EN BANC

G.R. No. 215370 – RICHELLE BUSQUE ORDOÑA, *Petitioner* **v. THE LOCAL CIVIL REGISTRAR OF PASIG CITY and ALLAN D. FULGUERAS,** *Respondents*.

Promulgated:

November 9, 2021

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SEPARATE CONCURRING AND DISSENTING OPINION

LEONEN, *J.*:

The provisions of the Constitution are part of any reading of any statute. The entire legal order is part of one whole and we betray our duty as judges when we fail to interpret a provision of a statute—no matter how seemingly orthodox—in the light of the provisions of the Constitution that protect the rights of women and the dignity of every human being qua human being.

We also fail our duties as judges—and betray our label as justices—when we succumb to the long abandoned legal philosophy of formalism, that is, reading the legal text separate from its contemporary realities or protecting old doctrines simply because they are old doctrines.

If we are truly to enable and empower women and mothers, it is time that we abandon the notion that fathers—and therefore patriarchy—have veto power over names and filiation.

Further, we do not do justice when we protect procedure over substantive rights. I urge that this Court act not as the passive entity it was before 1987, but as the protector of constitutional rights it was envisioned to be. We balance political power not by upholding an anachronistic doctrine but by doing what is right and just.

We are more than automatons that invoke technical procedural and antiquated doctrine rather than advance the rights of our mothers and children.

The rule of law is meaningless unless it is also the rule of just law.

The Constitution itself provides:

"Sec. 14. The State. . . *shall ensure the fundamental equality* before the law of women and men.[1]

The provision is clear. It is mandatory and it contains a judicial obligation to ensure the fundamental equality before the law of women and men. This constitutional duty cannot be defeated by a very restrictive and narrow reading of a statute that will ensure that mothers and women continue to suffer a status lesser than husbands or men.

The constitutional provision *cannot be amended by a statute.*

It uses the verb "*shall.*"

It commands that we "*shall ensure.*" It contains a positive duty, not a passive one.

Its object is not only to ensure equality; it is to ensure "fundamental equality before the law of women and men."

It is more than simply the passive equal protection clause.[2] It adds more to our judicial duties.

With these fundamental premises, I regret that I cannot fully concur with the *ponencia*.

I partially concur that the failure to implead Ariel Libut in the Rule 108 Petition may limit the reliefs that can be granted to petitioner. However, I dissent as to the extent of the effect of this failure. I also respectfully but emphatically dissent to the majority's reading of Article 167 of the Family Code.

The majority maintains that under Article 167 of the Family Code, petitioner, as a mother, is absolutely proscribed from establishing Alrich Paul's true filiation.

The majority recognizes that this reading of Article 167 perpetuates the "disparity between the mother's and father's legal standing in assailing the legitimacy and/or filiation of a child." The majority also recognizes that this disparity contravenes state obligations under the Convention on the Elimination of All Forms of Discrimination Against Women.[3]

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1 CONST., art. II, sec. 14.
2 CONST., art. III, sec. 1.
3 Ponencia, pp. 17–18.

Notwithstanding these recognitions, the majority maintains that the correct course of action is to suggest that the legislature amend the law.[4]

I respectfully disagree.

The fundamental equality of women and men before the law is guaranteed by the Constitution, statute, as well as international convention to which the Philippines is a party.[5]

The duty to ensure this fundamental equality of women and men is an active one.[6] This is especially evident when juxtaposed with the equal protection clause. Article III, Section 1 of the Constitution passively states that no person shall "be denied the equal protection of the laws," whereas Article II, Section 14 mandates that the State "shall ensure the fundamental equality."[7]

Saudi Arabian Airlines (Saudia) v. Rebesencio[8] explained:

> Article II, Section 14 of the 1987 Constitution provides that "[t]he State . . . shall ensure the fundamental equality before the law of women and men." Contrasted with Article II, Section 1 of the 1987 Constitution's statement that "[n]o person shall . . . be denied the equal protection of the laws," Article II, Section 14 exhorts the State to "ensure." This does not only mean that the Philippines shall not countenance nor lend legal recognition and approbation to measures that discriminate on the basis of one's being male or female. It imposes an obligation to *actively engage* in securing the fundamental equality of men and women.
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> The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), signed and ratified by the Philippines on July 15, 1980, and on August 5, 1981, respectively, is part of the law of the land. In view of the widespread signing and ratification of, as well as adherence (in practice) to it by states, it may even be said that many provisions of the CEDAW may have become customary international law. The CEDAW gives effect to the Constitution's policy statement in Article II, Section 14. Article I of the CEDAW defines "discrimination against women" as:
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> > any distinction, exclusion or restriction made on the basis of sex 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.

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4 Id. at 20.

