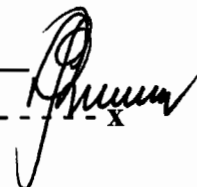


G.R. No. 213346 – REPUBLIC OF THE PHILIPPINES, *Petitioner*, v. MILLER OMANDAM UNABIA, *Respondent*.

Promulgated:

FEB 11 2019



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SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur in the result that the Petition should be denied. The erroneous entries in respondent Miller Omandam Unabia’s birth certificate must be rectified.

I

There is no iota of doubt that respondent was *conceived* and *born* male.¹ However, to prevent confusion, certain clarifications must be made.

The terms “sex” and “gender” refer to two (2) different ideas having vast differences. These cannot be used interchangeably. Sex is a biological concept, while gender is a social concept.²

On one hand, sex “refers to the biological distinctions between males and females,”³ and is based primarily on a person’s capability to reproduce.⁴ It “encompasses those that are biologically determined.”⁵ On the other hand, gender pertains to the “social elaboration of biological sex.”⁶ It highlights “the socially constructed differences between men and women”⁷ influenced by the different norms and standards of societies, varying from one society

¹ *Ponencia*, p. 9.

² Susan E. Short, Yang Claire Yang and Tania M. Jenkins, *Sex, Gender, Genetics, and Health*, American Journal of Public Health (2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3786754/?fbclid=IwAR3xZYKIGNkhta5wkVelbutQOW9rNg2AFCzeBAb5TArMmtPO_7Sht-IIaDs. Accessed February 19, 2019.

³ *Id.*

⁴ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (2013), available at <https://web.stanford.edu/~eckert/PDF/Chap1.pdf>, 2. Accessed February 19, 2019.

⁵ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

⁶ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (2013), available at <https://web.stanford.edu/~eckert/PDF/Chap1.pdf>, 2. Accessed February 19, 2019.

⁷ Susan E. Short, Yang Claire Yang and Tania M. Jenkins, *Sex, Gender, Genetics, and Health*, American Journal of Public Health (2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3786754/?fbclid=IwAR3xZYKIGNkhta5wkVelbutQOW9rNg2AFCzeBAb5TArMmtPO_7Sht-IIaDs. Accessed February 19, 2019.



to the other.⁸

Determining a person's sex mainly depends on "a combination of anatomical, endocrinal[,] and chromosomal features."⁹ "Chromosomes are the structures that carry genes which in turn transmit hereditary characteristics from parents to offspring."¹⁰

Ordinarily, humans are born with 46 chromosomes,¹¹ broken down into 22 pairs of autosomal chromosomes and another pair called the sex chromosomes.¹² In most women, the combination of their chromosomes usually comprises 46XX; in most men, their chromosomes usually consist of 46XY.¹³

However, research suggests that the dichotomy of the chromosomal combinations of men and women are not the same in all individuals.¹⁴ Some individuals are born with only one (1) sex chromosome (45X or 45Y), while some are born with three (3) or more sex chromosomes (47XXX, 47XYY, or 47XXY).¹⁵

The chromosomal combinations of men and women, which are used as basis to determine one's sex, are different in some individuals.¹⁶ One may be born with 46XX chromosomes but is considered male. Another may have 46XY chromosomes but is born female. One's sex is not limited to a customary combination but is subject to a range of chromosome complements and phenotypic variations.¹⁷

Conversely, gender is the result of the norms and standards imposed by society. It is a changing concept that differs in every society. While most individuals are biologically born as male or female, the behavioral standard

⁸ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

⁹ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (2013), available at <https://web.stanford.edu/~eckert/PDF/Chap1.pdf>, 2. Accessed February 19, 2019.

¹⁰ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

¹¹ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

¹² Susan E. Short, Yang Claire Yang and Tania M. Jenkins, *Sex, Gender, Genetics, and Health*, American Journal of Public Health (2013), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3786754/?fbclid=IwAR3xZYKIGNkhta5wkVelbutQOW9rNg2AFCzeBAb5TArMmtPO_7Sht-IlaDs. Accessed February 19, 2019.

¹³ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>, 2. Accessed February 19, 2019.

¹⁴ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (2013), available at <https://web.stanford.edu/~eckert/PDF/Chap1.pdf>, 2. Accessed February 19, 2019.

¹⁵ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>, 2. Accessed February 19, 2019.

¹⁶ Penelope Eckert and Sally McConnell-Ginet, *Language and Gender* (2013), available at <https://web.stanford.edu/~eckert/PDF/Chap1.pdf>, 2. Accessed February 19, 2019.

¹⁷ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

enforced in a given society affects one's gender identity.¹⁸ Exactly how one is taught how to interact with others of the same or opposite sex usually defines one's gender identity.¹⁹

In its Petition, the Republic of the Philippines assailed the Decisions of the Regional Trial Court and the Court of Appeals, which ordered the correction of respondent's sex from male to female. It argued that an individual's true gender is not determined by a simple visual observation and examination.²⁰

Respondent countered that the evidence on record supported the findings of the Regional Trial Court and the Court of Appeals. In support of his contention, he submitted a Medical Certificate,²¹ which certified him to be "phenotypically male."²²

The majority noted that based on respondent's photograph attached to the record, his Adam's apple was quite evident and prominent, which can only mean that respondent is male, because anatomically, only men possess an Adam's apple.²³

I regret that I cannot agree with the factual premise for determining the biological sex of respondent.

