

# SHOPPING FOR THEIR OWN PAIR OF PINK STILETTOS: LGBT RIGHTS VIS-À-VIS THE MAGNA CARTA OF WOMEN AND OTHER RECENT LAWS AND JURISPRUDENCE IN THE PHILIPPINES

Sherwin Dwight Ocampo Ebalo

In the struggle for human rights recognition, the movements of women and lesbians, gays, bisexuals and transgenders (LGBT) are kindred spirits. Ideally, the developments in one movement benefit the other.

However, recent women's rights laws do not extend their protection to LGBTs. The disjuncture lies with the clear legal distinction secured by women as a group as against all other groups, including LGBTs. Like its kindred spirit, the LGBT rights movement should also establish its clear legal identity.

The need for a clear legal identity for the LGBT rights movement is emphasized by three recent Supreme Court decisions. *Silverio vs Republic* shows the strict application of the law in favor of only those who are expressly granted with statutory benefits. *Republic vs Cagandaban* carves out an exception not specifically stated in the law because of the presence of substantial distinctions. Finally, *Ang Ladlad vs Comelec* successfully established a distinct legal identity for LGBTs, albeit for a specific purpose only.

In the end, equal human rights treatment begins with the recognition of each group's substantial characteristics. The challenge for the LGBT rights movement, therefore, is to clearly establish itself as a distinct group under the law.

## 1. Introduction

The LGBT<sup>1</sup> and women's movements are kindred spirits. The two groups fight for the same thing—the respect and recognition of human rights. Hence, it is but reasonable to deduct that the victory of one *should* be a victory for the other.

The LGBT rights movement is cognizant of this. In the recent 2010 Philippine National elections, the first ever LGBT party list group ran under a platform of “*equal rights, not special rights*” (Ang Ladlad, 2010). The slogan implied the syllogism above by tracing the root of party's purpose to something more fundamental than LGBT rights, or women's rights for that matter—*human* rights.

The women's rights movement in the Philippines has significantly progressed in the past decade. Ideally, the success of this movement should be benefitting the LGBT rights movement as well. However, a survey of the country's laws and jurisprudence show no hard-and-fast correlation. There is still a manifest disparity between the quantity, nay, even the quality, of laws promoting and respecting the rights of women and LGBTs.

This paper seeks to, first, illustrate how recent pro-women laws in the Philippines do not fit LGBT concerns<sup>2</sup>, and, second, portray the present status of the LGBT rights movement through recent Supreme Court decisions. Then, the paper tries to reconcile the discussions to reveal just what the LGBT rights movement can learn from its sister movement.

Frequent analogies will be made to shoe-shopping. The quest for LGBT rights is much like shopping for the perfect pair of shoes. It is a long cycle of fitting and mis-fitting with one end in mind—to find one's identity.

## 2. A primer on the LGBT movement in the Philippines

Before analyzing the present state of the LGBT movement, a brief backgrounder is in order.

The *Yogyakarta Principles*<sup>3</sup>, an outline of principles relating to *sexual orientation* and *gender* which seeks to be “a universal guide to human rights which affirm binding international legal standards with which all States must comply” provides thus:

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (Preamble, Note 1).

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms (Preamble, Note 1).

In the Philippines, a number of private organizations have fearlessly championed human rights as applied to the LGBT community. As early as 1999, the The Lesbian and Gay Legislative Advocacy Network Philippines (LAGABLAB-Pilipinas) was formally created with an aim to “[achieve] a society free from all forms of discrimination particularly those based on gender and sexual orientation.” (Lagablab, n.d.)<sup>4</sup> During the 12<sup>th</sup> Congress and the Congresses thereafter, Lagablab focused on the enactment of the Anti-Discrimination Bill which seeks to “[criminalize] a wide range of policies and practices that discriminate against Filipino LGBTs.” (Lagablab, n.d.)

Another pioneer LGBT group is Ang Ladlad, which ran as a party list group in the recent national elections. Its candidacy was, prior to the last elections, twice railroaded by the Commission on Elections (Comelec) on different grounds (Ang Ladlad, 2009). It espouses a five-tiered agenda.<sup>5</sup>

At present, Philippine law does not formally prohibit same-sex activities (Ang Ladlad vs Comelec, 2010)<sup>6</sup>, adoption by same sex couples (Domestic Adoption Act, s.7), nor disallows the conscription of LGBTs in the military (Noypitayo, 2010). However, Congress has yet to pass an Anti-Discrimination law, laws allowing the change of name and status of transgenders, laws recognizing LGBT relationships, and laws allowing same-sex marriages (Family Code, s.1)<sup>7</sup>.

