Silverio v. Republic: A Step Backward

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I. INTRODUCTION

With *Silverio v. Republic*,[1] the Supreme Court was presented with a chance to broaden the horizon of the Philippine legal landscape with a more modern and progressive conception of self and sexuality. Instead of embracing the opportunity, however, the *Silverio* Court chose instead to rein in that landscape and restrict it behind a border of regression and conservatism, thinly veiled by hodge-podge legal reasoning.[2]

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1. Silverio v. Republic, 537 SCRA 373 (2007).
2. Admittedly, the ramifications of *Silverio* stretch further than this study into whether or not the changes sought should be allowed. The Court itself touched upon public policy considerations, such as marriage and the effect that the changes will have on the various laws relating to women. Those are issues, however, that are more properly left for another extensive study. The only purpose of the foregoing argument is to show that the peculiar situation of

II. FACTUAL ANTECEDENTS

Always having identified himself as female rather than male, Rommel Jacinto Dantes Silverio decided to undergo a series of medical procedures intended to transform him into a woman.[3] Upon successful completion of the final procedure — sex reassignment surgery — she commenced her life anew as a female. Indeed, Silverio was even engaged to be married.

As her outward physiology finally corresponded to her own conception of identity, Silverio filed a petition in the Regional Trial Court for the change of her first name and sex as appearing in her birth certificate. Alleging that she was a male transsexual, she prayed that her first name be changed from Rommel Jacinto to Mely, and that the identification of her sex be changed from male to female.[4]

On 4 June 2003, the trial court rendered a decision in Silverio's favor, ordering the Civil Registrar to change the corresponding entries in the birth certificate.[5]

In turn, the Republic of the Philippines filed a petition for certiorari in the Court of Appeals, arguing that no law allowed the change of entries in a birth certificate by reason of a sex alteration. The Court of Appeals upheld this argument, setting aside the decision of the trial court.[6]

Naturally, Silverio sought recourse with the Supreme Court.

III. RATIO DECIDENDI

In denying the petition, the *Silverio* Court anchored its *ratio* on both procedural and substantive law.

First, the initial petition filed with the trial court was held to have been the wrong remedy. According to the Court, the applicable procedure was that found in Republic Act (R.A.) No. 9048,[7] which authorizes civil

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transsexuals does, indeed, require legal identification and the corresponding legal recourse to effect such. Public policy concerns can follow once that identification is obtained.

3. *Silverio,* 537 SCRA at 381. Among the procedures applied to Silverio were hormone treatments, breast augmentation, and sex reassignment surgery.

4. *Id.* at 380.

5. *Id.* at 382.

6. *Id.* at 382-83.

7. An Act Authorizing the City or Municipal Civil Registrar or the Consul General to Correct a Clerical or Typographical Error in an Entry and/or Change of First Name or Nickname in the Civil Register Without Need of a Judicial Order, Amending for this Purpose Articles 376 and 412 of the Civil Code of the Philippines, Republic Act No. 9048 (2001).

registrars or consul generals to summarily and administratively change first names in the civil registry.[8] Thus, since Silverio chose to file under Rules 103 and 108 of the Rules of Court, the Court held:

> In sum, the petition in the trial court in so far as it prayed for the change of petitioner's first name was not within that court's primary jurisdiction as the petition should have been filed with the local civil registrar concerned, assuming it could be legally done. It was an improper remedy because the proper remedy was administrative, that is, that provided under RA 9048. It was also filed in the wrong venue as the proper venue was in the Office of the Civil Registrar of Manila where his birth certificate is kept.[9]

Second — and, as will be seen, infinitely more damning to the cause — the Court held that Silverio's plea could not validly be granted in any case. According to the Court, the reasons advanced for a change of name did not fulfill either the grounds that R.A. No. 9084 prescribed therefore, or those accepted by jurisprudence.[10] As for the change of entry regarding sex, the Court based its denial on the fact that no law explicitly allowed such a change.[11]

As will be explained subsequently, on each aforementioned ground, the Supreme Court ruling was clearly in error.

IV. REPUBLIC ACT NO. 9048 AND THE PROCEDURAL ASPECT

Perhaps the most plausible basis by which the Court could have ruled against Silverio was that she availed of the wrong remedy. R.A. No. 9048 states:

> Sec. 1. *Authority to Correct Clerical or Typographical Error and Change of First Name or Nickname.* — No entry in a civil register shall be changed or corrected without a judicial order, except for clerical or typographical errors and change of first name or nickname which can be corrected or changed by the concerned city or municipal civil registrar or consul general in accordance with the provisions of this Act and its implementing rules and regulations.[12]

According to the Supreme Court, through Justice Renato Corona, the aforementioned law was precisely the problem in *Silverio*. Thus:

> RA 9048 now governs the change of first name. It vests the power and authority to entertain petitions for change of first name to the city or municipal civil registrar or consul general concerned. Under the law, therefore, jurisdiction over applications for change of first name is now

8. *Id.* § 1.

9. Silverio v. Republic, 537 SCRA 373, 387-88 (2007).

10. *Id.* at 387.

11. *Id.* at 393.

