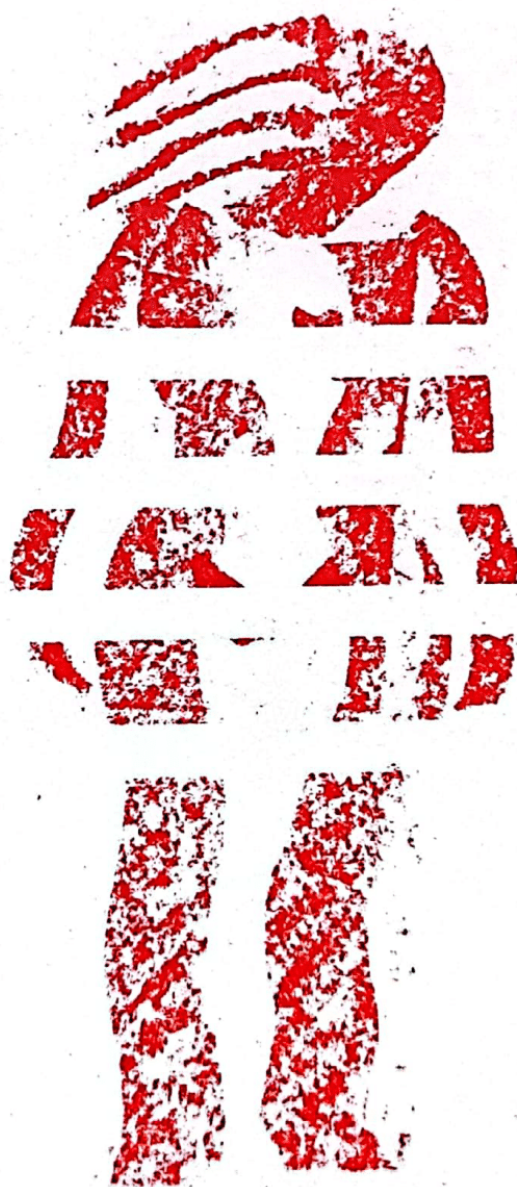


# RAPE AND HUMAN RIGHTS

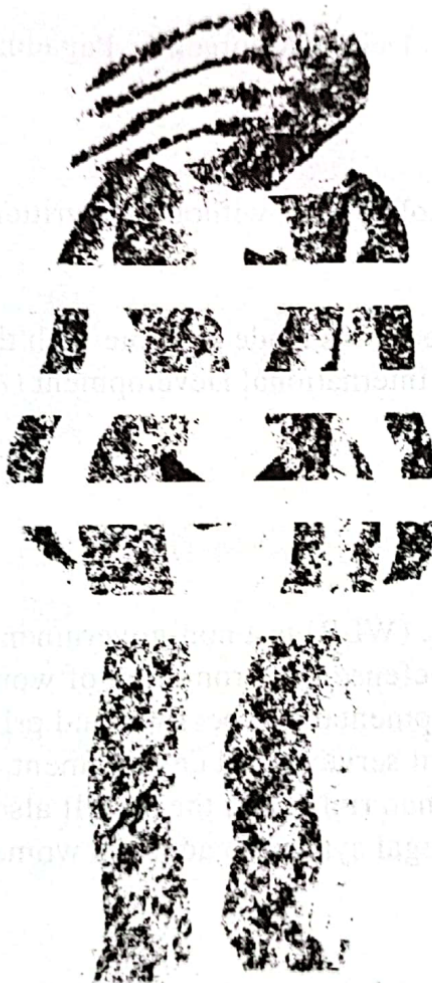
## Issues and Challenges



Women's Legal Bureau, Inc.

# RAPE AND HUMAN RIGHTS

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Women's Legal Bureau, Inc.  
Quezon City  
2005



**RAPE AND HUMAN RIGHTS**  
**Issues and Challenges**

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**Editor:** Evalyn G. Ursua  
**Writers:** Eleanor C. Conda, Imelda B. Deinla, Maureen C. Pagaduan  
and Evalyn G. Ursua  
**Artwork:** Tina P. Quirino

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The Women's Legal Bureau, Inc. (WLB) is a non-government legal resource organization that works for the defense and promotion of women's human rights. It adheres to feminist and developmental perspectives and principles in its work. Its programs include feminist legal services and development, research, education, and training on women's human rights and the law. It also engages in policy advocacy to transform the law and the legal system to advance women's rights and leadership.

**Mailing Address:**  
Room 305, College of Social Work and Community Development  
University of the Philippines  
Magsaysay Avenue  
Diliman, Quezon City 1101  
Philippines

**Telephone Numbers:** (63-2) 921-4389/920-3063  
**Facsimile Number:** (63-2) 921-4389  
**E-mail:** [wlb@philonline.com.ph](mailto:wlb@philonline.com.ph)  
**Website:** [www.womenslegalbureau.org](http://www.womenslegalbureau.org)

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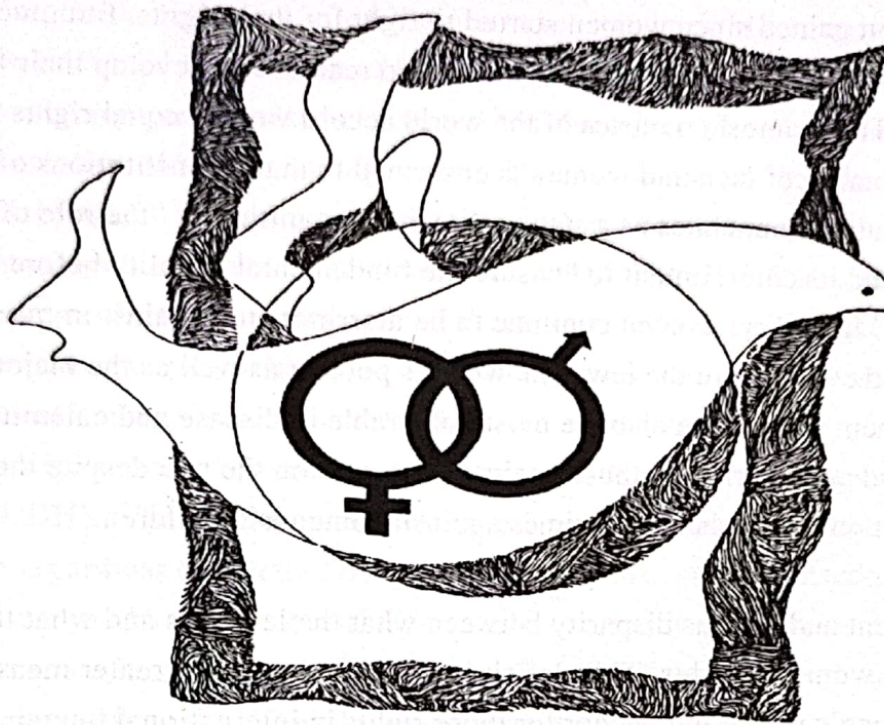
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## VIOLENCE AGAINST WOMEN AND HUMAN RIGHTS

Women have long fought for their right to be treated with dignity and respect. The emergence of the struggle for the recognition of women's rights began in the early part of the 19th century. At its inception, women began to talk about and share their experiences as women and organize themselves to petition governments to grant them political rights. The most visible form of women's political struggle in that century was the fight for suffrage which they eventually won. In the Philippines, women obtained the right of suffrage under the 1935 Constitution, after a referendum that was held in 1937. The rise of the movement for the right of suffrage also saw the awakening of women's awareness of their inferior status in society; women not only had to fight for their right to vote but also for their right to run for public office, to own property, and to be equal partners of men in both private and public life. Thus began the long journey for the broader struggle for women's rights.



Much had been gained since women started to fight for their rights. But much more needs to be done to end sex discrimination and for women to realize and develop their fullest potential as human beings. Today, most countries of the world accord women equal rights with men before the law. Equality of men and women is enshrined in many constitutions of the world. The Philippine Constitution enunciates as a state policy its recognition of "the role of women in nation-building" and its commitment to "ensure the fundamental equality before the law of women and men."<sup>1</sup> In reality, women continue to be discriminated against in many ways in their homes, at work and even before the law. The world's poorest as well as the majority of illiterates are women; women are also the most vulnerable to disease and calamity. Incidence of sexual violence and other forms of abuse against women is on the rise despite the imposition of capital punishment on certain heinous crimes against women and children.

There is evident and serious disparity between what the law says and what the reality is in terms of enforcing women's rights. This deficit in practice demands greater measure of protection for women's rights and anchor for those rights in international human rights law. It has also become imperative to reject the assumption of the neutrality of the law and to examine society's role – through its institutions and mechanisms – in maintaining and perpetuating gender subordination of women. Locating women's rights in the context of human rights elevates the rights of women from simply the realm of state responsibility to humanity's collective responsibility to protect and promote the human rights of all peoples of the world.

### **From women's rights to women's human rights**

Human rights are the birthright of all human beings. Respect for human dignity is the cornerstone of human rights. The 1993 United Nations World Conference on Human Rights reaffirmed, through the Vienna Declaration, the inherent and inalienable nature of human rights and declared that protection and promotion of human rights is the first responsibility of governments. The Vienna Declaration also specifically recognized the human rights of women as well as the duties of the states to protect and promote women's rights including the right to freedom from violence.



The massive destruction wrought by World War II and the widespread abuses against peoples impelled states through the United Nations to set standards of treatment of people by governments. The Universal Declaration of Human Rights (UDHR) signed on December 10, 1948 became the international standard of achievement for all peoples and nations in the protection and promotion of human dignity. The UDHR is a landmark document for humanity setting a yardstick by which to measure the degree of respect for and compliance with international human rights standards anywhere in the world. The UDHR is not a treaty or an international agreement by which states commit themselves to be bound. Since the Declaration, the world has seen the internationalization of human rights as a consequence of the recognition of the universality of human rights. It has also seen the codification of existing norms of conduct in human rights through human rights instruments taking as benchmark the principles contained in the UDHR. The UDHR is universal in scope and states are bound by the principles contained therein regardless of whether they have formally accepted its principles or ratified human rights covenants. The International Court of Justice has based some of its decisions on the principles contained in the Declaration. Almost all international and regional conventions have cited and elaborated on the principles set forth in the UDHR. Among those regional conventions are the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Organization of African Unity.