There is no set of conclusive statistics on the demography of LGBTs in the country. Interestingly, however, the Separate Opinion of Justice Abad in the case of *Ang Ladlad vs Comelec* (2010) recognizes the “universally accepted estimate that one out of every 10 persons is an LGBT of a certain kind.” It estimates the LGBT population in the Philippines at 8.7 million.

A special feature of the LGBT campaign is “equality.”<sup>8</sup>

### 3. The incompatibility of LGBT rights with recent pro-women laws

If women's rights and LGBT rights are intricately connected, then surely, the latter will benefit from the recent developments in the former. However, such is not the case in the Philippine context. There is an apparent incompatibility between the two, and this is shown in the wording of recent pro-women laws.

In the past six years, women's rights took an upsurge through the passage of two laws, the Anti-Violence Against Women and Children Act (Anti-VAWC, 2004) and the Magna Carta of Women (2009).

### 3.1 Anti-Violence Against Women and Children Act and LGBT Rights

The first law greatly expanded the concept of violence against women and children. In addition to physical violence, the following became actionable violence: sexual, psychological and economic violence. The Anti-VAWC Law provides for an efficient remedy against any act of violence through the swift issuance of barangay, temporary or permanent protection orders.<sup>9</sup>

Another salient point of this law is the recognition of the Battered Women's Syndrome as a defense against criminal charges.<sup>10</sup> The said innovation codified the Supreme Court's ruling on the case of *People vs Genosa*.<sup>11</sup>

The Declaration of Policy<sup>12</sup> provides that the law embodies the country's obligation to protect women's human rights under the Philippine Constitution, the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and other international instruments.

If the Anti-VAWC Law embodies women's human rights, will it also apply to LGBTs, following the transitivity of human rights? A simple textual analysis of the law answers the question in the negative.

The rules of statutory construction provide that laws should be understood using the ordinary meaning of their words (*Romualdez vs Sandiganbayan*, 2004).<sup>13</sup> "Violence against children" is defined as those committed by "any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate (Anti-VAWC, s.3)." The coverage obviously operates on a biological distinction, not a gender one. The combination of the words "woman, wife, and child" clearly removes a gay man or a transgender from the scope of the law.

The transitivity of human rights from women's rights to LGBT rights crumbles at this point. To illustrate, consider the case of an abused lesbian. A study conducted by Lesbian Advocates Philippines (LeAP!) revealed that lesbians experience the following "covert" forms of discrimination and violence: "(1) negative treatment from family members, where lesbianism is seen as a source of shame for the entire family... and (5) ostracism (2004, p. 151)." These violations fall squarely under *psychological violence* in the Anti-VAWC Law (s.3).<sup>14</sup>

If the victim obtains a protection order under the Anti-VAWC Law, the grant will be based on the victim's being a woman, not on her being a lesbian. This is because the law which grants the statutory remedy is a woman's rights law (Anti-VAWC, s.2), not a LGBT rights law. No transitivity occurs even if the victim succeeded in getting the desired protection. If the victim were gay or a transgender, the law will not even operate.

### 3.2 Magna Carta of Women and LGBT Rights

The second big legal leap for women's rights is the Magna Carta of Women (Republic Act 9710). It revolutionized women's rights by reinforcing them in the different social aspects of a woman's life. One of its salient provisions is Section 12 which provides: "The State shall take steps to review and, when necessary, amend and/or repeal existing laws that are discriminatory to women within three (3) years from the effectivity of this Act." The *Implementing Rules and Regulations* (IRR) of the said law mentions some of these "discriminatory laws" and the list is comprehensive.<sup>15</sup>

The Magna Carta of Women focuses on gender-discrimination which it defines as:

Sec. 4. (b) "Discrimination Against Women" refers to any gender-based distinction, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

It includes any act or omission, including by law; policy, administrative measure, or practice, that directly or indirectly excludes or restricts women in the recognition and promotion of their rights and their access to and enjoyment of opportunities, benefits, or privileges.

A measure or practice of general application is discrimination against women if it fails to provide for mechanisms to offset or address sex or gender-based disadvantages or limitations of women, as a result of which women are denied or restricted in the recognition and protection of their rights and in their access to and enjoyment of opportunities, benefits, or privileges; or women, more than men, are shown to have suffered the greater adverse effects of those measures or practices.

*Provided, finally,* That discrimination compounded by or intersecting with other grounds, status, or condition, such as ethnicity, age, poverty, or religion shall be considered discrimination against women under this Act.