12. R.A. No. 9048, § 1.

> *primarily* lodged with the aforementioned administrative officers. The intent and effect of the law is to exclude the change of first name from the coverage of Rules 103 (Change of Name) and 108 (Cancellation or Correction of Entries in the Civil Registry) of the Rules of Court, until and unless an administrative petition for change of name is first filed and subsequently denied. It likewise lays down the corresponding venue, form and procedure. *In sum, the remedy and the proceedings regulating change of first name are primarily administrative in nature, not judicial.*[13]

Hence, as the logic went, Silverio's claim should have faltered from the outset because it "was not within that court's *primary jurisdiction* as the petition should have been filed with the local civil registrar."[14]

A reading of the decision, however, reveals that the Court never truly intended to deny the petition solely on the basis of procedural concerns. As he himself mentions, R.A. No. 9048 only bestows primary jurisdiction on the civil registrar to adjudicate upon a remedy that is merely primarily administrative.[15] In other words, while the civil registrar may indeed have had jurisdiction to change the first name, it nevertheless did not have the *exclusive* jurisdiction to do so.[16]

Thus, without making explicit reference to the same, the Court was in fact adverting to the doctrine of primary jurisdiction. Under the doctrine:

> [*I*]*f a case is such that its determination requires the expertise, specialized training and knowledge of an administrative body,* relief must first be obtained in an administrative proceeding before resort to the courts is had even if the matter may well be within their proper jurisdiction. It applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative agency. In such a case, the court in which the claim is sought to be enforced may suspend the judicial process pending referral of such issues to the administrative body for its view or, if the parties would not be unfairly disadvantaged, dismiss the case without prejudice.[17]

What the Court failed to take into account, however, was that the doctrine of primary jurisdiction is not such a rigid concept so as to negate all contravening claims. Because it is merely an offshoot of the doctrine of

13. *Silverio,* 537 SCRA at 384-86 (emphasis supplied).

14. *Id.* at 387 (emphasis supplied).

15. Silverio v. Republic, 537 SCRA 373, 387 (2007).

16. The *ratio* essentially focuses on the substantive aspects of the claim, while merely paying lip service to the procedural aspects.

17. Euro-Med Laboratories, Phil., Inc. v. The Province of Batangas, 495 SCRA 301, 304-05 (2006) (emphasis supplied).

exhaustion of administrative remedies,[18] the exceptions thereto similarly apply to the doctrine of primary jurisdiction.

One such important exception is that the failure to observe either primary jurisdiction or exhaustion on the part of one party can be waived by his opponent. In other words, the doctrines are not jurisdictional and the courts may proceed as if they had been observed.[19] Hence, in the case of *Soto v. Jareno*,[20] the Court ruled as follows:

> We have repeatedly stressed this in a long line of decisions. The only effect of non-compliance with this rule is that it will deprive the complainant of a cause of action, which is a ground for a motion to dismiss. *If not invoked at the proper time, this ground is deemed waived and the court can then take cognizance of the case and try it.*[21]

Here, no argument was ever made by the Republic, whether at trial or on appeal, as to the failure of Silverio to exhaust administrative remedies. In fact, it is stated in the decision that the only ground upon which the Republic appealed was that no law allowed the change of an entry in the birth certificate on the ground of sex alteration.[22] Neither, indeed, was a motion to dismiss ever filed — yet, such a motion is the essential prerequisite to a dismissal based on non-observance of primary jurisdiction.[23]

Similarly, the doctrine of primary jurisdiction will only operate when *exclusive* jurisdiction is vested on the administrative agency.[24]

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18. *See* Estrada v. Court of Appeals, 442 SCRA 117 (2004) (where recourse was made to the courts instead of the administrative agency concerned — hence, a case of primary jurisdiction concerns — yet, the case was decided on the basis of the doctrine of exhaustion of administrative remedies).

19. Sunville Timber Products, Inc. v. Abad, 206 SCRA 482, 486-87 (1992).

20. Soto v. Jareno, 144 SCRA 116 (1986).

21. *Id.* at 119 (citing C.N. Hodges v. Municipal Board, Iloilo City, et al., 19 SCRA 28 (1967); Mun. of La Trinidad, et al. v. CFI of Baguio-Benguet, Br. I, 123 SCRA 81 (1983); Pineda v. Court of First Instance of Davao, 1 SCRA 1020, 1027 (1961); Atlas Consolidated Mining and Development Corp. v. Mendoza, 2 SCRA 1064 (1961)) (emphasis supplied).

22. Silverio v. Republic, 537 SCRA 373, 391 (2007).

23. *See* Euro-Med Laboratories, Phil., Inc. v. The Province of Batangas, 495 SCRA 301, 304-05 (2006). In this case, it was held that the doctrine of primary jurisdiction may be raised *sua sponte* by the courts. Nevertheless, such a statement should be considered of highly doubtful validity when courts of the very jurisdiction from which the citation is based, including its Supreme Court, do not uniformly accept such a holding. *Compare* Abram Demaree Homestead, Inc. v. Koestner, 839 A.2d 110, 118 (2004) (citing Northwest Airlines, Inc. v. Country of Kent, Mich., 510 U.S. 355 (1994)).

24. C.N. Hodges v. Municipal Board, Iloilo City, et al., 19 SCRA 28, 33 (1967).

There is nothing in R.A. No. 9048 that vests in the civil registrar exclusive jurisdiction to change a first name. Under Section 1, it merely states that the civil registrar *can* correct a first name.[25] The grant of power is similarly circumscribed by the Implementing Rules and Regulations of the law, which only state that civil registrars "are *authorized* to correct clerical or typographical error and to change first name or nickname in the civil register."[26] Since both the law and its implementing rules use a vocabulary more permissive than mandatory,[27] they should not thereby be held to exclude the jurisdiction of the regular courts.[28]

Since no motion to dismiss was ever filed, nor does the law absolutely vest in the civil registrar exclusive jurisdiction to act upon a change of name, the procedural error upon which part of the *Silverio* decision is based should have been disregarded by the Court.[29]

V. WHAT IT MEANS TO BE TRANSSEXUAL

Before proceeding further, it is important to lay down a few definitional postulates. Sex can be defined as the classification of being either male or female as determined by external genitalia. Gender, on the other hand, can refer to the culturally-determined behavioral, social, and psychological traits that are typically associated with being male or female.[30] In other words, sex relates more to the physical aspect of being, while gender refers to the psychological aspect. Nevertheless, the cleft between both definitions is not as precise as it seems.[31] The important point is the recurring notion that men and women are different — both anatomically and psychologically.

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25. R.A. No. 9084, § 1 (emphasis supplied).