The Preamble of the UDHR declares the inherent dignity and the equal and inalienable rights of the members of the human family as the foundation of freedom, justice and peace in the world as well as "the equal rights of men and women." Among the fundamental human rights in the Declaration affirming the equality of women and men are:

#### Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race,



colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

The adoption of the UDHR subsequently led to the adoption and ratification of two important human rights covenants. These are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Both Covenants affirm the principles in the UDHR and obligate state parties to ensure the equal right of women and men to the enjoyment of all economic, social, cultural, civil and political rights. The UDHR, the ICESCR and the ICCPR came to be collectively known as the International Bill of Human Rights – the foundation upon which subsequent international human rights instruments and mechanisms have been developed for the enforcement and promotion of human rights.

#### **Violence against women as a human rights violation and a form of discrimination**

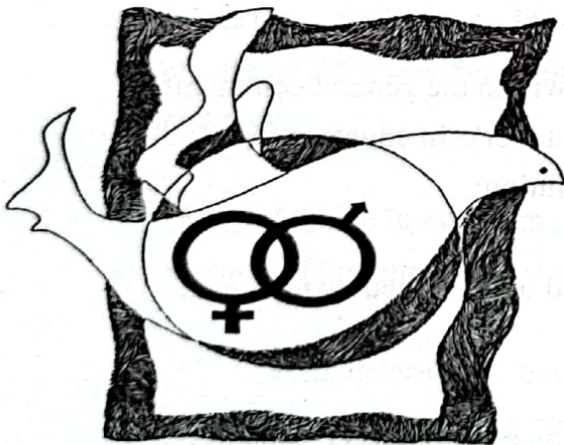
In 1979 or 31 years after the adoption of the UDHR, the Convention on the Elimination of All Forms of Discrimination Against Women (or the Women's Convention) was adopted by the General Assembly. The Women's Convention entered into force in 1981. Its adoption became necessary to combat the continuing and increasing discrimination and violations against women worldwide. In its preamble, the Women's Convention acknowledged the inadequacy of existing international instruments in fighting extensive discrimination against women despite a comprehensive listing of rights to which all persons including women are entitled. The Women's Convention affirms that discrimination against women violates the principles of equality of rights and respect for human dignity; that discrimination is an obstacle to equal participation of women in the political, social, economic and cultural life of their countries and constitutes a strong hindrance to the full development of women's potential.



The Women's Convention defines discrimination against women as "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."<sup>2</sup> States parties to the Women's Convention condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.<sup>3</sup>

Violence against women is one form of discrimination against women. General Recommendation No. 19 adopted by the Committee on the Elimination of Discrimination Against Women in 1992 states that gender-based violence or violence against women is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men within the meaning of Article 1 of the Women's Convention. Gender-based violence is violence that is directed against a woman because she is a woman or that affects women disproportionately. Pursuant to General Recommendation No. 19, gender-based violence includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. Examples of these are rape, battering, trafficking in women and other forms of sexual exploitation, sexual harassment, dowry-related deaths, female circumcision, and various forms of abuse occurring within the family. The Committee noted that not all the reports of States parties to the Women's Convention adequately reflected the

close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms and recommended a comprehensive approach in preventing violence against women that includes legal, administrative, political and cultural measures.



On 20 December 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women (DEVAW). It is the first international human rights instrument that deals exclusively with violence against women. It affirms that violence against women violates the human rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms. It expresses concern about the long-standing failure to protect and promote those rights and freedoms in relation to violence against women.



As in General Recommendation No.19, the DEVAW reflects the political analysis that violence against women arises out of social structures that put women in a position of subordination to men, and that it is both a result of women's subordination and a means by which men continue to control women. The preamble of the DEVAW for example states 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 their full advancement, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."<sup>4</sup>

A clear and comprehensive definition of violence against women is provided in the DEVAW. It states that violence against women is "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in public life."<sup>5</sup> The concept encompasses, but is not limited to, the following:<sup>6</sup>

1. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
2. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
3. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Under the DEVAW states may not invoke any custom, tradition or religious consideration to avoid their obligations to eliminate violence against women. States parties are exhorted to pursue all appropriate means and without delay a policy of eliminating VAW and to this end should undertake measures that include the following:

- Refrain from engaging in violence against women;



- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;
- Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;
- Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;
- Include in government budgets adequate resources for their activities related to the elimination of violence against women;
- Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
- Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;



- Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public.

## Violence against women and Philippine law

VAW as a human rights violation also finds anchor in Philippine domestic law. The Philippines has declared through its State Policies that –

The State values the dignity of every human person and guarantees full respect for human rights.<sup>7</sup>

The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.<sup>8</sup>

The provisions in the Declaration of Principles and State Policies in the Constitution are not necessarily mere hortatory statements but may be declaratory of rights that individuals can invoke. As an example, the right to a balanced and healthful ecology as well as the concept of intergenerational responsibility for the preservation and protection of the environment was derived from Article II, Section 16 of the Constitution and provides the basis for the minor petitioners' standing to sue in *Oposa v. Factoran*.<sup>9</sup> Similarly, redress for certain women's human rights violations may be directly anchored on state policies that merely restate and reaffirm fundamental human rights norms and principles. In fact, the Philippines as signatory to almost all international instruments on women's rights has the state responsibility and obligation to repeal discriminatory laws, change practices and create conditions for the full exercise and protection of women's rights. Respect for human dignity and equality of women and men are generally accepted principles of law that the Philippines is bound to observe, regardless of whether legislation has been passed for their enforcement.

The Philippines has enacted a number of legislation addressing various forms of violence against women. Among these are The Anti-Rape Law of 1997,<sup>10</sup> the Rape Victim Assistance and Protection Act of 1998,<sup>11</sup> the Anti-Sexual Harassment Act of 1995,<sup>12</sup> the Anti-Trafficking



in Persons Act of 2003,<sup>13</sup> and the Anti-Violence Against Women and Their Children Act of 2004.<sup>14</sup>

While Philippine law condemns and penalizes rape and other sexual abuse, victims continue to suffer stigmatization and prejudices and from stereotypes that make convictions of rape difficult. For example, victims often get blamed for the sexual assault because of the clothes they wear or because they are deemed promiscuous. While rape legislation in the Philippines was amended to expand the definition of rape, the culture in the legal system eschews the root cause of rape as the unequal power relations between men and women.

On the other hand, domestic violence is generally treated as a private matter which prevents proper intervention by public and government authorities. There are strong social, cultural and religious norms that operate against proper and serious community and official action against VAW. As a result, violence against the women continues unabated and the suffering of victims is aggravated.

The recently-enacted Republic Act No. 9262 known as the "Anti-Violence Against Women and Their Children Act of 2004" is, despite its perceived flaws, a landmark legislation that addresses violence against women and their children in intimate relations pursuant to the fundamental rights and freedoms guaranteed under the Constitution, the UDHR, the Women's Convention and other international human rights. The law penalizes violence against women and their children as a public crime. It covers "any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty."<sup>15</sup> The law also provides for protective measures for victims.

Much needs to be done to ensure that Republic Act No. 9262 is effectively enforced. Much will depend on educating women and enabling them to assert their rights, changing mindsets and cultural and religious practices that promote discrimination against women and gender-



based violence, educating and training government personnel involved in implementing and enforcing the law, and encouraging community vigilance in reporting VAW incidents. Moreover, women must realize that their right to be free from all forms of gender-based violence is not legally conferred or subject to government authority but is inherent in them as human beings. Thus, Filipino women should demand from the government its full responsibility under domestic law and international human rights law to respect, protect, promote and ensure the human rights of women.

The development of the discourse on women's rights as human rights has provided women and advocates with new and wider avenues for greater protection and enforcement of women's rights particularly with respect to violence against women. The consciousness that women's human rights are not merely legally derived but are inherent in women as humans create more opportunities for women and women's rights advocates to examine and challenge existing political social, cultural and religious systems and structures that perpetuate gender discrimination.

#### Endnotes:

<sup>1</sup> Const. art. II, sec. 14.

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979), art. 1.

<sup>3</sup> *Id.* art. 2.

<sup>4</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 (1993), Preamble.

<sup>5</sup> *Id.* art. 1.

<sup>6</sup> *Id.* art. 3.

<sup>7</sup> Const. art. II, sec. 11.

<sup>8</sup> *Id.* art. II, sec. 14.

<sup>9</sup> G.R. No. 101083, July 30, 1993.

<sup>10</sup> Rep. Act No. 8353 (1997).

<sup>11</sup> Rep. Act No. 8505 (1998).

<sup>12</sup> Rep. Act No. 7877 (1995).

<sup>13</sup> Rep. Act No. 9208 (2003).

<sup>14</sup> Rep. Act No. 9262 (2004).

<sup>15</sup> *Id.* sec. 3.





## INTERNATIONAL HUMAN RIGHTS PERSPECTIVES ON RAPE

### **RAPE UNDER INTERNATIONAL LAW: a history of non-recognition and impunity**

#### **Rape and international humanitarian law**

Over the centuries, rape and other acts of sexual violence against women have been employed as instruments of war not only to attack the individual victims but as a means to “humiliate, shame, degrade and terrify the entire...group.”<sup>1</sup> International humanitarian treaties either omitted, trivialized or mischaracterized gender and sexual violence. As a result, the rapes and other forms of sexual and gender violence that have been a pervasive part of almost every conflict have been historically unacknowledged, underinvestigated and underprosecuted.<sup>2</sup>



The Hague Conventions respecting the Laws and Customs of War of 1907 do not mention sexual violence but provide that "family honour and rights, individual lives and property, as well as religious convictions and liberty, must be respected." The Nuremberg Charter and the Charter for the International Military Tribunal for the Far East (IMTFE) did not mention rape either although the IMTFE convicted a number of Japanese officials for rape. The indictment for the IMTFE describes rape as among the "violation[s] of recognized customs and conventions of war" together with mass murder, pillage and torture, among others.