The use of the term "gender" is misleading. It gives the nuance that LGBTs are included in the provision as gender is commonly defined as one's sexual identity in relation to society and culture, which may broadly include one's sexual preference. Ironically, the illusion of LGBT inclusion in the law is shattered by no less than the law's human rights provision. Section 3, paragraph (4) states:

All individuals are equal as human beings by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of ethnicity, **gender**, age, language, **sexual orientation**, race, color, religion, political, or other opinion, national, social, or geographical origin, disability, property, birth, or other status as established by human rights standards [emphasis supplied].

The separation of “gender” and “sexual orientation” clearly evinces that the former does not contain the latter. Therefore, “gender” in this law is more properly construed as “sex.”

That LGBTs are not included in the scope of the Magna Carta of Women is clarified in other provisions of the law. The laws suggested by the IRR to be amended because of their discriminatory character are those which prejudice women vis-à-vis men. Examples of these are the Family Code provision which gives preference over the husband’s decision over his wife’s on matters involving parental authority (a.71)<sup>16</sup>, the Revised Penal Code article on concubinage (a.334)<sup>17</sup> which is more onerous than its male counterpart, adultery (a.333)<sup>18</sup>, and the Rules of Court section which presumes that a man will survive a woman if both were caught in a calamity (r.131.3).<sup>19</sup>

Human rights again do not flow from women to LGBTs in this law.

### 3.3 Why transitivity of human rights between the two movements is not guaranteed

The problem is one of classification. The Anti-VAWC Law and the Magna Carta of Women are, by express statutory provisions, women’s rights laws. That the rights enshrined therein apply only to women and not to LGBTs as a whole are clear in their sections on scope. They cannot be unduly applied to LGBTs, even if the LGBT rights movement and the women’s rights movement are kindred spirits.

To expand LGBT rights, the solution lies not in stretching the scope of clear-cut provisions of present women’s rights laws, but in taking inspiration from them. One such inspiration is the ability of the women’s rights movement to prove itself as a clear and distinct group under the law. The legal identity of women, as opposed to men, proved to be clear enough for Congress to recognize the group’s fragility from violence (Anti-VAWC) and subjection to discriminatory laws (Magna Carta of Women). The same distinctiveness and clarity is required from the LGBT rights movement.

## 4. The need for LGBT legal distinction

Even if the principle of transitivity does not operate as between women’s rights and LGBT rights, the latter is still supported by a broader set of rights (on which women’s rights are also anchored)—human rights. These human rights are translated into statutes of general application. Philippine courts do not hesitate to apply these rights,

whenever clearly applicable, to LGBTs. In fact, the Philippine Supreme Court has made pronouncements about LGBTs which, although not binding, may prove to be useful precedents for future legislation.

Two relatively recent cases, however, reveal that general laws in themselves can be picky. Courts that will try to apply them will rely on either the fine classifications as enumerated in the laws or on clear and substantial distinctions as proved by the circumstances of the case.

#### 4.1 Silverio vs Republic

In the case of *Silverio vs Republic of the Philippines* (G.R. No. 174689, 2007), Rommel Silverio underwent sex reassignment surgery and “from then on, lived as a female, and was in fact engaged to be married.” He then filed a petition in the Regional Trial Court to have his first name and sex as found in his birth certificate changed. The lower court granted his petition on the basis of justice and equity and on the belief “that no harm, injury [or] prejudice will be caused to anybody or the community in granting the petition (*Silverio vs Republic*, 2007)” On appeal by the Solicitor General, however, the decision was overturned.

The Supreme Court sustained the decision of the Court of Appeals on the issue of Silverio’s change of name. It stated that the present law does not allow one’s change of name on the basis of his or her sex reassignment.<sup>20</sup>

The Court noted that “Rather than avoiding confusion, changing petitioner’s first name for his declared purpose may only create grave complications in the civil registry and the public interest (*Silverio vs Republic*, 2007).”

The Supreme Court likewise affirmed the decision regarding Silverio’s change of status.<sup>21</sup> The Court mentioned that:

Under the Civil Register Law, a birth certificate is a historical record of the facts as they existed at the time of birth. Thus, *the sex of a person is determined at birth*, visually done by the birth attendant (the physician or midwife) by examining the genitals of the infant. Considering that there is no law legally recognizing sex reassignment, the determination of a person’s sex made at the time of his or her birth, if not attended by error, is immutable.

The Supreme Court also rejected the grant of the petition on the basis of equity. It noted that Silverio’s prayer was contrary to public policy. The Court clarified that:

The changes sought by petitioner will have serious and wide-ranging legal and public policy consequences. First, even the trial court itself found that the petition was but petitioner’s first step towards his eventual marriage to his male fiancé.