26. Rules and Regulations Governing the Implementation of Republic Act No. 9048, rule 1 (2001) (emphasis supplied).

27. In fact, even the word "principally" was held *not* to be equivalent in either definition or effect to the word "exclusively." Alfon v. Republic, 97 SCRA 858 (1980). What more words that signify the mere ability to do an act.

28. *See* An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes, Batas Pambansa Blg. 129, § 19 (1981) (which only negates Regional Trial Court jurisdiction if *exclusive* jurisdiction is vested in another tribunal).

29. That the *Silverio* Court chose primarily to base its denial on substantive issues, rather than procedural ones, lends credence to this conclusion. Indeed, it even claimed that the substantive issues were "more important" than the procedural ones.

30. Jillian Todd Weis, *The Gender Caste System: Identity, Privacy and Heteronormativity,* 10 L. & SEXUALITY 123, 124 (2001) (citing MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, TRUE SELVES 19 (1996)).

31. *See* Weis, *supra* note 30, at 162 (citing JUDITH BUTLER, BODIES THAT MATTER — ON THE DISCURSIVE LIMITS OF SEX 5 (1993)) ("[T]he sex/gender distinction

This is, however, precisely the issue with transsexuals. In Silverio's own words, she is a transsexual, or one who is "anatomically male but feels, thinks and acts as a female," and that she had identified with females since childhood.[32] This is not far from what seems to be the accepted definition, which holds that a transsexual is: "a person with the external genitalia and secondary sexual characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex."[33] In other words, a transsexual is so defined because he or she transcends the accepted differences inherent between the two sexes or genders. Thus, while perhaps anatomically male, a transsexual may think, feel, and act like a female or vice-versa.

This does not mean, however, that transsexualism is a lifestyle choice, or even a form of sexual deviance. Rather, transsexualism has been recognized as a medical condition that is derived from conditions in the womb and the development of the pre-natal brain.[34] Thus, the inherent problem then lies with the ability of the law to catalogue a transsexual within the more traditional concepts of male and female, upon which much of our legal system is built.

Yet, this problem is not limited solely to transsexuals. As more knowledge is gained of sexuality and human behavior, and as scientific advances exponentially increase to allow for discoveries not heretofore deemed possible, the range of persons who do not squarely fit the definition of male and female also expands. Thus, modern society is presented with transgenders,[35] she-males,[36] and, relevant to the discussion, intersexed persons.

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is joined with a notion of radical linguistic constructivism…."). The *Silverio* Court itself seemed completely unaware that there was, indeed a difference. So as not to delve into a scientific treatise with which the author is ill-equipped to handle, and with jurisprudential precedent for doing so, the terms sex and gender will be used interchangeably herein.

32. *Id.*

33. *In re* Heilig, 816 A.2d 68, 72 (Md. 2003) (citing STEDMAN'S MEDICAL DICTIONARY 1865 (27th ed. 2000)); *see also In re* Estate of Gardiner, 22 P.3d 1086, 1093 (2001) (citing STEDMAN'S MEDICAL DICTIONARY 1865 (27th ed. 2000)).

34. *Heilig*, 816 A.2d at 75 (citing Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth,* 151 ARCHIVES PED. & ADOLESCENT MED. 298, 303 (1997)).

35. Weis, *supra* note 30, at 142. Persons who choose to live as the opposite gender on a full-time basis, but do not wish to undergo sex reassignment surgery.

36. *Id.* Men who have undergone breast augmentation, but have retained their male genitalia.

Intersexed persons are those who are born with a conglomeration of traditionally male and traditionally female chromosomal, gonadal, and genital sex characteristics.[37] In layman's terms, intersexed people may have ambiguous genitalia or gonads that are male on one side and female on the other[38] — they are what are popularly known as hermaphrodites. The classification, however, does not end there. There is male pseudohermaphroditism, female pseudohermaphroditism, and true hermaphroditism. A true hermaphrodite has both ovarian and testicular tissue. A female pseudohermaphrodite has XX chromosomes and ovaries, but exhibits masculinized external genitalia. A male pseudohermaphrodite, on the other hand, has XY chromosomes and testes, but with feminized external genitalia.[39]

Pertinently, the foregoing medical conditions can, and do, go unnoticed and undiagnosed for years.[40] The same can be said for transsexuals, who, uniformly, do not realize that they identify with the opposite sex until early in their childhood.[41]

Because this middle ground separating sex and gender affects a large number of people,[42] the inevitable controversies that arise have led to various judicial attempts at bridging the gap. Perhaps the most widely popular case is that of *Corbett v. Corbett*,[43] an English case decided almost 40 years ago. In *Corbett,* the central issue revolved around a marriage annulment sought by the husband on the ground that his wife was actually a man. In annulling the marriage, the judge outlined five criteria by which the sexual condition of an individual may be determined:

(1) Chromosomal factors;

(2) Gonadal factors;

37. Corbett v. Corbett, [1970] 2 W.L.R. 1306 (Eng.). Chromosomal factors refer to the binary XY and XX chromosome groupings allegedly inherent in males and females. Gonadal factors refer to the presence or absence of testes and ovaries. Finally, genital factors refer to the presence or absence of internal sex organs.

38. Mary Coombs, *Transgenderism and Sexual Orientation: More Than a Marriage of Convenience*, 3 NAT'L J. OF SEXUAL ORIENTATION L. 1, 12 (1997).

39. *In re* Heilig, 816 A.2d 68, 74 (Md. 2003).

40. *Id.*

41. *In re* Estate of Gardiner, 22 P.3d 1086, 1098 (2001); Littleton v. Prange, 9 S.W.3d 223, 226 (1999); M.T. v. J.T., 355 A.2d 204, 205 (1976).

42. Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1054 (2001). Ranging from one percent to four percent of the general population.