5 *Alanis III v. Court of Appeals*, G.R. No. 216425, November 11, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66846> [Per J. Leonen, Third Division].

6 *Racho v. Tanaka,* 834 Phil. 21 (2018) [Per J. Leonen, Third Division].

7 Id. at 36.

8 750 Phil. 791 (2015) [Per J. Leonen, Second Division].

> *The constitutional exhortation to ensure fundamental equality, as illumined by its enabling law, the CEDAW, must inform and animate all the actions of all personalities acting on behalf of the State.* It is, therefore, the bounden duty of this court, in rendering judgment on the disputes brought before it, to ensure that no discrimination is heaped upon women on the mere basis of their being women. This is a point so basic and central that all our discussions and pronouncements — regardless of whatever averments there may be of foreign law — must proceed from this premise.[9] (Emphases added, citations omitted)

This duty to ensure the fundamental equality must not be brushed aside.

In *Yasin v. Honorable Judge Shari'a District Court*,[10] this Court confirmed a woman's right to resume using her maiden name after a divorce. In her separate concurring opinion,[11] Associate Justice Flerida Ruth Romero explained the significance of Article II, Section 14 of the Constitution as necessarily affecting the reading of Article 370 of the Civil Code in accord with the fundamental equality of men and women:

> [Article 370] provides:
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> > "ART. 370. A married woman *may* use:
> > (1) Her maiden first name and surname and add her husband's surname, or
> > (2) Her maiden first name and her husband's surname, or
> > (3) Her husband's full name, but prefixing a word indicating that she is his wife, such as 'Mrs.'"
>
> . . . .
>
> In recognition of the increasing clamor of women worldwide for equality, the 1987 Constitution laid down the basic policy with respect to the standing of women and men in the eyes of the law, thus:
>
> > "Sec. 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men."
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> *If it means anything at all, it signifies that women, no less than men, shall enjoy the same rights accorded by law* and this includes the freedom of choice in the use of names upon marriage. To give substance and meaning to the policy, laws have been enacted by Congress, and rules and regulations issued by administrative agencies, notably Republic Act No. 7192 "promoting the integration of women as full and equal partners of men in development and nation building. . .
>
> *Whatever rights or opportunities used to be denied to women in categorical language or due to ambiguity or implied from long-continued*

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9 Id. at 830–831.

10 311 Phil. 696 (1995) [Per J. Bidin, En Banc].

11 J. Romero, Concurring Opinion in *Yasin v. Honorable Judge Shari'a District Court*, 311 Phil. 696 (1995) [Per J. Bidin, En Banc].

> *practice or custom, are now clearly granted to them,* such as the right to "enter into contracts which shall in every respect be equal to that of men under similar circumstance," equal membership in clubs, admission to military schools, voluntary PAG-IBIG, GSIS and SSS Coverage and others.[12] (Emphases supplied)

In consonance with this duty to ensure the fundamental equality of women and men, the legislature enacted Republic Act No. 9710, or the Magna Carta of Women. The Magna Carta mandates the "State [to] take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."[13] The Magna Carta of Women also provides that the State, as the primary duty-bearer, shall refrain from discriminating against women, and shall

> fulfill these duties through law, policy, regulatory instruments, administrative guidelines, and other appropriate measures, including temporary special measures.
>
> Recognizing the interrelation of the human rights of women, the State shall take measures and establish mechanisms to promote the coherent and integrated implementation and enforcement of this Act and related laws, policies, or other measures to effectively stop discrimination against and advance the rights of women.
>
> The State shall keep abreast with and be guided by progressive developments in human rights of women under international law and design of policies, laws, and other measures to promote the objectives of this Act.[14]

The constitutional duty to ensure the fundamental equality of women and men before the law belongs just as much to this Court[15] as it does to the legislature. Of course, it would be ideal for the legislature to update the laws to ensure their texts are unequivocally aligned with principles of equality. Until this occurs, this Court can find room in the text to update its reading of the laws so that they are more in consonance with contemporary normative provisions in treaty and contemporary understanding of what equality means in the Constitution.

It is true that the Family Code, wherein the contentious provisions on filiation are found, was enacted after the Philippines ratified the Convention on the Elimination of All Forms of Discrimination Against Women in 1980 and the ratification of the 1987 Constitution. Nonetheless, the Convention on the Elimination of All Forms of Discrimination Against Women is a treaty with operative effects as law even after its ratification. Further, the Magna Carta of Women was enacted in 2008. All these should qualify any reading of the decades-old Article 167.

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12 Id. at 710–712.

13 Republic Act No. 9710 (2009), sec. 19.

14 Republic Act No. 9710 (2009), sec. 5.

15 *Alanis III v. Court of Appeals*, G.R. No. 216425, November 11, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66846> [Per J. Leonen, Third Division].