Control Council Law No. 10, the governing law for prosecuting lower-ranking German officials, mentioned rape as a crime against humanity but not as a war crime. The distinction is significant given that crimes against humanity require that they must have been committed on either a widespread or systematic basis. Sexual violence crimes were not recognized in the 1949 Geneva Conventions as constituting "grave breaches" nor were they enumerated under Article 3 common to all of the Geneva Conventions which sets out the minimum protection in the course of armed conflict. Rape and other sexual violence crimes were characterized as "outrages upon personal dignity, in particular, humiliating and degrading treatment" or as "attacks against a woman's honor." Although the Geneva Protocols of 1997 include rape, forced prostitution, or any form of *indecent*, these crimes are connected to "outrages upon personal dignity, in particular, humiliating and degrading treatment."

The Statutes of the International Criminal Tribunal for the Rwanda (ICTR) and the former Yugoslavia (ICTY) include rape as a crime against humanity but not expressly as a war crime either as a grave breach of the Geneva Conventions or as violation of the laws or customs of war. Rape, under the ICTR Statute, is listed as among the "outrages upon personal dignity" which form part of violations of the common Article 3 of the Geneva Conventions and the Additional Protocol II.

### **Rape and international human rights law**

The historical omission and trivialization of rape and other sexual violence under international humanitarian law were not textually apparent in the case of international human rights law. Universality and equality are principles firmly enshrined in the key human rights documents. But the general guarantees shroud in invisibility the inequalities and violence in women's lives worldwide.



Over time, critique of dominant human rights discourse and practice exposed their male orientation, prejudice against women and heterosexist mold. The private-public dichotomy in international human rights was also criticized for reflecting the social stratification between the private and the public spheres that resulted in the narrow definition and interpretation of human rights. Violence against women, although it persisted in practically all countries of the world, had no place to be recognized in such narrowness.

Violence against women as violation of women's human rights gained international recognition in the 1993 World Conference on Human Rights. This achievement in the international arena drew credibility and support from the significant work of women's movements and other groups in different parts of the world on gender-based violence. Within the United Nations, violence against women was initially discussed within the context of peace and development and within the women in development (WID) framework. The 1985 Nairobi Conference on Women marked the beginning of serious attention accorded the problem by international and national bodies. The United Nations General Assembly passed a resolution acknowledging the importance of the issue of violence in the home. This 1985 resolution called for concerted and multidisciplinary action to address the problem, including specific criminal legislation. In 1992, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted General Recommendation No. 19, an interpretative statement of the Committee of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (or the Women's Convention) in relation to violence against women. General Recommendation No. 19 declared that VAW is a form of discrimination against women under the Women's Convention.

The 1993 Vienna affirmation that VAW violates the human rights of women generated the momentum within the United Nations human rights system to focus on VAW which by then was already recognized as a global problem. A Special Rapporteur on VAW was designated for the first time. The United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women (DEVAW). This international policy document provides a definition of violence against women and recommends state actions to eliminate the pernicious problem.



## **RAPE AS A HUMAN RIGHTS CONCERN: Scope and Meaning**

### **Bases and sources**

Rape as a human rights concern is founded on the human rights guaranteed under international human rights law (i.e., treaty law, customary international law, general principles of international law and opinion juris). International human rights treaties include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. National constitutions and laws also constitute sources of human rights guarantees. Governments through ratification of human rights treaties or membership in the United Nations assume legal obligations to protect and promote those rights.

### **Rape and its effects on victims**

Violence against women including rape “constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms.” (Preamble, DEVAW). It is discrimination against women within the ambit of the Women’s Convention. Article 1 of the Women’s Convention defines discrimination against women as “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.”

General Recommendation No.19 gives examples of human rights affected by gender-based violence as follows:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;



- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

The Case of Martha<sup>3</sup> illustrates how rape affects the realization by a victim of these human rights, particularly the right to life, the right to liberty and security of person, the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment, and right to the highest attainable standard of physical and mental health:

[Martha] realized she was in danger after the garage door closed behind them. She then started to plead with him, "*Please...please, huwag dito, dalhin mo ako sa bahay.*" As he dragged her from his jeep, she felt a heavy object against her side, which she supposed was a gun. She was powerless.

During the rape attack, she was engulfed by physical and emotional pain....

Martha felt turmoil in her mind, heart and soul. She felt devastated and worthless because she had lost her virginity, which she considered her most precious possession....She tried to commit suicide several times.

...Three days later, Jess forcibly brought Martha to his house and raped her again. He was more violent and really hurt Martha, repeatedly saying, "...ganito ang rape...."

### Rape and the interrelatedness of its effects

Rape does not only leave deep physical and psychological scars on the victims. Its consequences spill over the different aspects of the lives of the women violated – work, relationships, social life, sexuality, aspirations, etc. Rape could render the victims too devastated to go to work (right to work), or to take interest in community or public affairs (right to participate in public affairs), or to enjoy their sexuality (sexual rights and right to bodily integrity).



## Justice for rape

Rape victims who decide to go through the legal route face a host of problems and

Even if we go by anecdotal data alone, we can already draw a landscape of how the legal system works in rape cases. The experiences of rape victims, advocates and helping professionals show a pattern of ignorance of the dynamics in rape, insensitivity or even cruelty to rape survivors, lack of appropriate facilities and skills, and prejudices deeply ingrained in both process and doctrines of the legal system. All these affect the administration of justice in its entirety. These also lead to the lack of familial, institutional and societal support for rape and other sexual assault victims, a fundamental problem that prevents reporting of rape cases and hampers the healing or recovery of victims.<sup>4</sup>

Victims are assured equal protection of the law, effective remedy and competent authority. Yet the realities that confront them in the administration of justice negate those guarantees.

## GOVERNMENT'S HUMAN RIGHTS OBLIGATIONS

International human rights perspectives clarify the substantive content and standards of specific human rights and the corresponding obligations of governments. State obligations can be general, that is, those derived from international customary law and general principles, or conventional, that is, those derived from the ratification of international human rights treaties.

### State obligations in general

There are different ways to look at the human rights obligations of government. They can be considered in terms of the following: (a) obligations of conduct and results; (b) obligations to do and not to do, or positive and negative obligations; and (c) obligations that require immediate implementation or those for progressive realization.



Although initially used in relation to economic, social and cultural rights, the three-level typology of state obligations is increasingly used within the United Nations human rights system. This approach considers human rights obligations as follows:

- (a) obligation to respect – the state and state actors should refrain from infringing or violating the rights of individuals and should leave them alone
- (b) obligation to protect – the state should take steps to prevent the violation of the human rights of individuals by private actors
- (c) obligation to promote, assist and fulfill – the state should inform citizens of their rights and provide the necessary “implements” to enable them, especially marginalized groups, to realize their human rights.

### **Specific state obligations in relation to rape and other forms of VAW**

Pertinent international human rights and policy documents provide specific measures that governments like the Philippines should take to address rape and other forms of VAW. In many ways they fall under the category of general human rights obligations discussed in the previous section.

#### **United Nations Declaration on the Elimination of Violence against Women**

Article 4 of the United Nations Declaration on the Elimination of Violence Against Women enumerates the specific measures that governments should undertake. Although not a human rights treaty, this declaration as a policy document adopted by the United Nations General Assembly requires adherence to its principles and fulfillment of its provisions by member states of the United Nations. There are other international policy documents which address VAW that governments are committed to fulfill. An example is the Beijing Platform for Action which includes violence against women as an area of concern.



### **Convention on the Elimination of All Forms of Discrimination against Women and General Recommendation No. 19**

Under the Convention on the Elimination of All Forms of Discrimination Against Women, elimination of discrimination is only part of what states parties are legally obliged to do. Governments should also undertake measures to ensure that women enjoy their human rights in the economic, social, political and other fields. This requires states parties to show *results* from the measures they have taken in eliminating discrimination and promoting the human rights of women in general. Article 2 together with Articles, 3, 4 and 5 of the Women's Convention lists what states parties like the Philippines should do to fulfill their conventional obligations.

General Recommendation No.19 links VAW to discrimination against women. Using the concept of discrimination under the Women's Convention, it discusses how traditional attitudes may perpetuate or justify gender-based violence against women. It also identifies contexts, realities and conditions (e.g., rural or migrant women, women in prostitution, poverty, war and conflict) that can increase women's vulnerability to gender-based violence. Further, it explains the impact of VAW on women's equal enjoyment of their human rights. Aside from providing specific recommendations to states parties, General Recommendation No.19 reaffirms the due diligence standard for determining state responsibility for violence committed by private actors.

States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

#### **Other human rights treaties and general comments**

The link between VAW and economic, social, cultural, civil and political rights has become the subject of general comments and concluding recommendations of other human rights treaty monitoring bodies. For example, in its General Comment 14 on the right to health, the United Nations Committee on Economic, Social and Cultural Rights stated that: ("V)iolations of the obligation to protect follow from the failure of a State party to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as ...the failure to protect women against



violence or to prosecute perpetrators." Aside from the United Nations Special Rapporteur on VAW, thematic special rapporteurs such as on the Right to Adequate Housing are looking into the relationship between VAW and the enjoyment of the specific rights within their mandates.

### **ASEAN Declaration on the Elimination of Violence against Women**

Members of the Association of Southeast Asian Nations which include the Philippines adopted this Declaration in June 2004. It affirms their commitment to eliminate VAW in the region and to undertake specific steps individually or collectively to achieve their objective. The Declaration reiterates the perspective that VAW is a human rights concern.

### **Addressing rape in the legal system from international human rights perspectives**

Victims of rape who access the legal system are guaranteed their human rights to equality before the law, equal protection of the law, competent authority, and effective remedy, to name some. With the stigmatization, victim-blaming, insensitivity, cruelty and prejudices that the victims encounter when they take the legal recourse, are these rights respected and promoted? When the cases before the courts are dismissed because of judicial biases and adherence to doctrinal myths about rape, are these rights recognized? When corruption in the legal system, lack of proper training and knowledge of laws, lack of facilities, budget and institutional support hamper the appropriate prosecution of rape cases, are these rights not denied?