43. Corbett v. Corbett, [1970] 2 W.L.R. 1306 (Eng.).

(3) Genital factors;

(4) Psychological factors; …

(5) Hormonal factors, or secondary sexual characteristics.[44]

Nevertheless, when the time came to decide on the validity of the marriage, the *Corbett* Court refrained from utilizing all of the aforementioned factors. Instead, it held that:

> The criteria must, in my judgment be biological ….
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> …
>
> [T]he law should adopt the first three of the doctor's criteria, i.e., the chromosomal, gonadal and genital tests and if all three are 'congruent,' determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.[45]

Hence, *Corbett* reflects the view that the sex or gender classification into male or female is almost always a matter of biological or physical construct — identity confusion notwithstanding.

On the other end of the spectrum is *M.T. v. J.T.*,[46] an American case. *M.T.* involved a divorce and support case between a transsexual and her husband. Naturally, the issue tended toward whether the marriage was valid in the first place. In finding that marriage was valid, the Court laid down an alternative to the *Corbett* test. Thus:

> [I]f the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.[47]
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> …
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> In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. … In so ruling we do no more than give legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.[48]

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44. *Id.* at 1322.

45. *Id.* at 1328.

46. M.T. v. J.T., 355 A.2d 204 (1976).

47. *Id.* at 209.

48. *Id.* at 211.

The difference with *Corbett* lies in the fact that *M.T.* clearly took both physical and psychological characteristics into account. Harkening back to what has been said earlier, the *M.T.* Court, thus, fused the definitional divide between sex and gender to fashion what is essentially a more progressive test.

It should be noted, however, that both *Corbett* and *M.T.* involve post-operational transsexuals, or those that have undergone sex reassignment surgery. They thus have a distinctly similar factual correspondence with the instant case, as Silverio also underwent sex reassignment surgery prior to resort to the courts.

Which test then is more *apropos*? The general inclination is towards the more holistic *M.T.* test. *Corbett*, while having been affirmed in England itself,[49] and having a following in some courts of other jurisdictions,[50] nevertheless finds almost no support in a host of other countries.[51] Indeed, the European Court of Human Rights has itself repudiated the theory espoused in *Corbett*, holding that it is in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.[52] At the same time, the *Corbett* Court itself admitted that its decision could not comprehend all non-binary sexual characterizations, as for example, the case of intersexed persons.[53] Finally, the actual *Corbett* ruling also completely ignored its own predicate — that the psyche is as much a part of the determination as the biological factors. In the words of a New Zealand case contrary to *Corbett*: "This does not mean that they (the biologicals) alone should necessarily be determinative of sexual identity. The psychological and social factors may be far more important to a person's intrinsic sense of self."[54]

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49. *See* Bellinger v. Bellinger, [2001] EWCA (Civ) 1140, [2002] Fam. 150 (C.A.) (Eng.).

50. *See In re* Ladrach, 513 N.E.2d 828 (1987); Littleton v. Prange, 9 S.W.3d 223 (1999).

51. *In re* Heilig, 816 A.2d 68, 85 n.9. (Md. 2003). At least 20 European countries and two Asian countries have all repudiated the *Corbett* holding by allowing post-operational transsexuals to enter into marriages with persons of their original sex.

52. Goodwin v. United Kingdom, [2002] 2 F.C.R. 577, 67 B.M.L.R. 199 (Eur. Ct. H.R. Grand Chamber 2002). *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 221.

53. Corbett v. Corbett, [1970] 2 W.L.R. 1306 (Eng.).

54. Attorney General v. Otahuhu Family Court, [1995] 1 N.Z.L.R. 603, 610 (H.C.).

On the other hand, the *M.T.* test enjoys precisely the same advantages that *Corbett* lacks. Hence, in the determination of a post-operational transsexual's true sex and gender, it is that test which must be applied.

VI. CHANGE OF NAME

Under R.A. No. 9084, a first name may be changed if any of the following grounds are met: a) the petitioner finds the first name or nickname to be ridiculous, tainted with dishonor, or extremely difficult to write or pronounce; b) the new first name or nickname has been habitually and continuously used by the petitioner and he has been publicly known by that by that first name or nickname in the community; and, c) the change will avoid confusion.[55] Underlying all of these, however, is the primordial element upon which a change in name may be granted — a proper or reasonable cause.[56]

In the instant case, the change was sought solely for the purpose of making Silverio's birth records compatible with her post-operation sex.[57] With unabashed gusto, the Court pounced on such an argument with a litany of reasons why the change *would not* be allowed. Thus, apart from the R.A. No. 9048 argument, the Court held:

> [R]A 9048 does not sanction a change of first name on the ground of sex reassignment. 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.
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> Before a person can legally change his given name, he must present proper or reasonable cause or any compelling reason justifying such change. In addition, he must show that he will be prejudiced by the use of his true and official name *In this case, he failed to show, or even allege, any prejudice that he might suffer* as a result of using his true and official name.
>
> …
>
> … [M]ore importantly, [the petition] had no merit since the use of his true and official name does not prejudice him at all.[58]

Perhaps more credence could have been given to the Court's denial were it not for the fact that it also refused to support its own reasoning with some sort of factual basis. Yet, much like his claim that Silverio failed to allege reasons in support of his position, the Court similarly failed to invoke reasons in support of its denial. A mere blanket invocation of "grave

55. R.A. No. 9048, § 4.

56. Silverio v. Republic, 537 SCRA 373, 387 (2007).

57. *Id.*

58. *Id.*

complications in the civil registry and the public interest"[59] and that "the use of his true and official name does not prejudice him at all"[60] cannot substitute an explanation to those conclusions.