However, marriage, one of the most sacred social institutions, is a special contract of permanent union *between a man and a woman*. One of its essential requisites is the *legal capacity of the contracting parties who must be a male and a female*. To grant the changes sought by petitioner will substantially reconfigure and greatly alter the laws on marriage and family relations.

Nevertheless, the decision notes in its penultimate paragraph that “The Court recognizes that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal. However, the remedies petitioner seeks involve questions of public policy to be addressed solely by the legislature, not by the courts (*Silverio vs Republic*, 2007).” This is arguably a judicial recognition of the LGBT community. Nevertheless, it only goes as far as that, a mere recognition, because of the fact that there is no law from which the Courts may base a favorable decision for Silverio. The case therefore suggests the need to make LGBT a legally distinct group in order for it to be granted with statutory privileges.

## 4.2 Republic vs Cagandahan

In the case of *Republic vs Cagandahan* (G.R. No. 166676, 2008), the Court itself “made” a new legal classification as an exception to the rules on changing one’s name and sex. Jennifer Cagandahan was born female but developed Congenital Adrenal Hyperplasia (CAH), a condition where persons thus afflicted possess both male and female characteristics. He filed a petition in the Regional Trial Court for change of first name and sex. The lower court granted said petition on the basis of a showing of “very clear and convincing proofs” and that “[Jennifer] has chosen to be male (*Republic vs Cagandahan*, 2008).” The Solicitor General challenged the decision on the basis of lack of legal basis.

The Supreme Court classified Jennifer as an “intersex individual”<sup>22</sup> and carved out an exception to the laws on change of name and sex. It mentioned that:

In deciding this case, we consider the compassionate calls for recognition of the various degrees of intersex as variations which should not be subject to outright denial. “It has been suggested that there is some middle ground between the sexes, a ‘no-man’s land’ for those individuals who are neither truly ‘male’ nor truly ‘female’.” The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.

The Court further anchored its decision on Jennifer’s choice of his sex.<sup>23</sup> That Jennifer chose to be male rather than female, when the intake of appropriate hormones could have made him conform with the sex stated in his birth certificate, the Court deferred to “dictate on respondent concerning a matter so innately private as one’s sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse



the male tendency due to CAH. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female (*Republic vs Cagandahan*, 2008).”

### 4.3 Reconciling the Silverio and Cagandahan cases

The difference between the Silverio and the Cagandahan cases is simple—the latter was able to create an exception based on substantial distinctions. In the former case, the Court applied the law strictly by making immutable the sex determination of a person at birth. Sex reassignment was not recognized as a ground for changing one’s sex because of the absence of a law allowing such.

In the second case, however, the immutability of the sex determination at birth was muddled by a cause which was not a ground formally recognized under the law. The Court considered the special circumstances in the case, in particular, the “dictates of nature” and Cagandahan’s sexual preference to carve out an exception to the law. In effect, the decision made a new classification—intersex individuals—who, for purposes of petitions for change of name and sex, now enjoy certain privileges.

The two cases make it clear that in order to enjoy certain statutory privileges, those who wish to avail it must show substantial qualifications sought by the law. The implied challenge for the LGBT movement, therefore, is to establish itself as a distinct group entitled to statutory rights and privileges which actualize human rights.

## 5. Political representation of the LGBT

The need to establish a distinct legal classification was achieved politically by the LGBT movement in the last elections. After being denied twice by the Comelec in four years, the Supreme Court held in the case of *Ang Ladlad LGBT Party vs Commission on Elections* (G.R. No. 190582, 2010) that the petitioner was eligible for candidacy as a party list representative. The Court slammed Comelec’s denial of Ang Ladlad’s petition on the basis of moral grounds.<sup>24</sup> Such reasoning ran afoul with Article III, Section 5 of the *Constitution* which states that “[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.”

The Court also overturned Comelec’s public morals argument. It noted that Comelec did not allege any “specific overt immoral act performed by *Ang Ladlad*” and neither has it shown that “petitioner’s admission into the party list system would be so harmful as to irreparably damage the moral fabric of society.”<sup>25</sup>

On the issue of equal protection,<sup>26</sup> the Court formally recognized that LGBT may constitute a valid group or classification for purposes of the Party List System. It stated:

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 (*Ang Ladlad vs Comelec*, 2010).