Adopting a human rights perspective means state actors recognize that the human rights of victims may be impaired or denied because of factors such as those earlier identified. State actors likewise acknowledge that they have legal obligations with respect to human rights. Using the typology of state obligations earlier described might provide a systematic approach to doing this. The following is an illustration of how this approach can help identify whether or not measures are already in place, and if not, what else should be done:

- (a) What should law enforcement and other agencies and the judiciary do to ensure that their members refrain from infringing the rights of victims? (obligation to respect)



Measures can include orientations on rape; focused human rights education in which human rights obligations are clarified; adoption of internal policies that promote respect for the rights of victims and citizens in general and prohibit practices and attitudes that discriminate against rape victims or impair their rights; and mechanisms within agencies or the judiciary to deal with any violation of rights. Protocols of agencies may also be reviewed to ensure their consistency with human rights standards.

- (b) What should be done to ensure that third parties do not violate the rights of victims? (obligation to protect)

In some cases, rape victims amicably settle or drop their complaints because of pressure from family or third parties. How to address this should be considered.

- (c) What should be done to promote the rights of victims and assist the disadvantaged ones? (obligation to promote, assist and fulfill)

Measures can include: information materials on human rights, legal remedies for violations, and support programs for disadvantaged victims (e.g., free legal services and economic support during the legal process).

## **ELIMINATING VAW AND PROMOTING THE RIGHTS OF WOMEN: Challenges and Issues**

The government is legally obliged to address structural or systemic factors such as the unequal power relations of men and women and discriminatory cultural practices that result in violence against women. Pursuant to its obligation under the Women's Convention to modify or abolish customs and practices which constitute discrimination against women,<sup>5</sup> the government can undertake public education, human rights-based gender sensitivity trainings and research, among others. This may be easier said than done. Addressing the cultural aspects of VAW and other forms of discrimination against women involves dealing with a patriarchal ideology so



entrenched in the system. Moreover, given the multi-ethnic and cultural structure of Philippine society it may be expected that multi-justice systems are in operation alongside the formal legal system with their own laws and mechanisms to deal with rape. How this affects the rape victims' human rights has to be looked into. Potential tensions between international human right standards and operative cultural norms relating to rape should be considered.

The administration of justice and government's actions in rape cases appear to view women as one homogenous group. Analysis and action do not seem to be nuanced by differences among women. The vulnerabilities of women, the impact of rape on them, and their ability to access remedies and support services may depend on or be affected by those differences. To some degree the DEVAW recognizes this. In its preamble it mentions that certain groups of women are especially vulnerable to VAW including women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict. In practical terms, how do measures addressing rape take into account women's diversities to ensure their equal benefit from the measures or the protection of their rights?

The Women's Convention instructs states parties to consider temporary special measures in order to speed up achievement of *de facto* equality in rights for women.<sup>6</sup> Perhaps after doing research and gaining understanding of women's complex situations, the government can better determine what those special measures should be.

Appropriate institutional arrangements and adequate resources are needed to effectively implement government's initiatives on VAW. Prioritization may have to be done but in a way that is guided by government's human rights obligations.

Official reports such as the 5<sup>th</sup> and 6<sup>th</sup> Progress Report of the Philippines to the CEDAW boast of the numerous government initiatives to address VAW. They include programs of executive agencies, enactments of the legislature, and measures taken and laudable decisions made by the Supreme Court. The reports conclude that there is a need for a more systematic and synchronized government response to violence against women and children. The reports also admit that monitoring and enforcement of laws and policies on gender-based violence is a continuing challenge. The greater challenge it appears is for the government to ensure and show



"results" and "outcomes" and not to be content with long enumerations of what it has done.

### Endnotes:

<sup>1</sup> C. Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS* 358 (R. Lee ed., 1999).

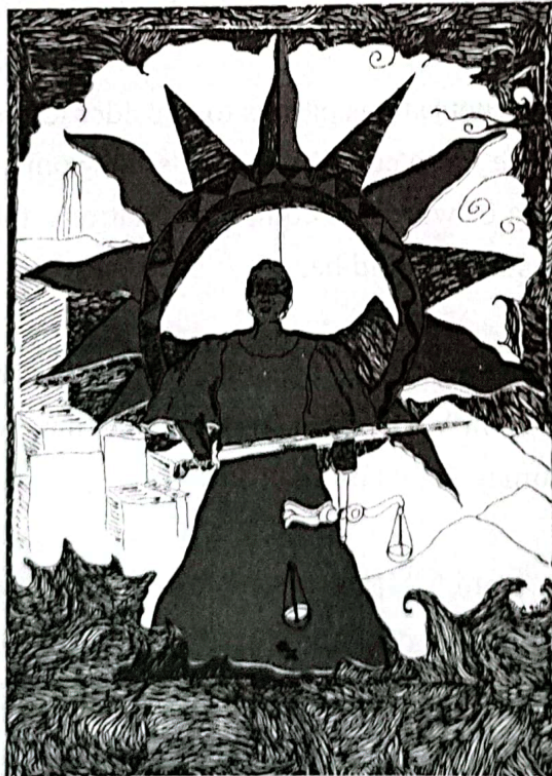
<sup>2</sup> B. Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Lattanzi and Schabas eds., 1999).

<sup>3</sup> WOMEN'S LEGAL BUREAU, INC., *ADDRESSING RAPE IN THE LEGAL SYSTEM: A MULTIDISCIPLINARY TRAINING MANUAL* 9 (2001).

<sup>4</sup> *Id.* at 254-255.

<sup>5</sup> See arts. 2(f) and 5 of the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 (1979).

<sup>6</sup> See *id.* art. 4 (a) and General Recommendation No. 25 (2004).







## RAPE AND SOCIETY

*The State values the dignity of every human person and guarantees full respect for human rights.<sup>1</sup>*

*The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.<sup>2</sup>*

*No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.<sup>3</sup>*

There is much work to be done to keep true to the ideals laid down in the Philippine Constitution. In stark reality, rape is a very concrete, serious and significant problem in Philippine society. All regions in the country record a large number of reported rapes, particularly incest rape. In 2002, the Southern Tagalog region topped the chart on the number



of reported rape cases. Metro Manila also registered one of the highest reported incidence of rape as well as other forms of sexual violence against women, perhaps primarily because of its large population. The Bicol and Central Visayas regions registered the third and fourth highest number of reported rape cases among all the regions. Nationally, the Philippine National Police data on reported cases show that an average of seven women were raped daily in 2002, the same average recorded in 2001. That this number is based only on reported cases makes it even more disturbing.

Police records show that there is **no typical woman victim or typical male perpetrator of rape, thus debunking common stereotypes.** The data show that any woman can be raped. Victims have included babies several months old and grandmothers. There is no regard for relation, wealth, education, disability, pregnancy or even beauty when it comes to men raping women. As to the perpetrators, very rarely is he a stranger. According to the Philippine National Police, 66 percent of the perpetrators of child rape in 2000 were known to the victims. He is often an intimate or a trusted relative. Thirty-four percent of the child rapes were incestuous. Most perpetrators were from 18 to 35 years old but some were younger than 18 or older than 35.

**Each rape committed is a story replete with expressions of power of the perpetrator over his victim.** The state of drunkenness or being drugged in some reported cases describes the circumstance of the commission but does not constitute the reason for the rape. The stories of rape relate to a variety of socio-cultural and political contexts of power in relations between men and women. Men readily appropriate women's bodies when they rape their own children while their wives work abroad or are away from home. Some perpetrators express the belief that their children are their property that they are privileged to use before any other man. Men abuse young women by using their economic power (such as by promising them freedom from poverty), or seducing them into believing stories that exploit women's psycho-social vulnerabilities (such as by winning their trust or promising them marriage), or overpowering them physically.

Thus, it is simple thinking to reduce rape to a sinful consequence of uncontrolled passion or lust or to believe that laws are effective deterrents to rape. The rule of equality enshrined in our Constitution becomes abstract in the face of the realities of social inequalities rooted in



traditions of hierarchy, i.e., of the societal and systemic power of a few over the rest especially those who have been historically marginalized and subordinated. These social divisions have borne collective and personal identities that are referred to as the majority, the dominant, or the mainstream as opposed to the minority (minorities), the marginalized, or the dominated.

**Societies are all divided generally into class, race (color), ethnicity and gender, male and female.** Moreover, there are divisions and differences in religion, age, disabilities, sexual preferences, etc.

**Intolerance for difference has a violent history.** The dominant sectors of society have always wielded their power of regulation and control. They have used both coercive and persuasive powers to minimize as well as eliminate signs of difference and legitimize their exercise of power over others who are different. Thus, those who are white have been preferred over those who are black, yellow, brown or red (colored); the few who are rich over the many who are poor; the young over the old, men over women, heterosexuals over homosexuals, the fully-abled over the disabled (or differently abled) and so on and so forth. This preference is not benign. It has produced stereotypes, prejudices and discrimination that have stigmatized and harmed those who are different and not preferred. **At the extreme end of this oppression is violence – physical, sexual and psychological – including rape, that which is particularly inflicted on women because they are women.**



The production and reproduction of inequalities in all societies are made possible through the complex relationships of systems and structures that all societies develop. All societies have three major systems: the economic, political and cultural systems. Briefly:

1. the economic system encompasses the production, distribution and consumption of all goods and services that a society has;
2. the political system rules processes of control and decision-making in a society especially in the area of public life; and
3. the cultural system relates to the production of values, beliefs, traditions and customary practices of a society.



Social structures are similarly categorized into economic, political or cultural. Structures refer to social institutions and mechanisms that in a sense prop up or support the functioning or operation of the system. Thus, an intimate link between social systems and structures are established.

For example, the political system has laws, the courts and lawyers as institutions and mechanisms of the legal system. On the other hand, the cultural system has the church, priests and religious rituals as its own structures that support and promote its own set of values and beliefs. These systems and structures can be viewed at the macro and the micro levels, illustrating how systems can manifest themselves at various levels of reality, from general to specific, from global to national, from national to village, or from the community or group to the individual or personal.

Systems and structures, though intimately linked, are not always in harmony or homogeneous, i.e., uniform and one. Critical to social processes of systems and structures is the production of knowledge and meanings, both positive and negative. Thus, in a significant way, social processes are evaluative, rendering meaning and judgment to all social beliefs and behavior. The development of various perspectives or critical analysis and positions, i.e., standpoints and biases, and of social conditions is an ideological undertaking because it involves the power to name as well as to be the truth, the good and the right. **Contestations and negotiations for knowledge and meaning, for truths, values and beliefs are replete with power dynamics, both political and cultural (to determine who knows the truth and who is untrue), that are played out in every relation of all men and women in everyday life.**



The economic, political and cultural systems produce gender ideologies, the constant contestation of meaning and truth as to what it is to be a man and a woman or specifically what it is to be a good man or a good woman in society. Gender ideologies are intimately linked to the making and interpretation of laws as well as to the legal system in terms of the education of legal professionals, the access to legal resources and a host of other factors that make for the subjective status of men and women in the eyes of the law.