On the contrary, one easily makes the observation that when a change of *given* name is sought, then our own Supreme Court has perfunctorily granted the same. In other words, and at least prior to R.A. No. 9048, no reason need be given if the surname or middle name was not involved. In *Alfon v. Republic*,[61] for example, the petitioner sought to change her name from Maria Estrella Veronica Primitiva Duterte to Estrella S. Alfon. In granting the petition, the Court focused entirely on the reasons for a change in the *surname*; holding that, though legitimate, petitioner was not confined to solely using her father's last name, especially since she was known in the community by her mother's surname.[62] Again, in *Zapanta v. Local Civil Registrar*,[63] which dealt with a petition to change a name post mortem, the Court granted the same on the basis that the petition was one for the correction of a death entry. In the process, it ignored that it was not the fact of death that was sought to be corrected, but rather, the *given* name of the deceased.[64] Hence, when the Court stated in *Silverio* that "the State has an interest in names,"[65] "[a] change of name is a privilege, not a right,"[66] "[p]etitions for change of name are controlled by statutes,"[67] it was really referring to a change in surnames. As shown by its previous cavalier attitude to a change in given names, the State interest in the change thereof is essentially minimal.

This manner of cursorily allowing a change in first name is in line with cases from other jurisdictions. In *In re Anonymous*[68] and *In re Anonymous*,[69] it was held that the mere fact of sex reassignment surgery was enough to allow a petition for a change of name.[70] According to the Court in the first *In re Anonymous*, where, with or without medical intervention, the psychological sex and the anatomical sex are "harmonized," then the social sex or gender

59. *Id.* at 387.

60. *Id.* at 388.

61. Alfon v. Republic, 97 SCRA 858 (1980).

62. *Id.* at 862.

63. Zapanta v. Local Civil Registrar of the City of Davao, 237 SCRA 25 (1994).

64. *Id.* at 27.

65. Silverio v. Republic, 537 SCRA 373, 384 (2007).

66. *Id.*

67. *Id.*

68. *In re* Anonymous, 293 N.Y.S.2d 834 (1968).

69. *In re* Anonymous, 314 N.Y.S.2d 668 (1970).

70. *Id.* at 670; *Anonymous*, 293 N.Y.S.2d at 834.

of the individual should conform to the harmonized status of the individual, and if such conformity requires a change in statistical information, the changes should be made.[71] Indeed, in later cases, even pre-operational transsexuals were permitted a change of given name.[72] As held in the case of *In re Guido*:[73]

> This Court is asked only to sanction legally Petitioner's desire for a change of name, after satisfying itself that Petitioner has no fraudulent purpose for doing so and that no other person's rights are interfered with thereby. … The law does not distinguish between masculine and feminine names, which are a matter of social tradition. … Apart from the prevention of fraud or interference with the rights of others, there is no reason — and no legal basis — for the courts to appoint themselves the guardians of orthodoxy in such matters.[74]

While R.A. No. 9084 does not explicitly sanction a change of first name on the ground of sex reassignment, or because the petitioner is a transsexual, these same reasons may fall under the theoretical rubric of the enumerated grounds.

The first ground for a change of name is that "[t]he *petitioner* finds the first name or nickname to be ridiculous, tainted with dishonor or extremely difficult to write or pronounce."[75] What this means is that the ridiculousness, dishonor or difficulty in writing or pronunciation are examined not from the viewpoint of the civil registrar, but rather, from the perspective of the petitioner. In the case of transsexuals, what could be more ridiculous and dishonorable than being forced to live under a name that clearly does not correspond to your own conception of identity and self? The prejudice, in such a case, is obvious — contrary to what the Court might think.

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71. *In re* Anonymous, 57 Misc. 2d 813, 816 (1968).

72. *In re* Eck, 584 A.2d 859, 861 (1991).

> Absent fraud or other improper purpose, a person has a right to name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditionally 'male' first name to one traditionally 'female' or vice-versa.

Id. at 860-61. *In re* McIntyre, 715 A.2d 400, 402-03 (1998) ("The fact that he is a transsexual seeking a feminine name should not affect the disposition of his request.").

73. *In re* Guido, 771 N.Y.S.2d 789 (2003).

74. *Id.* at 791.

75. R.A. No. 9084, § 4 (1) (emphasis supplied).

Moreover, the change will also prevent confusion.[76] Because proper identification is needed in almost all aspects of life, inherent confusion arises when a female appears presenting identification with a traditionally male name.[77] It has been well-documented that the inability of a transsexual to change his or her identification papers so as to suit his or her alternative gender has negative repercussions in areas of employment, insurance, marriage, and relations with society in general.[78] As held by one court, the failure to allow a change in name will actually create, rather than stymie, confusion; thus:

> Because the trial court's decision will not affect this transsexual's sexual manner and dress, it will be even more confusing to the public not to allow appellant to change his name to Susan. While saddled with a male name and a female visage, appellant must constantly convince the public that his name is 'Richard.' Should appellant be permitted to change his name to 'Susan,' the general public's outward perception of appellant would be consistent with appellant's legal name.[79]

In any case, whatever reasonable fears of confusion the Court may have are well negated by the fact that Silverio has consistently used her female name in the past.[80] This, in turn, is itself a ground for the changing of one's first name.[81]

It will also be remembered that a change of name is governed by the overall requirement that there is a proper and reasonable cause. As stated above, the mere fact that one is a transsexual should be reason enough to grant the change of first name. This is not only in line with the foreign decisions already discussed, but also with the apparent policy of our own Court to easily allow a change in a given name.[82]

Of course, the contrary ruling of the *Silverio* Court stemmed from a misunderstanding of the sexual identity issues involved. To repeat, the Court's reasoning was that:

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76. *Id.* § 4 (3).

77. *See* Weis, *supra* note 30, at 133-34.

78. *See* Goodwin v. United Kingdom, [2002] 2 F.C.R. 577, 67 B.M.L.R. 199 (Eur. Ct. H.R. Grand Chamber 2002).

79. *In re* Maloney, No. CA2000-08-168, 2001 WL 908535, 5 (Ohio App. 12 Dist.), *rev'd,* 774 N.E.2d 239 (2002) (Valen, J., dissenting).

80. *See* Tse v. Republic, 20 SCRA 1261 (1967); Alfon v. Republic, 97 SCRA 858 (1980); *In re* Halligan, 361 N.Y.S.2d 458, 460 (1974) (that Silverio used her female name consistently prior to filing her petition can be assumed from the fact that she had lived as a female for years before the controversy arose).