It must be noted, however, that the decision was specific as to sectoral representation only. The Court was quick to point out that:

**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...

**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 [emphasis supplied] (*Ang Ladlad vs Comelec*, 2010).

The Court also noted that the decision is in accord with anti-discrimination precepts embraced in international law.<sup>27</sup> On the fundamental issue of whether or not such precepts which pertain to discrimination against “sex” included the concept of sexual orientation, the Court observed that: “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.” Additionally, a variety of United Nations bodies have declared discrimination on the basis of sexual orientation to be prohibited under various international agreements (*Ang Ladlad vs Comelec*, 2010).” The Yogyakarta principles were merely considered as soft law.

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* (*Ang Ladlad vs Comelec*, 2010).

The decision was a success on the part of the LGBT movement because it was able to establish itself as a legal group, albeit only for a specific purpose, i.e. political representation in Congress. Nevertheless, the hesitation of the Court to recognize the LGBT as a “special class”, coupled with international law’s silence on the matter, underscore the need earlier pointed out in the *Silverio* and *Cagandahan* cases—the establishment of the LGBT as a distinct group under the law.

## 6. Conclusion: Shopping for their own pair of pink stilettos

This paper began with a premise: the women’s rights movement and the LGBT rights movement are kindred spirits such that the development in one is a development in the other. However, the preliminary section debunked this intuitive principle by showing that recent legal developments in women’s rights are inapplicable to LGBTs. The paper then perused recent jurisprudence on LGBT concerns. Juxtaposing these two sections shows why the two movements are not in perfect sync, and why, for its own sake, the LGBT rights movement should shop for its own pair of stilettos.

The argument is simple: LGBT rights need clearer bases. The Anti-VAWC Law and Magna Carta of Women are laws which find their roots in specific provisions of the Constitution and the CEDAW. These provisions and this treaty specifically recognize women’s rights as a species of human rights (Anti-VAWC, s.2; Magna Carta of Women, s.2).

Consider, in particular, the following provisions of the Constitution:

The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men (1987 Constitution, a.2, s.14).

The party-list representatives shall constitute twenty *per centum* of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector (a.6, s.5.2).

The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost. There shall be priority for the needs of the under-privileged, sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers (a.3, s.11).

The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation (a.12, s.14).

The legal environment is different for LGBT rights. The Constitution does not make any mention of LGBT, gender or sexual orientation. There is no treaty of which the Philippines is a signatory that recognizes the LGBT group. The Yogyakarta Principle dubbed as a reflection of “the existing state of human rights laws in relation to issues of sexual orientation and gender identity” was treated only as soft law by the Philippine Supreme Court (*Ang Ladlad vs Comelec*, 2010).

It is not surprising, therefore, that there are more pro-women’s rights laws than there are pro-LGBT rights laws. Nevertheless, the absence of specific provisions in the Constitution or international agreements does not debilitate the LGBT rights movement altogether. The said specific “foundations” only give a head start to certain marginalized groups like women. The LGBT still find comfort under the general protection of human rights also found in the Constitution (Art III, Bill of Rights) and international agreements. For example, 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 (*ICCPR*, a.26).

These provisions are the most basic foundations of LGBT rights, and in fact, of any other group. *Ang Ladlad* recognizes this when it sports the slogan “Equal rights, not special rights,” and wisely so. Recently, the group opposed an ordinance in Cebu which established a separate toilet for the “third sex” (*Ang Ladlad*, 2010).

But what is genuine *equality*? One women’s rights framework offers a helpful definition:

This report defines gender equality in terms of equality under the law, equality of opportunity (including equality of rewards for work and equality in access to human capital and other productive resources that enable opportunity), and equality of voice (the ability to influence and contribute to the development process). It stops short of defining gender equality as equality of outcomes for two reasons. First, different cultures and societies can follow different paths in their pursuit of gender equality. **Second, equality implies that women and men are free to choose different (or similar) roles and different (or similar) outcomes in accordance with their preferences and goals** [emphasis supplied] (World Bank, 2001, pp. 2-3).

Equality under the law is not just about treating everyone in the same way. It is treating people under *similar circumstances* the same way (*Association of Small Landowners in the Philippines Inc. vs. Secretary of Agrarian Reform*, 1989). Hence, equality comes with an appreciation of the distinctions of each group.

Here lies the challenge for the LGBT movement: to establish a sense of identity necessary to prove before the law that they have circumstances which significantly differ from other groups, even as against women.

The LGBT movement has already realized this early on by lobbying for the Anti-Discrimination Bill, but it should not stop there.