With this in mind, this Court can easily fulfill its duty to ensure the fundamental equality of women and men before the law by finding ways to construe laws in a way more aligned with this equality.

Although Article 167 states that "[t]he child shall be considered legitimate although the mother may have declared against [their] legitimacy or may have been sentenced as an adulteress," this does not have to operate as an ironclad rule, proscribing the mother from having personality to raise the issue of legitimacy before the court. It leaves ample room to allow a mother to establish the grounds for impugning the legitimacy of a child.

The text does not explicitly prohibit a mother from impugning her child's legitimacy in court. There is space to read Article 167 as merely stating the effect of a declaration against legitimacy, that is, a mother's act of declaring against legitimacy per se is not sufficient to detract from her child's legitimacy. Just as the sentence of adultery does not automatically affect the legitimacy of a child, her declaration against the legitimacy does not also affect the same.

The provision in and of itself does not forever silence the mother from claiming, from her own knowledge, the paternity of her own child. By reading constitutional provision, treaty, and law together, we are duty bound not to read the law to enable the continued inequality between the mother and the alleged father. We cannot, while acknowledging the content of the Constitution, emasculate our competence to do what the Constitution empowered us to do—to read the law properly.

It is true that Articles 170 and 171 of the Family Code specifically recognize that actions to impugn the legitimacy of a child may be brought by a husband or, in the proper cases, his heirs:

> ARTICLE 170. The action to impugn the legitimacy of the child shall be brought within one year from the knowledge of the birth or its recording in the civil register, if the husband or, in a proper case, any of his heirs, should reside in the city or municipality where the birth took place or was recorded.
>
> If the husband or, in his default, all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if abroad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier. (263a)

> ARTICLE 171. The heirs of the husband may impugn the filiation of the child within the period prescribed in the preceding article only in the following cases:
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> (1) If the husband should die before the expiration of the period fixed for bringing his action;
> (2) If he should die after the filing of the complaint, without having desisted therefrom; or
> (3) If the child was born after the death of the husband. (262a)

Nonetheless, neither provision states that it contains an exclusive enumeration of who may bring the case. None of the provisions on legitimacy expressly prohibit the mother from doing so.

Moreover, the law does not even suggest any compelling reasons to allow a husband and his heirs to impugn filiation yet prevent the wife from doing the same.

For this Court to insist on denying a wife a right clearly bestowed on a husband and his heirs, notwithstanding the absence of a clear legislative prohibition, substantial distinctions must exist.

In *Garcia v. Drilon*,[16] we recognized that there could be an identification of difference and an accommodation thereof in pursuit of fundamental equality:

> *I. R.A. 9262 rests on substantial distinctions.*
>
> The unequal power relationship between women and men; the fact that women are more likely than men to be victims of violence; and the widespread gender bias and prejudice against women all make for real differences justifying the classification under the law. As Justice McIntyre succinctly states, "*the accommodation of differences... is the essence of true equality.*"
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> *A. Unequal power relationship between men and women*
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> According to the Philippine Commission on Women (the National Machinery for Gender Equality and Women's Empowerment), violence against women (VAW) is deemed to be closely linked with the unequal power relationship between women and men otherwise known as "gender-based violence". Societal norms and traditions dictate people to think men are the leaders, pursuers, providers, and take on dominant roles in society while women are nurturers, men's companions and supporters, and take on subordinate roles in society. This perception leads to men gaining more power over women. With power comes the need to control to retain that power. And VAW is a form of men's expression of controlling women to retain power.

[16] 712 Phil. 44 (2013) [Per J. Perlas-Bernabe, En Banc].

> The United Nations, which has long recognized VAW as a human rights issue, passed its Resolution 48/104 on the Declaration on Elimination of Violence Against Women on December 20, 1993 stating that "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into subordinate positions, compared with men."[17] (Emphasis supplied, citations omitted)

Thus, in her separate concurring opinion,[18] Justice Teresita Leonardo-De Castro pointed out that treating men and women differently due to differences between them may be resorted to in pursuit of the goal of substantive equality:

> **Verily, the classification made in Republic Act No. 9262 is substantially related to the important governmental objectives of valuing every person's dignity, respecting human rights, safeguarding family life, protecting children, promoting gender equality, and empowering women.**
>
> The persistent and existing biological, social, and cultural differences between women and men prescribe that they be treated differently under particular conditions in order to achieve **substantive equality** for women. Thus, the disadvantaged position of a woman as compared to a man requires the special protection of the law, as gleaned from the following recommendations of the CEDAW Committee:
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> > 8. [T]he Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. **Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.** Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.
> >
> > 9. **Equality of results is the logical corollary of de facto or substantive equality.** These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and **women enjoying freedom from violence.** (Emphases in the original)

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17 Id. at 91–92.