81. R.A. No. 9084, § 4 (2).

82. *See* Zapanta v. Local Civil Registrar, 237 SCRA 25 (1994); Alfon v. Republic, 97 SCRA 858 (1980).

> Petitioner's basis in praying for the change of his first name was his sex reassignment. He intended to make his first name compatible with the sex he *thought* he transformed himself into through surgery. *However, a change of name does not alter one's legal capacity or civil status*. RA 9048 *does not sanction a change of first name on the ground of sex reassignment*. 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.[83]

Here, the Court espouses the view that the sex reassignment surgery did not, in fact, create any recognizable legal consequences. In fact, it seemed to believe the opposite — that the petition was filed in order to *effect* a legal consequence. This is wrong. Rather, what Silverio sought by the filing of her petition was to simply give recognition to an already established change in status: that of her transition from male to female.

Returning to the *M.T.* test, because Silverio had already successfully undergone sex reassignment surgery, then she should have been considered a female for all intents and purposes. Indeed, Silverio's anatomical features had already been made to conform to her gender, psyche, and psychological sex. Contrary to the Court's opinion, Silverio had already been transformed by the surgery. In which case, the identity by sex must be governed by the congruence of the anatomical and the psychological.

Therefore, as stated above, the change of name should have been granted as a matter of course — as it would prevent confusion and dishonor, and harmonize Silverio's legal name with that by which she had been known.

VII. CHANGE OF SEX

A. Rule 108 is the proper remedy for the petition, and the Regional Trial Court has jurisdiction over the same.

In denying the prayer for a change of sex, the *Silverio* Court primarily kept to a single determinative factor — that no law explicitly allowed a change of sex. It stated that,

> while petitioner may have succeeded in altering his body and appearance through the intervention of modern surgery, no law authorizes the change of entry as to sex in the civil registry for that reason. Thus, there is no legal basis for his petition for the correction or change of the entries in his birth certificate.[84]

This holding is in stark contrast to both the law and the Court's own past stance regarding remedies where the law provides none.

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83. Silverio v. Republic, 537 SCRA 373, 387 (2007) (emphasis supplied).

84. *Id.* at 393 (emphasis supplied).

First, the Court blithely disregards the dictates of Article 9 of the Civil Code, which states that "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."[85] In this case, the Court simply washed its hands clean of the petition by stating that there was no legal authority for the same. Clearly, this is in violation of the aforementioned Article 9, because the absence of a law is never a hindrance to the application of legal reasoning. When there is no law stating the specifics of what should be done under the circumstances, that which is in accord with equity should be ordered.[86] Moreover, the application of equity to the petition was not such as would have run contrary to either law or jurisprudence, thereby prohibiting its use.[87] Nevertheless, when the trial court used equity as a basis to rule in favor of *Silverio*, the Court simply stated that it was "wrong" to do so.[88]

Second, the claim that there is no remedy in law is incongruent with the very ratio of the case. Under R.A. No. 9048, changes in sex are expressly removed from the meaning of clerical or typographical errors.[89] This led to the pronouncement that "under RA 9048, a correction in the civil registry involving the change of sex is not a mere clerical or typographical error. *It is a substantial change for which the applicable procedure is Rule 108 of the Rules of Court*."[90] Illogically, the Court then turned that reasoning on its head by stating:

> The entries envisaged in Article 412 of the Civil Code and correctable under Rule 108 of the Rules of Court are those provided in Articles 407 and 408 of the Civil Code.
>
> . . .
>
> The acts, events or factual errors contemplated under Article 407 of the Civil Code include even those that occur after birth. *However, no reasonable interpretation of the provision can justify the conclusion that it covers the correction on the ground of sex reassignment*.[91]

In plain language, the import of the argument is this: a change in the civil registry regarding sex reassignment is a substantial change for which

85. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 9 (1950).

86. Far East Bank & Trust Co. v. Marquez, 420 SCRA 349, 357 (2004).

87. Smith, Bell & Co., Inc. v. Court of Appeals, 267 SCRA 530, 542 (1997).

88. *Silverio*, 537 SCRA at 393.

89. R.A. No. 9048, § 2 (c).

90. Silverio v. Republic, 537 SCRA 373, 389 (2007) (emphasis supplied).

91. *Id.* (emphasis supplied).

Rule 108 must be followed; but, unfortunately for Silverio, the said rule does not cover sex reassignments.[92]

This is an unprecedented departure from the ordinary course of the Court's disposition regarding Rule 108. In the case of *Republic v. Valencia*,[93] the petitioner therein sought a change in the civil register entries of her minor children regarding nationality (from Chinese to Filipino) and legitimacy (from legitimate to illegitimate) via Rule 108. The petition was opposed to on the ground that Rule 108 had, until then, only referred to corrections that could be changed summarily — i.e. non-substantial changes. In holding for the petitioner, the *Valencia* Court entered into a lengthy disquisition why the precedents set by previous jurisprudence were *not* controlling — ultimately holding that the petition could be filed under Rule 108. Therefore, what the Court did was to fashion a remedy, where before, there had been none.

Why the same methodology was not observed here is unclear. In *Valencia,* the Court essentially held that, despite the silence of the law, the only just recourse was to create a remedy for the petitioner. Thus, the Court stated: "however, it is also true that a right in law may be enforced and a wrong may be remedied as long as the appropriate remedy is use."[94] "To follow the petitioner's argument that Rule 108 is not an appropriate proceeding *without in any way intimating what is the correct proceeding or if such a proceeding exists at all, would result in manifest injustice*."[95]

The *Valencia* ruling is precisely the opposite of the Court's disposition of the instant case. Here, the Court ruled that Silverio's chosen remedy was incorrect, but it still refrained from indicating the correct proceeding or if such proceeding exists at all. To use the Court's own language, the *Silverio ratio* thereby resulted in "manifest injustice."