In this crucial period, the LGBT should cling to its identity and broadcast what makes it a distinct group in the first place. Public opinion will play an important part. Consider the following excerpt:

A basic premise of the discussion thus far is that deliberate public policy is the prime mover for change in gender structures. Indeed, governments possess a range of instruments for catalyzing social transformations, including legal and regulatory policies. But state action also needs the broad support of society in order to effect a deep and lasting change. State effectiveness is greater when civil society groups, especially women's organizations, are able to organize and participate actively in open dialogue. In fact, behind many government actions to promote gender equality have been civil society groups providing support—or pressure—for change. And through treaties, conventions, and donor assistance the international community has supported or pressed national governments to recognize and eliminate gender inequalities (World Bank, 2001: 2-3).

Hence, the LGBT movement should not be afraid to flaunt its defining characteristics. If its constituency desires to lobby for same-sex marriages, the recognition of same-sex civil partnerships, and the expansion of the exceptions for changing one's name and sex, then the LGBT movement should do so, without any hesitation. Those desires and needs of the group, no matter how alien to the common Filipino, are what defines the LGBT movement and should be proudly donned. The public needs to be educated and Congress needs to understand exactly what the LGBT movement is about in order for it to distinguish the LGBT movement from all other groups, and, consequently, to tailor statutory privileges for the enhancement of LGBT rights.

Consider the following excerpt from a thesis regarding the women's movement written eleven years ago:

The nationalist movement in the Philippines has gradually recognized the importance of women's liberation in its vision of social change... Yet, there seems to be a greater pull of political and national issues that the women's movement

has been paying less attention to gender issues in social relations. Also, due to the deep-seated traditions and religious culture in the Philippines, women activities, feminists and even academics involved in women's studies have not yet developed a critique of the Filipino family, marriage and church practices leading to a systematic conceptualization of how culture reinforces female subordination. It appears, therefore, that such critique has been **consciously avoided by the women's movement and progressives** as a whole because doing so could antagonize the larger population and hence, result to **political suicide** [emphasis supplied] (Angeles, 1989).

On hindsight, the women's rights movement eventually made the said critiques on the Filipino family, marriage and the Church. Contrary to earlier fears, making the said moves did not amount to political suicide. The women's rights movement is very much alive and kicking.

The LGBT movement should take the same leap of faith. There is much to learn from its kindred spirit, and the first challenge is simple yet profound. It should go find its own perfect pair of pink stilettos, its clear legal identity, and firmly assert it in its demands for the fair and equal enforcement of human rights.

## ACNKOWLEDGMENTS

I would like to acknowledge Prof. Elizabeth Aguilin-Pangalangan, L.L.M. of the University of the Philippines, College of Law, whose guidance and dedication to her own advocacy on women's and children's rights has inspired me to write for my own advocacy.

I would also like to thank all my colleagues, friends and family who listened and gave their comments to my ideas. You are my co-writers in this one.

## ENDNOTES

- <sup>1</sup> LGBT stands for “Lesbians, Gays, Bisexuals and Transgenders.”
- <sup>2</sup> The author is not espousing a view that the women’s rights movement and the LGBT rights movement are totally incompatible. What is suggested is that the *present* statuses of the two are not in sync, such that the success of one does not automatically carry over to the other. In fact, many of the sources cited herein are products of the women’s rights movement.
- <sup>3</sup> The *Yogyakarta Principles* was drafted by 29 human rights experts from 25 countries in November 2006. The experts have agreed that the *Yogyakarta Principles* “reflects the existing state of human rights laws in relation to issues of sexual orientation and gender identity.” The *Yogyakarta Principles* also contain State recommendations.
- <sup>4</sup> Lagablab is composed of a number of organizations which include: The Library Foundation (TLF Share), Indigo Philippines, Lesbian Advocates of the Philippines, Metropolitan Community Church-Manila, Order of St. Aelred, UP Babaylan and Womyn Supporting Womyn Center.
- <sup>5</sup> (a) Support for the Anti-Discrimination Bill that gives LGBT Filipinos equal rights and opportunities in employment and equal treatment in schools, hospitals, restaurants, hotels, entertainment centers, and government offices. The bill makes discrimination versus LG BTs a criminal act.  
 (b) Support for LGBT-related and LGBT-friendly businesses.  
 (c) Setting up of micro-finance and livelihood projects for poor and physically-challenged LGBT Filipinos;  
 (d) Setting up of centers for old and abandoned LGBTs. The centers will also offer legal aid and counseling, as well as information about LGBT issues, HIV-AIDS, and reproductive health. These centers will be set up in key cities of the country.  
 (e) Support for the bill repealing the Anti-Vagrancy Law that some unscrupulous policemen use to extort bribes from gay men.
- <sup>6</sup> *Ang Ladlad LGBT Party vs Comelec*, G.R.No.190582 (8 April 2010). “We recall that the Philippines has not seen fit to criminalize homosexual conduct.”
- <sup>7</sup> *Executive Order 209 (Family Code)*, Art. 1. Marriage is a special contract of permanent union **between a man and a woman** entered into in accordance with law for the establishment of conjugal and family life [emphasis supplied].
- <sup>8</sup> It is interesting to note that Lagablab sports the credo “Equality is our agenda,” and Ang Ladlad, in turn, believes in “equal rights, not special rights.”
- <sup>9</sup> *Republic Act 9262*, Section 8. *Protection Orders*.- A protection order is an order issued under this act for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of this Act and granting other necessary relief. The relief granted under a protection order serve the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim’s daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The