Both men and women have Adam's apple. It is not limited to men. Granting that the Adam's apple is more prominent in some men, this is merely caused by differing hormonal levels.²⁴

An Adam's apple "is the colloquial term used to describe what is officially named the laryngeal prominence of the thyroid cartilage."²⁵ It is caused by an increased amount of testosterone,²⁶ a hormone "involved in

¹⁸ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

¹⁹ *Gender and Genetics*, World Health Organization, available at <https://www.who.int/genomics/gender/en/>. Accessed February 19, 2019.

²⁰ Ponencia, pp. 6–7.

²¹ Id. at 7.

²² Id. at 9.

²³ Id. at 8.

²⁴ Thomas H. Fitzpatrick, Marco A. Siccardi, *Anatomy, Head and Neck, Adam's Apple*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK535354/>. Accessed February 19, 2019.

²⁵ Thomas H. Fitzpatrick, Marco A. Siccardi, *Anatomy, Head and Neck, Adam's Apple*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK535354/>. Accessed February 19, 2019.

²⁶ K. V. S. Hari Kumar, Anurag Garg, N. S. Ajai Chandra, S. P. Singh, and Rakesh Datta, *Voice and endocrinology*, Indian Journal of Endocrinology and Metabolism (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5040035/>. Accessed February 19, 2019.

regulating secondary male characteristics”²⁷ such as the Adam’s apple.²⁸ While testosterone is ordinarily associated with men,²⁹ “women . . . also have naturally occurring testosterone[.]”³⁰ Despite men having a higher amount of testosterone, the function of an Adam’s apple in both women and men is just the same: to protect the vocal cords immediately behind it.³¹

Accordingly, it is erroneous to conclude that only men can possess an Adam’s apple. A woman has an Adam’s apple, though generally less protruding than her male counterpart.³² It is a logical fallacy to attach the category “male” to the size and shape of the Adam’s apple. It is a false binary.

II

I, however, agree with the majority that Republic Act No. 10172, being remedial in nature, can retroactively apply here.

Settled is the rule that procedural laws have a retroactive effect, but may only be applied to cases or actions pending and undetermined when they were enacted.³³

Remedial laws or procedural laws are statutes concerning modes of procedure³⁴ “designed to facilitate the adjudication of cases.”³⁵ These laws “do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights[.]”³⁶ Thus, remedial laws do not fall within the proscription against retroactive

²⁷ George N. Nassar, Stephen W. Leslie, *Physiology, Testosterone*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK526128/>. Accessed February 19, 2019.

²⁸ Thomas H. Fitzpatrick, Marco A. Siccardi, *Anatomy, Head and Neck, Adam's Apple*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK535354/>. Accessed February 19, 2019.

²⁹ Vineet Tyagi, MD, Michael Scordo, MD, Richard S. Yoon, MD, Frank A. Liporace, MD, and Loren Wissner Greene, MD, MA, *Revisiting the role of testosterone: Are we missing something?*, *Reviews on Urology*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5434832/>. Accessed February 19, 2019.

³⁰ Sari M. Van Anders, Jeffrey Steiger, and Katherine L. Goldey, *Effects of gendered behavior on testosterone in women and men*, *Proceedings of the National Academy of Sciences of the United States of America* (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4653185/>. Accessed February 19, 2019.

³¹ Thomas H. Fitzpatrick, Marco A. Siccardi, *Anatomy, Head and Neck, Adam's Apple*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK535354/>. Accessed February 19, 2019.

³² Thomas H. Fitzpatrick, Marco A. Siccardi, *Anatomy, Head and Neck, Adam's Apple*, National Center for Biotechnology Information (2018), available at <https://www.ncbi.nlm.nih.gov/books/NBK535354/>. Accessed February 19, 2019.

³³ *Zulueta v. Asia Brewery, Inc.*, 406 Phil. 543 (2001) [Per J. Panganiban, Third Division].

³⁴ *Frivaldo v. Commission on Elections*, 327 Phil. 521 (1996) [Per J. Panganiban, En Banc].

³⁵ *Land Bank of the Philippines v. Natividad*, 497 Phil. 737, 744 (2005) [Per J. Tinga, Second Division].