Moreover, it is not as if a change in the civil registry regarding sex is an alien concept. In the case of *Labayo-Rowe v. Republic*,[96] the Court was clear in stating that, "as repeatedly construed, changes which may affect the civil status from legitimate to illegitimate, *as well as sex*, are substantial and controversial alterations which can only be allowed after appropriate adversary proceedings."[97]

92. SPECIAL PROCEEDINGS, rule 108 (outlines the procedure for the cancellation or correction of entries in the civil registry).

93. Republic v. Valencia, 141 SCRA 462 (1986).

94. *Id.* at 468.

95. *Id.* at 476 (emphasis supplied).

96. Labayo-Rowe v. Republic, 168 SCRA 294, 299 (1988) (emphasis supplied).

97. *Id.* at 229 (emphasis supplied).

Even Silverio's chosen court, the Regional Trial Court, should have been held to be the tribunal with proper jurisdiction over the matter. In the case of *In re Heilig*,[98] the court therein was faced with the question of whether or not a transsexual could apply for a change in her birth certificate absent any statutory guidelines therefor. The circuit court denied the petition on the grounds that: a) gender has physical manifestations that are not subject to modification; and, b) there was no authority for it to enter such an order.[99] After reviewing the scientific history of transsexuals, and siding with the *M.T.* test, the appellate court decided that the circuit court did have jurisdiction.

The appellate court noted that circuit courts are vested with jurisdiction in all cases, except those exclusively conferred upon another tribunal; this, it called the circuit court's "equity jurisdiction."[100] Consequently, because the concept of equity jurisdiction was crafted precisely to handle cases not otherwise enforceable and remedies not otherwise available — such as those to declare a status — then there was ample basis to hold that the Circuit Court had jurisdiction to render a judgment.[101]

While, in this jurisdiction, the term "equity jurisdiction" refers to the ability of the Supreme Court to suspend its rules of procedure, it would be wise to suspend for a moment the locally inaccurate lexicon. For here, the Regional Trial Court is also vested with jurisdiction to hear cases that are not within the exclusive jurisdiction of any other tribunal.[102] Moreover, when it comes to a change in status, it is principally the Regional Trial Court that has jurisdiction to order the same.[103] Therefore, while the Court may be correct in stating that no law explicitly provides for a change in the civil registry regarding sex, this does not mean that no court may entertain the petition. In fact, as per *Heilig*, it is clear that it is the Regional Trial Court that has jurisdiction over the same.

Therefore, since a change in sex had been recognized by the Court before *Silverio*, and consistent with its own avowed policy to bestow justice when the law is silent, the *Silverio* Court should have ruled that Rule 108 allowed for a change in sex and that it was the Regional Trial Court that had jurisdiction.

B. Sex, as a status, is not immutable. Its entry in the birth certificate may thus be changed.

98. *In re* Heilig, 816 A.2d 68 (Md. 2003).

99. *Id.* at 69.

100. *Id.* at 70.

101. *Id.*

102. B.P. Blg. 129, § 19 (6).

103. 1997 RULES OF CIVIL PROCEDURE, rule 103, § 1 & rule 108, § 1.

According to the Court, it was not merely the supposed improper remedy that was fatal to Silverio's claim. In addition, there was no "error" that could be corrected. Thus,

> [t]o correct simply means "to make or set aright; to remove the faults or error from" while to change means "to replace something with something else of the same kind or with something that serves as a substitute." The birth certificate of petitioner contained no error. All entries therein, including those corresponding to his first name and sex, were all correct. No correction is necessary.[104]

The Court was right in stating that there was no error *per se* that could be corrected. Indeed, even the cases cited by the Court to indirectly support its *ratio* agree with this proposition. In *K v. Health Division, Dept. of Human Resources*[105] the change in name and sex of a transsexual was not allowed for the simple reason that the governing Oregon statute only allowed for *corrections* in the birth certificate — as via an adoption or a change in name of the parent.[106] *In re Ladrach*,[107] was decided on much the same parameters. Therein, the Ohio court ruled that the statute in question was simply a "correction" type statute, which permitted solely the correction of errors, such as those dealing with spelling. Since there was no error in the designation of the transsexual as a boy, the application was dismissed.[108]

Both *Health Division* and *Ladrach* are, however, contextually different from the instant case — for here, not only does R.A. No. 9084 explicitly allow a *change* in given names,[109] Rule 108 does so as well.[110]

Harkening back to the *M.T.* test, there was definitely a *change*. According to the test, biological factors are not the only determinants in classifying sex and gender. Emphasis must instead be placed on all the factors, including the psychological; this, *Corbett* itself recognized.[111] Hence, so long as there is a congruence in the physical and psychological factors, then a change in sex may be said to have taken place.[112] Using *M.T.* as the

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104. Silverio v. Republic, 537 SCRA 373, 390 (2007).

105. K v. Health Division, Dept. of Human Resources, 560 P.2d 1070 (1977).

106. *Id.* at 1071.

107. *In re* Ladrach, 32 Ohio Misc. 2d 6 (1987).

108. *Id.* at 8.

109. R.A. No. 9084, § 4. *See* OR. REV. STAT. § 432.235 (4) (In fact, following the case, the Oregon legislature amended the statute to allow a change in first name for post-operational transsexuals.).

110. *See* Republic v. Medina, 119 SCRA 270 (1982) (using the term "change" throughout a decision concerning Rule 108).

111. Corbett v. Corbett, [1970] 2 W.L.R. 1306 (Eng.).

112. M.T. v. J.T., 355 A.2d 204, 209 (1976).

standard, the fact that Silverio had already undergone sex reassignment surgery and was indeed already living her life as a woman indicated that "the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex," and, as such, "identity by sex must be governed by the congruence of these standards."[113] It is this *change* that should then allow the corresponding change in the civil registry.