protection orders that may be issued under this Act are the barangay protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO).

- <sup>10</sup> *Republic Act 9262*, Sec. 3. (c) “*Battered Woman Syndrome*” refers to a scientifically defined pattern of psychological and behavioral symptoms found in women living in battering relationships as a result of cumulative abuse.

Sec. 26. *Battered Woman Syndrome as a Defense*. – Victim-survivors who are found by the courts to be suffering from battered woman syndrome do not incur any criminal and civil liability not withstanding the absence of any of the elements for justifying circumstances of self-defense under the Revised Penal Code.

In the determination of the state of mind of the woman who was suffering from battered woman syndrome at the time of the commission of the crime, the courts shall be assisted by expert psychiatrists/ psychologists.

- <sup>11</sup> G.R. No. 135981 (January 15, 2004). In this case, Genosa used the defense of the Battered Woman’s Syndrome against charges of parricide. The Court recognized the Battered Women’s Syndrome as a defense, but Genosa, failing to prove that she fell under said defense, was convicted.

- <sup>12</sup> *Republic Act 9262*, Sec 2. *Declaration of Policy*.- It is hereby declared that the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security.

Towards this end, the State shall exert efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the Provisions of the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.

- <sup>13</sup> *Romualdez vs Sandiganbayan*, G.R. No. 152259 (29 July 2004). “Elementary is the principle that words should be construed in their ordinary and usual meaning.”

- <sup>14</sup> *Republic Act 9262*, Sec. 3. Psychological violence refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.

- <sup>15</sup> Section 15 of the *IRR* lists down provisions from the *Family Code*, *The Revised Penal Code*, *Rules of Court* and the *Code of Muslim Personal Laws*.

- <sup>16</sup> *Family Code*, Art. 71. Who exercises. — (1) The father and the mother shall jointly exercise just and reasonable parental authority and fulfill their responsibility over their legitimate and acknowledged children. In case of disagreement, the father’s decision shall prevail unless there is a judicial order to the contrary.

- <sup>17</sup> *Revised Penal Code*, Art. 334. *Concubinage*. — Any husband who shall keep a mistress in the conjugal dwelling, or shall have sexual intercourse, under scandalous circumstances, with a woman who is



not his wife, or shall cohabit with her in any other place, shall be punished by prison correccional in its minimum and medium periods.

The concubine shall suffer the penalty of destierro.

- <sup>18</sup> Ibid., Art. 333. *Who are guilty of adultery.* — Adultery is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her knowing her to be married, even if the marriage be subsequently declared void.

Adultery shall be punished by prison correccional in its medium and maximum periods.

If the person guilty of adultery committed this offense while being abandoned without justification by the offended spouse, the penalty next lower in degree than that provided in the next preceding paragraph shall be imposed.

- <sup>19</sup> *Rules of Court*, Rule 131. SEC. 3. *Disputable presumptions.* — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

(jj) That except for purposes of succession, when two persons perish in the same calamity, such as wreck, battle, or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, the survivorship is determined from the probabilities resulting from the strength and age of the sexes, according to the following rules: (4) If both be over fifteen and under sixty, and the sex be different, the male is deemed to have survived; if the sex be the same, the older

- <sup>20</sup> *Republic Act 9048*, Sec. 4. *Grounds for Change of First Name or Nickname.* — The petition for change of first name or nickname may be allowed in any of the following cases:

(1) The petitioner finds the first name or nickname to be ridiculous, tainted with dishonor or extremely difficult to write or pronounce;

(2) The new first name or nickname has been habitually and continuously used by the petitioner and he has been publicly known by that first name or nickname in the community; or

(3) The change will avoid confusion.