³⁶ *Frivaldo v. Commission on Elections*, 327 Phil. 521, 557 (1996) [Per J. Panganiban, En Banc].

operation of statutes.³⁷

Republic Act No. 9048 was the governing law when respondent filed his Petition.³⁸ Under this law, the concerned city or municipal civil registrar or consul general may administratively correct or change clerical or typographical errors,³⁹ provided that it does not involve a change in the nationality, age, status, or sex of the petitioner.⁴⁰

While respondent's appeal was pending before the Court of Appeals, Republic Act No. 10172 was enacted into law. Republic Act No. 10172 amended Republic Act No. 9048 in the sense that clerical errors regarding one's sex may now be administratively corrected.⁴¹

In its Decision, the Court of Appeals applied Republic Act No. 10172 and ruled that respondent had presented all the necessary documents to prove that there was a clerical error regarding his sex.⁴²

The Court of Appeals correctly applied Republic Act No. 10172. As a procedural law, it neither creates nor eliminates vested rights. Instead, it merely reinforces and confirms people's right to have the entries in their birth certificates corrected. It reaffirms their right to remove any cloud of doubt on their identity.

Moreover, Republic Act No. 9048, as amended by Republic Act No.

³⁷ *Heirs of Divinagracia v. Ruiz*, 638 Phil. 639 (2010) [Per J. Carpio, Second Division].

³⁸ *Ponencia*, p. 7.

³⁹ Rep. Act No. 9048 (2001), sec. 1 provides:

SECTION 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.

⁴⁰ Rep. Act No. 9048 (2001), sec. 2(3) provides:

SECTION 2. *Definition of Terms.* — As used in this Act, the following terms shall mean:

....

(3) "Clerical or typographical error" refers to a mistake committed in the performance of clerical work in writing, copying, transcribing or typing an entry in the civil register that is harmless and innocuous, such as misspelled name or misspelled place of birth or the like, which is visible to the eyes or obvious to the understanding, and can be corrected or changed only by reference to other existing record or records: *Provided, however,* That no correction must involve the change of nationality, age, status or sex of the petitioner.

⁴¹ Republic Act No. 10172 (2012), sec. 2 provides:

SECTION 2. Section 2, paragraph (3) of the Act is likewise amended to read as follows:

SEC. 2. *Definition of Terms.* — As used in this Act, the following terms shall mean:

....

(3) 'Clerical or typographical error' refers to a mistake committed in the performance of clerical work in writing, copying, transcribing or typing an entry in the civil register that is harmless and innocuous, such as misspelled name or misspelled place of birth, mistake in the entry of day and month in the date of birth or the sex of the person or the like, which is visible to the eyes or obvious to the understanding, and can be corrected or changed only by reference to other existing record or records: *Provided, however,* That no correction must involve the change of nationality, age, or status of the petitioner.

⁴² *Ponencia*, pp. 4–5.

10172, specifically states that its provisions shall have a retroactive effect as long as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code and other laws.⁴³

III

As a final note, a review of the pertinent laws and rules would reveal that the entries in a person's birth certificate were never meant to be set in stone. The procedure in changing the entries in a birth certificate is not unprecedented. In several cases, this Court has had the opportunity to decide on cases involving changes in the entry of a person's birth certificate.⁴⁴

This fundamental desire to change and correct one's entry in his or her birth certificate is born from the need to be identified as an individual. The entries in one's birth certificate separate him or her from others. The entries, such as the name and sex, as indicated in one's birth certificate, are considered as markers of one's identity. To ensure that an individual's sex is aligned with his or her identity, one undergoes the process of correcting his or her sex, as entered in his or her birth certificate.

Perhaps in the nearest future, when our society, as represented by our constitutional organs, may become more enlightened, the binary male or female may be reassessed. Understanding that sex may be a continuum interacting with gender as another continuum may assist to identify ourselves better, devoid of the stereotypes imposed by a patriarchal society.

Even the objective of being identified as regards to biological sex may become superseded with the changing of times. For instance, there has been a steady rise of sex reassignment surgeries being performed all across the globe.

Sex reassignment or gender-affirming surgery⁴⁵ "is a medical treatment intended to effect change to a person's sex. It may include surgery and hormonal treatments designed to alter a person's gender."⁴⁶ As more individuals undergo sex reassignment, changing the sexes in their birth

⁴³ Rep. Act No. 9048 (2001), as amended by Rep. Act No. 10172 (2012), sec. 11, provides:

SECTION 11. Retroactivity Clause. — This Act shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code and other laws.

⁴⁴ See *Silverio v. Republic of the Philippines*, 562 Phil. 953 (2007) [Per J. Corona, First Division] and *Cagandahan v. Republic*, 586 Phil. 637 (2008) [Per J. Quisimbing Second Division].

⁴⁵ Frey JD, Poudrier G, Chiodo MV, Hazen A., *An Update on Genital Reconstruction Options for the Female-to-Male Transgender Patient: A Review of the Literature*, National Center for Biotechnology Information (2017), available at <https://www.ncbi.nlm.nih.gov/pubmed/28234856>. Accessed February 19, 2019.

⁴⁶ BLACK'S LAW DICTIONARY, 9th Ed. (2009), West Publishing Co., p. 1498.

certificates is inevitable. Thus, sex may cease to be believed as permanent and immutable. It may already be an impractical and obsolete marker of identity. Rather than identify, it may become a forced category with all its attendant burdens.

Accordingly, I vote to **DENY** the Petition.



MARVIC M.V.F. LEONEN
Associate Justice