Possibly anticipating this argument, the Court further argued that sex is something that cannot be changed:

> 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.*[114]

The "error" in this case referred to one where the birth attendant writes "male" or "female" but the genitals of the child are that of the opposite sex.[115]

The claim that sex is immutable is one that is itself rooted in an extremely archaic notion of sexual identity. As stated by the Court, "[s]ince the statutory language of the Civil Register Law was enacted in the early 1900s and remains unchanged, it cannot be argued that the term 'sex' as used then is something alterable through surgery or something that allows a post-operative male-to-female transsexual to be included in the category 'female.'"[116] Indeed, that the Court allowed itself to argue a very 21st century case using standards established in the 19th and early 20th centuries speaks volumes as to the inapplicability of its argument.[117]

Present day medical standards present a vastly different argument. As concisely summarized in *Heilig*, decided this century,[118]

> the current medical thinking does seem to support at least these relevant propositions: (1) that external genitalia are not the sole medically recognized determinant of gender; (2) that the medically recognized

113. *Id.*

114. Silverio v. Republic, 537 SCRA 373, 392 (2007) (emphasis supplied).

115. *Id.* at 392 n.30.

116. *Id.* at 393.

117. Take, for example, the case of *People v. Cayat,* wherein a law prohibiting non-Christian tribesmen from consuming alcohol was upheld by the Supreme Court on the basis that such tribesmen were uncivilized. *See* People v. Cayat, 68 Phil. 12 (1939). If such a law were to be put under judicial scrutiny today, would it still be upheld by the Court?

118. *In re* Heilig, 816 A.2d 68, 79 (Md. 2003).

> determinants of gender may sometimes be either ambiguous or incongruent; (3) that due to mistaken assumptions made by physicians of an infant's ambiguous external genitalia at or shortly after birth, some people are mislabeled at the time as male or female and thereafter carry an official gender status that is medically incorrect; (4) that at least some of the medically recognized determinants of gender are subject to being altered in such a way as to make them inconsistent with the individual's officially declared gender and consistent with the opposite gender; and (5) whether or not a person's psychological gender identity is physiologically based, it has received recognition as one of the determinant's of gender and plays a powerful role in the person's psychic makeup and adaptation.
>
> For our purposes, the relevance of these propositions lies in the facts that *(1) gender itself is a fact that may be established by medical and other evidence, (2) it may be, or possibly may become, other than what is recorded on the person's birth certificate*, and (3) a person has a deep personal, social and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become. [119]

Unlike *Silverio, Heilig* takes into account what has been outlined above regarding the different classes of *clinically-accepted* sexual identities — such as transsexualism and the status of being intersexed — concluding with one very simple point: gender is *not* immutable. In so doing, it reveals that the very cornerstone of the *Silverio* argument is not only antiquated, but also utterly misinformed.

For the Court, "the sex of a person is determined at birth, visually done by the birth attendant … by examining the genitals of the infant."[120] Hence, the only possible error that could be corrected is the birth attendant mistakenly writing male or female when the genitals of the child are of the opposite sex.[121]

This manner of determining the sex of a person is erroneous. As noted earlier, neither intersexed persons nor transsexuals are able to identify their true gender until well after birth. Moreover, it is *impossible* to identify their condition by a simple *visual* examination of the genitals. Reliance, therefore, cannot be placed on the genitals as how they appear to the birth attendant, since conditions that occur later on in life and a thorough medical examination may or may not negate the apparent sex at birth.

Moreover, transsexualism is not the result of conscious choice but is a verified clinical condition, resulting from the pre-natal environment. The *Silverio* decision therefore effectively punishes these individuals for something over which they had no control.

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119. *Id.* (emphasis supplied).

120. Silverio v. Republic, 537 SCRA 373, 392 (2007).

121. *Id.* at 392 n.30.

Therefore, if sex may very well change, or at least be revealed to be different from what was indicated at birth, then the situation of a post-operative transsexual should be fully included within the parameters of Rule 108.

VIII. CONCLUSION

Each legal basis advanced by the *Silverio* Court to deny the petition has been shown to be utterly erroneous or based on the wrong premise. First, though Silverio did not indeed resort first to the civil registrar, that is a defect that was waived by the Republic by its failure to file a motion to dismiss. At the same time, the authority of the civil registrar to change a first name is not exclusive, and, thus, the Regional Trial Court shared equal jurisdiction over the petition. Second, there was ample reason to grant a change in the given name, since the continued use by Silverio of her original name would bring dishonor and cause confusion. Moreover, the mere fact of a sex reassignment has been held compelling enough a reason to allow a change in first name. Third, though no law explicitly allowed the correction of the entry of sex, this should not prevent the courts from ruling on the same since Silverio's prayer did indeed involve a substantial change that could be adjudicated under the general equity jurisdiction. The Court should also have recognized that a change in sex did occur since there was now a fusion of Silverio's physical and psychological characters. In turn, this recognition of a change in sex should allow a corresponding change in the birth certificate.

Essentially, the entire *ratio* of the case is premised on a misconception. For the Court, the sex reassignment surgery of Silverio did nothing for her status as a legally-recognized male. Indeed, according to the Court, transsexualism is nothing more than "preferences and orientation."[122]

As has been aptly demonstrated, however, this is far from the truth. Transsexuals are afflicted with a condition that prevents the unification of their internal gender identity with their outward appearance. Because of natal and pre-natal conditions, persons considered transsexuals are never fully compatible with their bodies, particularly the genitalia that corresponds to what, for them, is the opposite sex. Yet, through *Silverio*, the Court has effectively closed the door against any remedy that may be afforded the transsexuals seeking to give legal recognition to their true status — not to mention that it also closed the door against the possibility of legal recognition itself.

That the *Silverio* Court, mandated with "its sacred duty as the last sanctuary of the oppressed and the weak,"[123] shirked from this very

122. *Id.* at 395.

123. Leonor v. Court of Appeals, 256 SCRA 69, 76 (1996).

responsibility when it chose to remain rooted in antiquated and utterly misinformed conceptions is an outright shame.