- <sup>21</sup> The Court defined status as: “The status of a person in law includes all his personal qualities and relations, more or less permanent in nature, not ordinarily terminable at his own will, such as his being legitimate or illegitimate, or his being married or not. The comprehensive term *status*... include such matters as the beginning and end of legal personality, capacity to have rights in general, family relations, and its various aspects, such as birth, legitimation, adoption, emancipation, marriage, divorce, and sometimes even succession [emphasis supplied].”

- <sup>22</sup> “Intersex individuals are treated in different ways by different cultures. In most societies, intersex individuals have been expected to conform to either a male or female gender role. Since the rise of modern medical science in Western societies, some intersex people with ambiguous external genitalia have had their genitalia surgically modified to resemble either male or female genitals. More commonly, an intersex individual is considered as suffering from a “disorder” which is almost always recommended to be treated, whether by surgery and/or by taking lifetime medication in order to mold the individual as neatly as possible into the category of either male or female.”

- <sup>23</sup> “Ultimately, we are of the view that where the person is biologically or naturally intersex the determining factor in his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex. Respondent here thinks of himself as a male and considering that his body produces high levels of male hormones (androgen)

there is preponderant biological support for considering him as being male. Sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like respondent, is fixed.”

<sup>24</sup> The Comelec Second Division actually quoted Romans 1:26, 27, the story of Sodom and Gomorrah, and the Koran.

<sup>25</sup> *Ang Ladlad vs Comelec*, supra. The Court also recognized the unique plight of the LGBT and the fact the homosexual conduct has not been criminalized; it stated: “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.”

<sup>26</sup> *Central Bank Employees Association, Inc. v. Banko Sentral ng Pilipinas*. “[i]n our jurisdiction, the standard of analysis of equal protection challenges... 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.”

<sup>27</sup> *International Covenant on Civil and Political Rights (ICCPR)*, Art. 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.

## BIBLIOGRAPHY

Angeles, Leonora Calderon, 1989. *Feminism and Nationalism: The Discourse on the Woman Question and Politics of the Women's Movement in the Philippines*. Thesis. College of Social Science and Philosophy, Department of Political Science, University of the Philippines, Diliman.

Ang Ladlad, 2010. *Philippine gay party on ballot for the first time*. Ang Ladlad, [online] 9 May. Available at: <<http://www.angladlad.org/?p=390>> [Accessed 3 October 2010].

Ang Ladlad, 2010. *Ang Ladlad slams separate bathrooms for LGBTs*. Ang Ladlad, [online]. 6 September. Available at: <<http://www.angladlad.org/?p=442>> [Accessed 5 October 2010].

Lesbian Advocates Philippines (LeAP!), 2004. *Unmasked: Faces of Discrimination Against Lesbians in the Philippines*. Manila: LeAP!.

Lesbian and Gay Legislative Advocacy Network Philippines (Lagablab). *About us*. [online] Available at: <<http://lagablab.wordpress.com/about-lagablab/>> [Accessed 3 October 2010].

Noypitayo, 2010. *Gays welcome in the Philippine military*. Noypitayo. [online] 1 July. Available at: <<http://www.noypitayo.com/2010/07/gays-welcome-in-the-philippine-military/>> [Accessed 5 October 2010].

World Bank, 2001. *Policy Research Report: Engendering Development through Gender Equality in Rights, Resources, and Voice*. U.S.: Oxford.

## Laws and International Instruments

*1987 Constitution of the Philippines*. (a.2.14, a.3.5, a.3.11 a.6.5.2, a.12.14)

*Anti-Violence Against Women and Children Act 2004, Republic Act 9262*. (s.2, 3, 26)

*Domestic Adoption Act 1998, Republic Act 8552*. (s.7).

*Family Code 1987, Executive Order 209*. (a.1, 71).

*International Covenant on Civil and Political Rights 1966/1976*. (a.26)

*Magna Carta of Women 2009, Republic Act 9710*. (s.3, 4.b., 12)

*Revised Penal Code 1930, Act No. 3815*. (a.333, 334)

*Rules of Court 1997.* (r.131.3)

*Yogyakarta Principles 2006.* (Preamble, N.1).

## **Jurisprudence**

*Ang Ladlad LGBT Party vs Commission on Election* (8 April 2010) G.R. No. 190582.

*Association of Small Landowners in the Philippines Inc. vs. Secretary of Agrarian Reform* (14 July 1989) G.R. 78741.

*People vs Genosa* (15 January 2004) G.R. No. 135981.

*Republic vs Cagandaban* (12 September 2008) G.R. No. 166676.

*Romualdez vs Sandiganbayan* (29 July 2004) G.R. No. 152259.

*Silverio vs Republic of the Philippines* (22 October 2007) G.R. No. 174689.