It is important to examine how the cultural and political systems play a major role in influencing and determining the establishment of laws and our interpretations of those laws in specific cases and crimes. Take for instance the production of **myths**. Through language and historical processes, certain ideas and notions become or get passed off as truths, become embedded in tradition and customs and thus become the subject of myth. The cultural construction of myth by the dominant culture of society enables it to get support and promotion from one generation to the other as well as expand its application to all areas of life.

As part of knowledge processes, they develop into **doctrines** that govern, rule, establish or influence social roles, identities and social space consistent with what is regarded as **natural, logical and common sense**. This means that because women are seen to be naturally (i.e., biologically) weaker, less muscular, etc., logically (according to this perspective) they require more assistance and protection. Because public space is believed to be more open to danger and harm, it is common sense (according to this perspective) for women to stay home as much as possible and take the primary role of childcare and housekeeping. According to this perspective, the skills and virtue to fulfill such role in life must take a central significance for women in society. Moreover, the ideal woman should be aptly rewarded and copied. Thus, it is merely logical (according to this perspective) that when a woman is harmed, she must prove that she has lived a virtuous life in keeping with her role which, thus, makes her worthy of society's or men's protection.

Virginity as the measure of a woman's value is another illustration. In Philippine society today, virgins continue to have more value than non-virgins. This promotes the ideal of virginity. Non-virgins are women of loose morals such as prostitutes and sexually promiscuous women. This culture of virginity, held up by values promoted in the family, in school and particularly in the Catholic religion, makes some women more "rapeable" than others in the interpretation of laws.

Rape has the effect of devaluing women. This belief underpinned the previous classification of rape as a crime against chastity. Even now, with rape classified as a crime against persons, women victims are still made to account for their sexual history to establish



whether, as single, young women, they were virgins before the rape. It is no different for older women whose honor and reputation are scrutinized, with lawyers asking about their sexual experience or proclivities. The focus on the "lacerated" hymen to establish the fact of rape clearly gives premium to virginity with the hymen as the indicator. From hymens, women are asked to show injury on their breasts, thighs and other body parts. In contrast, not enough significance is given to the trauma caused by the rape or to the irreparable harm caused to the victim's mind and spirit. For rape has been simplistically viewed as the insertion of a body part into another body part, thus denying focus on the psychological and other harm caused, or trivializing the gravity of the harm when instruments or objects are used. Women continue to be seen as property and raped women as damaged goods with decreased value and demand in the marriage market.

The new law on rape, Republic Act No. 8353, gives a gender-sensitive perspective on rape by establishing that rape is a crime against persons. Persons are bodies, intelligence, emotions, feelings and spirit. Persons have human rights protected both by national and international laws. Thus, the valuation of women based on virginity is challenged. Rape is not about virginity, hymens are not central to rape, and rape violates the person.

**Women can and do survive rape and can heal from it. But surviving rape and healing require not only the just resolution of the crime committed but also a holistic strategy for women and community empowerment.**

#### **Endnotes:**

<sup>1</sup> Const. art. II, sec. 11.

<sup>2</sup> *Id.* art. II, sec. 14.

<sup>3</sup> *Id.* art. III, sec. 1.





### THE LAW ON RAPE: APPLICATION AND DEVELOPMENTS IN JURISPRUDENCE

The enactment of Republic Act No. 8353 or The Anti-Rape Law of 1997, which amended the provisions on rape in the Revised Penal Code, was considered a victory of and for women. Republic Act No. 8353 made three major changes in the Revised Penal Code provisions on rape:

- (1) It reclassified rape from a crime against chastity to a crime against persons.
- (2) It expanded the definition of rape to include acts other than the penile penetration of the vagina and males as victims.
- (3) It criminalizes rape in marriage.



## Reclassification of rape

The reclassification of rape from a crime against chastity to a crime against persons was meant to address the gender prejudices packed in the word "chastity," a cultural concept that is linked to "virginity" and the sexual history of the victim. Many women who do not meet society's standards of "chastity" often experience hostility and prejudices in the legal system and consequently suffer defeat for "lack of credibility" in prosecuting rape cases. The change in the classification affirms that rape is a crime against the personhood of the victim, regardless of her personal background and sexual history. It also affirms the character of rape as a social and public issue, and not simply a private matter to be dealt with by victims and their families. With its reclassification as a crime against persons, rape has joined the ranks of public crimes, thus rendering pardon generally without effect on its prosecution. This is, however, subject to two exceptions. The law says that pardon will still put a stop to prosecution and extinguish criminal liability if it comes in the form of marriage, or when the offender is the husband and he is pardoned by his wife.

## Expanded definition

The expanded definition of rape was meant to address the androcentric nature of the old definition. Now, under the new definition, rape may be committed by means other than the use of the penis and its insertion into the vagina, and through grave abuse of authority, fraudulent machination, or threat, elements that were not included in the old definition.

Under the new definition, rape is committed:

- 1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:
  - a) through force, threat, or intimidation;
  - b) when the offended party is deprived of reason or otherwise unconscious;
  - c) by means of fraudulent machination or grave abuse of authority; and
  - d) when the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present;



(2) By any person who, under any of the circumstances mentioned in paragraph 1 above, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object into the genital or anal orifice of another person.<sup>1</sup>

### **Criminalization of rape in marriage**

The old rule was that a husband may not be charged with rape of his wife unless there was a decree of legal separation. Republic Act No. 8353 changed this rule by recognizing that rape may be committed in marriage without making it conditional on the existence of a decree of legal separation. This recognition is found in the following provision of the law:

In case it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty: Provided, that the crime shall not be extinguished or the penalty shall not be abated if the marriage is void *ab initio*.<sup>2</sup>

While the above provision refers only to husbands, the expanded definition of rape which includes several ways of committing the crime should leave no doubt that any husband or wife may commit rape against her or his spouse.

### **New language, problematic concepts**

The new law has spawned a set of new terms in jurisprudence.

In recent decisions of the Supreme Court applying the changes made by Republic Act No. 8353, the Court referred to rape committed under the first paragraph of the definition (Article 266-A, first paragraph, Revised Penal Code, as amended by Republic Act No. 8353) as "rape by sexual intercourse" and to rape committed under the second paragraph (Article 266-A, second paragraph, Revised Penal Code, as amended by Republic Act No. 8353) as "rape through sexual assault."<sup>3</sup>

The use of "rape by sexual intercourse" brings to mind the distinction made by the



Supreme Court between "carnal knowledge," the language used by the definition to refer to penile-vagina contact, and "sexual intercourse." In *People v. Quiñanola*<sup>4</sup> the Court said that carnal knowledge is unlike the traditional connotation of sexual intercourse, but this was made in reference to the issue of whether full penetration of the vagina is required:

In the context it is used in the Revised Penal Code, "carnal knowledge," unlike its ordinary connotation of sexual intercourse, does not necessarily require that the vagina be penetrated or that the hymen be ruptured. The crime of rape is deemed consummated even when the man's penis merely enters the labia or lips of the female organ....

The problem with using the term "sexual intercourse" is that it connotes mutuality and thus serves to confuse. Rape is rape and sexual intercourse is sexual intercourse; in consensual sexual relating, one will never use the word rape, and no one who has been raped thinks of her experience as sexual intercourse or sex. So why use "sexual intercourse" to refer to a violent act that is rape?



Old terms also continue to pose some conceptual and ideological problems to advocates and victims. For instance, the use of the terms "qualified rape" (those with qualifying circumstances that increase the penalty or make the crime punishable by death) and "simple rape" (those without any qualifying circumstance) in court decisions<sup>5</sup> may appear logical, following the legal construct in other crimes such as "simple theft" and "qualified theft," among others. The problem, however, is that rape is never simple, and to refer to rape as "simple" seems to trivialize its harm to the victims and ignores the complex psycho-social factors involved in the crime. Moreover, the legislation itself does not use those terms.

Sometimes, the language in Supreme Court decisions displays insensitivity to the trauma of victims or trivializes the gravity of the rape. Consider the following metaphors used by the Court, which depict women not as persons with rights violated but as tantamount to property invaded ("bombardment of the drawbridge is invasion enough even if the troops do not succeed in entering the castle"), or characterize rape as simply involving a body part ("pudenda") and the violent act as benign as "knocking":



There are no half measures or even quarter measures nor is their gravity graduated by the inches of entry. Partial penile penetration is as serious as full penetration. The rape is deemed consummated in either case. *In a manner of speaking, bombardment of the drawbridge is invasion enough even if the troops do not succeed in entering the castle.*<sup>6</sup>

*A mere knocking at the doors of the pudenda, so to speak, by the accused's penis suffices to constitute the crime of rape as full entry into the victim's vagina is not required to sustain a conviction.*<sup>7</sup>

### Rape may be committed by using a finger

A major issue that resulted from the second paragraph of the definition of rape is whether rape may be committed by using a finger as "instrument or object."

The first case that answered this question was one decided by the Court of Appeals. *Obaña, et al. v. Soriano, et al.*,<sup>8</sup> a case that involves insertion of a finger into the vagina, discussed the history of the law as the context of its interpretation. It held that "object" is synonymous to "thing," and that the human finger is definitely a "thing." The Court reasoned out that excluding the insertion of a finger or of fingers into the genital or anal orifice of another from the definition of rape would be unintelligible, arbitrary and capricious delimitation of what the law had set out to expand.

On the basis of the ruling in *Obaña*, the Department of Justice issued Memorandum Circular No. 20, dated March 11, 2002, setting aside its previous Memorandum Circular No. 22, dated September 28, 2000 (which provided that insertion of body parts other than one's penis does not constitute rape). Memorandum Circular No. 20 instructs public prosecutors to file an information for rape when fingers are used in the commission of the crime.

