FINAL.pdf>.

a word more than what was necessary in order to arrive at their respective rulings. In fact, it may be reasonably argued that, since the manner of deciding the three reviewed cases was so insulated from the manner in which the other two were decided, re-arranging the chronological order of these cases would not have made any substantial difference as regards the Court's final ruling in each of them. In other words, any new case concerning LGBT rights will exist in the same way that these three cases exist in relation to one another—in total isolation. This may prove to be favorable to the proponents of LGBT rights because it means that the Court will grant any subsequent case a clean slate without any favor and more importantly, without any prejudice.

In conclusion, the prevailing social circumstances point to the inevitability that, sooner or later, the Court will have to definitively weigh in on the issue of LGBT rights. The intent of this case review is to impart a sense of hope that is as slight as it is undaunted that the Court, when finally called upon to pass on the issue of LGBT rights, will rule in a manner in consonance with the interests of a group which has, for too long, struggled to assert its acceptability. As then Chief Justice Puno enunciated in his concurring opinion in *Ang Ladlad*, “a person's sexual orientation is so integral an aspect of one's identity.”³⁶ To our knowledge, it has never been the practice of the Supreme Court to deprive a person of anything integral to the existence of his or her identity.

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³⁶ *Ang Ladlad*, 618 SCRA 32, 103 (Puno, C.J., concurring). (Citation omitted.)