18 J. Leonardo-De Castro, Concurring Opinion in *Garcia v. Drilon*, 712 Phil. 44 (2013) [Per J. Perlas-Bernabe, En Banc].

> The government's commitment to ensure that the status of a woman in all spheres of her life are parallel to that of a man, requires the adoption and implementation of ameliorative measures, such as Republic Act No. 9262. Unless the woman is guaranteed that the violence that she endures in her private affairs will not be ignored by the government, which is committed to uplift her to her rightful place as a human being, then she can neither achieve substantive equality nor be empowered.
>
> The equal protection clause in our Constitution does not guarantee an absolute prohibition against classification. The non-identical treatment of women and men under Republic Act No. 9262 is justified to put them on equal footing and to give substance to the policy and aim of the state to ensure the equality of women and men in light of the biological, historical, social, and culturally endowed differences between men and women.[19] (Emphases in the original, citations omitted)

However, this recognition that the law may under certain circumstances treat men and women differently cannot operate in favor of prohibiting a woman from impugning filiation in this case.

Indeed, even assuming that men and women have essential biological differences that justify different treatment under the law, or even seen from the view of traditional religious teachings that gender roles are complementary and not identical, no compelling reason has been advanced to justify allowing husband and his heirs to impugn filiation, but not the wife.

Again, if we are true to our duty to "ensure the fundamental equality between men and women"[20] and our conscience that it is not only the husband who is the parent, we should not be blind to the proper interpretations of these provisions.

Thus, a mother is not barred from establishing the grounds for impugning legitimacy provided for under Article 166 of the Family Code. What is not prohibited may be done, except when it violates "morals, customs[,] and public order."[21]

To hold otherwise will impede the progress of gender equality for which this Court has been known so far.

Nonetheless, while I believe petitioner has the right to establish the grounds for impugning legitimacy, I agree that it would be procedurally unsound to grant the petition with regard to the deletion of the entries regarding paternity given petitioner's failure to implead Ariel.

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19 Id. at 136–137.

20 CONST., art. II, sec. 14.

21 *Manila Electric Co. v. Public Service Commission*, 60 Phil. 658, 661 (1934) [Per J. Villa-Real, En Banc].

Still, the name change should be allowed.

The majority denied even the change of name because of the failure to implead Ariel in the initial petition.

Rule 108 requires that "persons who have or claim any interest which would be affected thereby" be made parties to the proceeding.[22] In this case, even if Alrich Paul is considered to be Ariel's legitimate child, Ariel does not have any interest that would be affected by Alrich Paul's change of name.

The correction requested is for Alrich Paul to use his mother's name as his surname. Under the law, legitimate children are entitled to use the name of their mother as their surname.[23] Ariel's status as presumptive father does not entitle him to compel Alrich Paul to adopt his last name. Thus, as regards this correction, Ariel is not an indispensable party.

With this, I submit that, although the question of paternity has legal effects as to both Alrich Paul and Ariel and should thus involve Ariel as a matter of procedure, there is no legal obstacle to allowing Alrich Paul to use his mother's surname.

As a final note, the tradition of taking the father's last name is not quintessentially Filipino. The convention of families sharing a last name was merely imposed by a governor-general on the people of the Philippines in 1849.

Even in the West, the tradition is not as old as one might assume:

> As Deborah Anthony, a professor of legal studies at the University of Illinois at Springfield, outlined in a 2018 paper, surnames in England prior to the 17th century weren't standardized. Many signified a profession (such as Potter) or place of residence (such as Hilton, short for "hill town"). Surnames also changed over time: A person named Hilton, for instance, might take up the last name Potter after beginning their vocation in ceramics.[24]

To be sure, a certain amount of history is reflected in a person's last name. However, there is nothing so sacred about taking a father's last name that we cannot question the tradition. To assume that it is in the child's best interest to take on a father's surname is highly speculative.

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22 Rules of Court, Rule 108, sec. 3.

23 *Alanis III v. Court of Appeals*, G.R. No. 216425, November 11, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66846> [Per J. Leonen, Third Division].

24 Michael Waters, *A Patriarchal Tradition That Just Won't Budge*. THE ATLANTIC, October 28, 2021, <https://www.theatlantic.com/family/archive/2021/10/patrilineal-surnames/620507/> (last accessed on November 4, 2021).

In this day of data-keeping, tracking a person's familial lines, even without the convention passing down a father's surname, is easy enough, and can accommodate traditions that respect a mother as much as they respect a father.

ACCORDINGLY, I vote that the petition be **PARTIALLY GRANTED** and that the Civil Registrar of Pasig City be **DIRECTED** to delete the surname "Fulgueras" and enter "Ordoña" as the surname of Alrich Paul in his certificate of live birth.

MARVIC M.V.F. LEONEN
Associate Justice