Prior to *Obaña*, there was no Supreme Court ruling clarifying that rape may be committed by using a finger under the second paragraph of its definition. But in an apparent indication of judicial mindset, the Supreme Court stated, by way of an *obiter dictum*, in *People v. Silvano*<sup>9</sup> that:



Appellant could have been held liable for "instrument or object rape" under RA 8353 when he inserted his tongue and finger into her [sic] daughter's vaginal orifice. Luckily for him, at the time that he committed such act, "instrument or object rape" was not yet punishable.

Subsequently, the Supreme Court decided several cases of rape committed by using fingers. The Court considered this "rape through sexual assault" although it did not elaborate on this unlike in *Obaña*. Thus, in *People v. Soriano*,<sup>10</sup> it held that insertion of one's finger into the genitalia of another constitutes "rape through sexual assault" as in *People v. Palma*.<sup>11</sup>

### The culture has not changed

The amendments introduced by Republic Act No. 8353 created much optimism about a more sensitive and appropriate investigation and resolution of rape cases. However, this was far from what happened in the years that followed the enactment of the law. Culture would not automatically transform simply because a new law had been passed. Age-old myths and misconceptions about rape, prejudices against women, and stigmatization of victims continue as intensely as ever even with the new law.

Still, Republic Act No. 8353 is a big leap from the old legal perspectives about rape. The reclassification of rape from a crime against chastity to a crime against persons is by itself a major change. It is a far cry from the classification of rape in early western societies as a crime against property. That was then when women were considered not as persons but the property of their fathers or husbands. Rape then was punishable because men felt the rapists had trespassed on their property, i.e., their wife or daughter. But men could rectify the wrong by either marrying the daughter or paying the father.

It was in the early 20<sup>th</sup> century that women started their advocacy against the sexist perspectives that prevailed in rape laws and in the treatment of the victims. As women gained greater legal protection and more political equality, traditional rape laws came under close scrutiny and severe attack and criticism. Women advocated for shifting the role of victim from men (the owners of women as property) to women (the actual victims) and the elimination of the exemption of husbands from criminal liability for raping their wives. Women advocates also pushed for courts to understand that it was a natural thing for a woman to feel shame after being raped, and that she was most likely to destroy a lot of evidence that would be useful in court.



But many things have not changed. The etymology of the word rape is packed with sexism that, to some extent, continues to this day:

The word *rape* is derived from the Latin *rapere* which means to steal, seize, or carry away. It is the oldest means by which a man seized or stole a wife. In reality, it constituted enforced marriage since a man simply took whatever woman he wanted, raped her, and brought her to his tribe. Rape was actually conducted under the guise of respectable behavior, rewarding the rapist for the misuse and abuse of women.<sup>12</sup>

The "bride capture" through rape then has its modern version in marriage today: under the law, the marriage of the offender and the offended party extinguishes the criminal liability of the rapist or abates the criminal action against him. This is expressly provided in the law:

The subsequent valid marriage between the offender and the offended party shall extinguish the criminal action or the penalty imposed.<sup>13</sup>

Since marriage "erases" the wrong or "legitimizes" the violation and allows the victim to keep her "honor" and "chastity" in the eyes of the community, it is no wonder that in the family and community, women are encouraged to marry their rapist when this is possible. In other cases, women are told to simply forgive, forget and leave up to God the experience of rape. This apparent trivialization of the harm caused by rape and the victim-blaming that often accompanies it ("you did not struggle enough," "you seduced him," "you voluntarily went with him") are also indirect ways of legitimizing the rape and maintaining the respectability of the rapist. Rather than focusing on the behavior of the offender and making him account for his act, women victims are instead made to account for their behavior and sexual history. Almost often and despite Supreme Court decisions to the contrary, women have to show that they were "rapeable," meaning that they were "chaste" (or "virgin") or of good moral reputation and that insuperable force or threat was used against them to prove that the act was against their will.

While Supreme Court decisions do not usually perpetuate stereotypes as to who can be victims of rape and have even declared that women in prostitution can also be raped, myths and misconceptions continue to affect and define results at the level of trial courts and prosecution offices. Incredible as it may seem in this day and age with all the advancements in information technology, many people still believe in the following myths and misconceptions: that only



young, beautiful and sexually attractive women get raped; that rape is perpetrated only by poor, pathologic and depraved men; that handsome, rich, educated, etc. men do not need to rape; that women are partly to blame for the rape because they behave in ways that elicit men's sexual desires; that sexy clothes excite men, so to avert rape it is a woman's responsibility to avoid provocative or revealing attire; that women who do not show physical resistance to rape must have wanted the rape to occur; that no physical injury means no resistance from the victim or no use of force by the rapist; that women who cry "rape" must have an ax to grind against the rapist; that rape is a crime of lust or passion; that rape happens only in poorly lit or secluded places; that a victim of rape must demonstrate an obviously distraught emotional state; and that the age, social class, looks, demeanor and gender of a person are relevant when considering the likelihood of her or his becoming a victim and the likelihood of his or her being a rapist.

Underpinning all these myths and misconceptions is the belief that women can and should be able to avoid rape. If they are not able to get away, then the woman must have wanted it to happen.

The feminist poet Joi Barrios has eloquently captured in the following poem what women victims go through in the legal system:

*Gahasa  
ni Joi Barrios*

*Ihanda ang ebidensiya*

*Eksibit Blg. 1: Patalim, baril  
o kahit anong sandata  
patunay ng pagbabanta*

*Eksibit Blg. 2: Panty na may mantsa  
patunay ng kabirhenan ng  
dalaga.*

*Eksibit Blg. 3: Sertipikasyon ng doktor,  
patunay na  
a: sapilitan  
b: lubusan  
ang pagpasok ng ari.*





*Eksibit Blg. 4: Sertipikasyon ng pagkatao,  
patunay ng hindi pagiging puta.*

*Ipasok sa hukuman ang nasasakdal.*

*Iharap sa hukuman ang nagsasakdal.*

*Simulan ang panggagahasa.*

### Medico-legal issues

Medico-legal doctrines enshrined in Supreme Court decisions and relied upon for many decades have been exposed recently by medical professionals as founded on myths or unscientific assumptions. That they have been accepted as medico-legal truths for many years is a good example of how myths can be perpetuated through official declaration by the legal system.

Perhaps the most traumatizing of the medico-legal processes was the practice of measuring the hymenal orifice. In many a Supreme Court decision, one can read something like this:

2. Hymen, intact and its orifice, small (0.5 cm in diameter) as to preclude complete penetration by an average sized, adult, Filipino, male organ in full erection without producing any genital injury.<sup>14</sup>

This practice was based on the belief that the hymen is not elastic, or may be elastic only in some cases, as in the words of the doctor quoted by the Supreme Court in *People v. Dizon*<sup>15</sup> that the "hymen was the distensible or elastic kind." The logic of the measurement was that if the hymen is small as to preclude complete penetration by an average-sized, adult Filipino male organ in full erection (believed to be 2.5 centimeters in diameter) without producing an injury, then, if indeed it was penetrated, injury would have been produced. If no injury was produced, then there was no rape. Enlightened medical professionals say that this is a myth because, in the first place, the hymen is elastic (and can accommodate a baby at birth), and the 2.5-centimeter-in-diameter-penis has no scientific basis. The practice of inserting tubes to measure the hymenal orifice was stopped only about three years ago by the National Bureau of Investigation despite that as early as 1996 the Court, in an enlightened decision stated:



The vaginal wall and the hymenal membrane are elastic organs capable of varying degrees of distensibility. The degree of distensibility of the female reproductive organ is normally limited only by the character and size of the pelvic inlet, other factors being minor. The female reproductive canal being capable of allowing passage of a regular fetus, there ought to be no difficulty allowing the entry of objects of much lesser size, including the male reproductive organ, which even in its largest dimensions, would still be considerably smaller than the full-term fetus.<sup>16</sup>

The Court cited the above ruling in *People v. Echegaray*<sup>17</sup> when it brushed aside the claim of the accused that he could not have raped the victim because of the size of his penis which could have ruptured her vagina had he actually done so.

Another issue is that pertaining to the "intact hymen" and "ruptured hymen" or "broken hymen."<sup>18</sup> Again, enlightened medical professionals say these terms should be abandoned for being unscientific. There is no such thing as "intact" hymen and describing the hymen as "ruptured" or "broken" is misleading. In any case, the Supreme Court has clarified in many cases that the fact that the hymen was "intact" upon examination does not belie rape because a "broken" hymen is not an essential element of rape.

Corollary to this is the inquiry into virginity that attends practically every rape investigation involving unmarried women. Again, the Supreme Court has clarified that the "virginity" of the victim even after the rape does not negate the commission of the crime because the law only requires the introduction of the penis into the labia of the pudendum. Other than its being irrelevant, medical science tells us that there is no scientific marker for "virginity;" it is a purely cultural concept that should be jettisoned in rape prosecutions. The struggle over the "virginity" issue will no doubt continue, as inquiries into the victim's sexual history are the rule rather than the exception in rape prosecutions despite the rape shield provision in Republic Act No. 8505:

In prosecutions for rape, evidence of complainant's past sexual conduct, opinion thereof or of his/her reputation shall not be admitted unless, and only to the extent that the court finds, that such evidence is material and relevant to the case.<sup>19</sup>



Republic Act No. 8505, otherwise known as the Rape Victim Assistance and Protection Act of 1998, is the twin law of Republic Act No. 8353. It was enacted shortly after Republic Act No. 8353. Many of its provisions have not been implemented, particularly its directive for the creation of a rape crisis center in every province and city. The same law requires that in rape investigations, the investigating police officer and examining physician must be of the same sex as the victim and that the preliminary investigation or inquest of cases involving women rape victims must be assigned to a female prosecutor. Doctors and the police however say that there are not enough female doctors and police officers particularly outside of Metro Manila to comply with this requirement.

### **What is the meaning of consent?**

Often central to every rape prosecution is the issue of consent. In popular understanding, there is a tendency to equate the presumption of innocence of the accused – a cardinal rule in our constitutional system – with the presumption that there was consent from the victim. This happens when, in finding that rape was not proved, a conclusion is made that the complainant consented to the act.

But where there is no finding of lack of consent, or where evidence is insufficient to prove that there was force or intimidation or that the act was committed against the will of the woman, must a conclusion follow that there was consent in conformity with the presumption of innocence?

Corollary to this is the question of what is sufficient expression of lack of consent in rape. Will a “no” suffice? Pleading by the woman? Running around a locked room? Shouting? Crying? Or must there be physical struggle? If there was physical struggle, how much of it should suffice as expression of lack of consent?

In many rape prosecutions, the sufficiency of force becomes a critical issue. Again, what is sufficient force? Do courts consider pinning down the victim using the perpetrator’s body weight enough? Pushing down? Using knees or hands to forcibly part the legs? Grabbing? Boxing? Covering of the mouth? Or must any of these be accompanied by something greater to meet the requirement of force?



These questions, while appearing to treat elements of the commission as discrete, are relevant in the light of the widespread belief that rape is easily fabricated. In many decisions, the famous words of Sir William Hale dating to the 17<sup>th</sup> century are quoted and paraphrased as a cardinal caveat in judging rape complaints: "An accusation for rape is easy to make, difficult to prove and even more difficult to disprove." Thus, it was not long ago when the Supreme Court held in the case of *People v. Salarza*<sup>20</sup> that most rape charges are unfounded:

Rape is a charge easy to make, hard to prove and harder to defend by the party accused, though innocent. Experience has shown that unfounded charges of rape have frequently been proffered by women actuated by some sinister, ulterior or undisclosed motive.

This pronouncement finds no support in data, and in fact the Court cited none. Combined with the other doctrines long followed in our legal system, such as the "Filipina of decent repute" doctrine ("No young decent Filipina [innocent in the ways of the world] would publicly admit that she was ravished and her honor tainted unless such was true, for it would be instinctive for her to protect her honor"), a strong prejudice against *some* women is created. One must prove that one's case is not one of the many so-called unfounded charges and that one fits the stereotype of the decent Filipina.

The Court's statement in *People v. Salarza* quoted above is a stark contrast to what it said in *People v. Melivo*,<sup>21</sup> which in effect debunks Hale's famous declaration:

No matter how courageous the act of filing a complaint might appear to be, rape exacts a heavy psychological and social toll on the victim who is usually twice victimized: by the rapist during the act of rape and by a society which devalues the victim's worth by characterizing the crime principally as an insult to the victim's chastity. *With all the attendant social consequences such a classification brings, many cases of rape go naturally unreported, and those cases which manage to reach the authorities are routinely treated in a manner so demeaning to the victim's dignity that the psychological ordeal and injury is repeated again and again in the hands of inexperienced, untrained and oftentimes callous investigators and courtroom participants.* If a woman would have second thoughts about filing an ordinary rape case, all the more would it be difficult and painful for a child to complain against her own father.



be difficult and painful for a child to complain against her own father.

*People v. Salarza* may well be a treatise on what constitutes "consent" in rape cases. In that case, the majority opinion of the Court acquitted the accused because the complainant was "half asleep" when the accused committed his acts and she was conscious of what was being done to her although she claimed that she thought the person was her boyfriend.

The dissenting opinions given by then Associate Justices Florenz Regalado and Hilario Davide Jr. reflect unusual sensitivity and keen discernment of the psycho-social issues involved in "consent." According to Justice Regalado:

2. I need not devote much space to the proposition that it was complainant's negligence, in not ascertaining the identity of the person who came in the dark to lie with her, which resulted in her ravishment. *This would be equivalent to saying that the stealth of the rapist would be rewarded with absolution upon proof of negligence on the part of the victim in meticulously ascertaining any semblance of duplicity in the forbidding privacy of the bedroom.* Complainant was expecting her boyfriend's momentary return, then she fell asleep; she was slightly aroused by the preliminaries for coitus which she and her boyfriend had been indulging in and, in the dark with nothing to warn her otherwise, in her drowsy state of mind she submitted to the person she thought was her boyfriend.

*She is now faulted for not exercising that degree of diligence necessary to detect any strategy of an impostor, otherwise the latter shall be rewarded for his success. The responsibility for the sexual assault is laid at the door of the victim for not detecting and preventing it from happening, and not upon the felon who schemed and caused the event to happen.* This appears to be the alarming import of the arguments offered in defense of appellant on this score, a cogitation which regretfully I cannot reconcile with any doctrinal rule I have learned in the law of crimes against chastity.

....

Mr. Justice Davide has cited authoritative discussions demonstrating, from both physiological and neurological considerations, that a person who is half asleep and therefore in a stupor of drowsiness or semiconsciousness, is not capable of giving full, informed, intelligent and voluntary consent....



capable of giving full, informed, intelligent and voluntary consent....

...A woman who is half asleep being only half conscious, or in a state of drowsiness hence not fully conscious, is not capable of completely giving that consent contemplated as valid in law which would bar a prosecution for rape upon the defense of consensuality in the sexual act.<sup>22</sup>

For his part, then Associate Justice and now Chief Justice Davide Jr. opined:

...The crux of the matter then is the construction and interpretation of the word "unconscious." I submit that since both "being deprived of reason" and "unconsciousness" are founded on absence of will to give consent intelligently and freely, the term "unconsciousness," then, should not be tested by a mere physical standard, *i.e.*, whether one is awake or asleep, conscious or alert. *Rather, the inquiry should likewise determine whether the victim was fully informed of all considerations so as to make a free and informed decision regarding the grant of consent. It is only through this two-tiered test that a holistic appraisal of consent may be had.*

In our jurisprudence, carnal knowledge of a sleeping woman is rape (*People v. Dayo*, 51 Phil. 102 [1927]; *People v. Corcino*, 53 Phil. 234 [1929]; *People v. Caballero*, 61 Phil. 900 [1935] and *People v. Conde*, 322 Phil. 757 [1996]), because in that state the woman is completely unconscious, both physically and mentally. Sleep, being the naturally or artificially induced state of suspension of sensory and motor activity (*People v. Conde, supra*, at 767), obviously deprives a woman of the ability to consent. However, to repeat, since it is "absence or lack of will" which is the primordial factor in the second circumstance of rape, then I submit that to construe the term "unconsciousness" exclusively in light of physical considerations would be unduly restrictive and fail to heed the gravamen of the offense, *i.e.*, lack of consent.

...Plainly, despite Zareen's awareness of *what* was being done to her, the question of *who* was doing it to her was a totally different matter. Her accession to the *what* was premised on the belief, in good faith, that it was her boyfriend *who* lay with her in bed. Her failure to ascertain the identity of her partner was a mistake in good faith for which she should not be faulted; neither should it result in the acquittal of accused-appellant.



In Zareen's case, she was still "half-asleep" or drowsy when she was penetrated by the accused, having been awakened when he removed her underwear and mounted her, which she acceded to believing, in good faith, that it was her boyfriend Ricky, with whom she had nightly intercourse. When this belief turned out to be erroneous when accused announced, in the midst of the act, that he was not Ricky, but Jun (the accused), that was the only time that Zareen became fully aware of the totality of circumstances—critically, that of her partner's identity—at which time she intelligently and freely exercised her will by immediately and unequivocally rejecting the accused.

I submit that an inquiry into whether or not Zareen was half-asleep does not suffice as regards the determination of an intelligent grant of consent; hence it may be said that in a sense, the grant of consent was likewise not free. Clearly, it is only when a woman is fully informed that consent may be intelligently given—which was absent in the instant case....

However, should there be [sic] any further debate on the issue of Zareen's physical condition and consequences thereof, i.e., she was "awake" thus fully conscious, I assert that Zareen's failure to detect that it was not Ricky who lay with her that night, was not only not unreasonable, but perfectly understandable, in light of human nature and as recognized by the medical profession. "Consciousness" has been described by medical practitioners as denoting a state of awareness of one's self and one's environment; conversely, whether a person is disoriented is measured by one's degree of alertness and awareness of the environment, considering the circumstances of time, place and person.

What matters for purposes of this opinion is that the medical profession recognizes a spectrum of impaired or depressed consciousness and orientation in persons who are nevertheless deemed "awake." The terms used in this regard are obtundity, somnolence and stupor. While we wish not to dabble in areas where we admittedly do not possess the requisite expertise, at bottom, given the circumstances of time and place, Zareen was clearly, in layman's language: disoriented, drowsy or confused, thus cannot be held culpable for her failure to immediately recognize that it was not Ricky, nor her failure to ascertain Jun's identity, not even her assumption that it was Ricky who lay with her:



This orientation as to person, place, and time depends on the ongoing sensory impressions. *Have you ever awakened from a deep sleep to find that momentarily you did not know the day, the hour, or even where you were? Weren't your mental functions impaired until you became oriented, until all the pieces of the puzzle suddenly fell into place?...*

Returning to the legal front, what is material here is that any semblance of consent given was clearly and painfully a mistake in good faith, as Zareen was not fully aware of the totality of the circumstances, thus rendering her, for all legal intents and purposes, unconscious and unable to give consent freely and intelligently. All told, this instance of reverse *error in personae*, clearly a material factor in the grant of consent by the victim, resulted in total absence of consent which accused-appellant should be held criminally liable for as charged.<sup>23</sup>

There is also the "normal conduct" doctrine that works against some women whose reactions and behavior may appear "unnatural" or "abnormal" to many. Courts usually examine the conduct of victims before, during and after the rape. In one case, the Supreme Court held that "the conduct of the woman immediately after an alleged sexual assault is crucial to establish the truth or falsity of the rape charge"<sup>24</sup> and in another the Court held that the woman's:

actuations under the circumstances did not show the kind of resistance *expected of a woman defending her virtue and honor*. A much more vigorous opposition to the assault on her virtue is only to be expected of an inexperienced victim on the threshold of womanhood. The complainant's conduct immediately after the incident displays outright inconsistency with the natural reaction of an outraged woman robbed of her honor, and raises too many questions.

Culturally accepted indicators of consent (meaning, no sexual abuse or rape) include the lack of physical struggle or verbal resistance at the time of the sexual assault (contemporaneous conduct) and the lack of visible sign of anguish or trauma after the assault (subsequent conduct), or behavior not consistent with "human experience" or "human nature," or not the "normal reaction" of one who has been raped (e.g., proceeded with "normal activities," continued to relate with the accused).



Yet psychologists and psychiatrists have a ready explanation for this. The threat of rape is a life-threatening situation for every victim, regardless of the circumstances of its commission or the absence of a deadly weapon. For it is an attack on one's bodily and psychological integrity. Psychiatrists and psychologists explain that in this life-threatening situation, women exhibit a wide range of coping behavior immediately before, during and after the attack. There is no single standard for what is called "normal behavior."

To some extent, this has been recognized by the Court in many decisions where it declared that people react differently to a given situation and there is no standard form of behavioral response when one is confronted with a strange or startling or frightful experience as heinous as the crime of rape; that the workings of the human mind when placed under emotional stress are unpredictable and cause different reactions in people.<sup>25</sup> The Court has also recognized that fear has been known to render people immobile, if not useless, in some life and death situations;<sup>26</sup> that intimidation is addressed to the mind of the victim and is, therefore, subjective, and its presence cannot be tested by any hard and fast rule and must be viewed in the light of the victim's perception and judgment at the time of the commission of the crime.<sup>27</sup>

But the challenge it seems boils down to applying the standards in specific situations. In some cases, the Supreme Court has shown sensitivity and sophisticated understanding of rape but one can also find decisions of the Court which are a stark contrast to its sensitive decisions.

The fact that private complainant did not resist or attempt to flee or shout for help does not negate force or intimidation...

While indeed the victim might have tarried in reporting her defilement, yet the delay is explained by the fear generated by appellant in the mind of complainant. The hiatus in reporting the crime does not extricate appellant from his predicament. As the trial court found, complainant did not divulge the first incident of rape out of fear for her life and that of her family. She could have kept her ordeal forever in silence were it not for the second incident which engendered her continuing fear of a repetition thereof, unless she could put a stop to it. *This reaction appears typical of a woman who has been abused. Rape is a harrowing experience and the shock concomitant to it may linger for a while. It is upon this fear springing from the initial rape that the perpetrator hopes to build a climate of psychological terror, which could numb his victim to submissiveness.*<sup>28</sup>



Perhaps the best illustration of how the myth of normal behavior persists despite the repeated reiteration by the Supreme Court that people react differently to similar circumstances is the insistence in rape prosecutions at the trial court level and in investigations at the prosecution offices that rape victims must demonstrate tenacious resistance even to the point of incurring serious bodily harm. In earlier cases, the rule of tenacious or utmost resistance to the rape was required of victims. In later cases, the Supreme Court held that the law does not impose a burden on the rape victim to prove resistance particularly in cases where force or intimidation is alleged; the prosecution need only to prove force or intimidation by the accused. The Court has also held that the victim's failure to shout or offer tenacious resistance cannot be construed as voluntary submission in cases where rape was allegedly committed by the use of force or intimidation. Yet, women victims are usually required in trial courts and prosecution offices to show that they manifested tenacious resistance.

### Hail to the women

As in other countries of the world, the changes in the Philippine law on rape would not have come about if not for the voices of victims and the advocacy of Filipino women. That our laws are much better now is the result of their efforts. If women did not come together, talked and listened to each other about their experiences, and resolved to lobby to change the androcentric character of the rape law and the stereotypes perpetuated by the legal system, Philippine law would still be trapped in the antiquated perspectives that permeate many rape laws. Even the inclusion of men as victims in the present law resulted from women's advocacy. For their efforts, the least that the legal system can do is to take seriously the problem of rape and work assiduously to give justice to the victims.





## Endnotes:

- <sup>1</sup> REV. PEN. CODE, art. 266-A, as amended by Rep. Act No. 8353 (1997).
- <sup>2</sup> *Id.* art. 266-C.
- <sup>3</sup> People v. Palma, G.R. No. 148869-74, Dec. 11, 2003; People v. Soriano, G.R. Nos. 142779-95, Aug. 29, 2002.
- <sup>4</sup> G.R. No. 126148, May 5, 1999.
- <sup>5</sup> See People v. Rote, G.R. No. 146188, Dec. 11, 2003; People v. Rata, G.R. Nos. 145523-24, Dec. 11, 2003.
- <sup>6</sup> People v. Escobar, 281 SCRA 498, 507 (1997) (Emphasis Supplied).
- <sup>7</sup> People v. Echegaray, G. R. No. 117472, June 25, 1996, 257 SCRA 561, 573, citing People v. Abella, 228 SCRA 662, 666 [1993]; People v. Tesimo, 204 SCRA 535, 555-556 [1991]; People v. Castillo, 197 SCRA 657, 662 [1991] (Emphasis Supplied).
- <sup>8</sup> CA-G.R. SP No. 60353, Aug. 29, 2001
- <sup>9</sup> 309 SCRA 362 (1999)
- <sup>10</sup> G.R. Nos. 142779-95, Aug. 29, 2002.
- <sup>11</sup> G.R. No. 148869-74, Dec. 11, 2003.
- <sup>12</sup> Carmen Germaine Warner, *Rape and Rape Laws in Historical Perspective, in RAPE AND SEXUAL ASSAULT MANAGEMENT AND INTERVENTION I* (Carmen Germaine Warner ed., 1980).
- <sup>13</sup> REV. PEN. CODE, art. 266-C, as amended by Rep. Act No. 8353 (1997).
- <sup>14</sup> People v. Gagto, 253 SCRA 455, 460 (1996).
- <sup>15</sup> G.R. No. 144053, Dec. 11, 2003.
- <sup>16</sup> People v. Melivo, G. R. No. 113029, Feb. 8, 1996.
- <sup>17</sup> G. R. No. 117472, June 25, 1996.
- <sup>18</sup> See People v. Rote, G.R. No. 146188, Dec. 11, 2003; People v. Dizon, G.R. No. 144053, Dec. 11, 2003.
- <sup>19</sup> Sec. 6.
- <sup>20</sup> People v. Salarza, G. R. No. 117682, Aug. 18, 1997, 277 SCRA 578, 588.
- <sup>21</sup> G.R. No. 113029, Feb. 8, 1996, 253 SCRA 347, 358-359 (Emphasis Supplied).
- <sup>22</sup> People v. Salarza, G. R. No. 117682, Aug. 18, 1997, 277 SCRA 578, 592-594 (Emphasis supplied).
- <sup>23</sup> *Id.* at 603-606 (citations omitted).
- <sup>24</sup> People v. Dizon, G.R. No. 144053, Dec. 11, 2003.
- <sup>25</sup> People v. Talaboc, 256 SCRA 441 (1996); People v. Miranda, 262 SCRA 351 (1996); People v. Layagum, 262 SCRA 207 (1996); People v. Ariel, 261 SCRA 339 (1996); People v. Opelina, 412 SCRA 343 (2003); People v. Caabay, 409 SCRA 486 (2003); People v. Lambid, 412 SCRA 417 (2003); People v. Negosa, 409 SCRA 486 (2003).
- <sup>26</sup> People v. Galas, 262 SCRA 381 (1996).
- <sup>27</sup> People v. Oarga, 259 SCRA 90 (1996); People v. Gumahob, 265 SCRA 84 (1996).
- <sup>28</sup> People v. Ilao, G.R. Nos. 152683-84, Dec. 11, 2003.





## RAPE AND JUSTICE BEYOND THE LAW

Are we doing justice to victims when we engage in rape prosecution? Is justice achieved through the court process?

The experiences of lawyers and litigants in the legal system in pursuing rape complaints show a plethora of problems. These include outdated and unscientific methods of investigation, reliance on pure legal principles without the aid of other disciplines, myths and misconceptions about rape and prejudices against women and victims, poverty (as a barrier to reporting and a motivating factor for settlement), community values (such as restoring the peace as a motivation for amicable settlement) and indigenous traditions (settlement of rape cases within the community), class prejudice against the poor, and graft and corruption. These are more than enough to discourage any victim from reporting the rape. It is not surprising then that reporting of rape is the exception rather than the rule. Thus, in many a rape case, the wheels of justice never start to grind at all.



Rape is often taken in isolation from the community where it happens and devoid of its political, socio-cultural and economic context. Without that context, rape is not approached as a human rights and gender issue but as a peace and order problem or an unfortunate experience of the woman who, often, gets the blame for what happened. *The responsibility for the sexual assault is laid at the door of the victim for not detecting and preventing it from happening, and not upon the felon who schemed and caused the event to happen*, so says then Supreme Court Associate Justice Regalado in one case. That statement could very well describe what happens in many a rape case around the country.

In rape prosecutions, the evidence that is often emphasized, forwarded and given weight is limited to the physical, ignoring the psychological dimensions of the violation and the psychosocial sequelae of the victims. The emphasis on the objective and the tangible by the legal system prevents many women who could not show any physical injury from getting justice.

Rape prosecutions show that culture plays a critical role in the development, interpretation and application of the law. The concept of consent or lack of consent, for instance, is largely informed by notions of sexuality (e.g., it is a woman's responsibility to avoid wearing provocative or revealing attire because men, when provoked, have no control over their urges), gender-based expectations of women (e.g., to prove that she did not want the "sex" forced upon her she had to struggle, and to prove that she had struggled she had to be physically damaged in addition to the rape), prejudices against female behavior (e.g., wearing sexy clothes), etc. Similarly, the concept of harm in rape which is evident in the assignment of penalties is dependent on the appreciation of the effect of rape on bodily and psychological integrity. When the law assigns a much lower penalty to rape through sexual assault (i.e., using an instrument or object or penile penetration of the anus) than to rape committed by inserting the penis into the vagina, it in effect appreciates the harm caused by the former as greater than that caused by the latter. This is a simplistic view of rape that focuses only on the body parts involved.

Our attitudes, too, about punishment and forgiveness affect the prosecution of rape. Filipino culture seems to put importance on forgiveness, especially when family members are involved. It is not surprising that the law, despite that rape has become a crime against persons, still provides for pardon, albeit limited to marriage and marital rape. Even in cases where



pardon is not allowed, settlement is nevertheless encouraged. All these reveal our concept of justice manifested in our concept of harm, of punishment or redress of wrong, and of sufficiency of penalty, etc. In indigenous cultural practices on punishment, the contestation between national laws and local traditions is evident, and more often it is the latter that prevails.

The dominant traditions in the legal system often work against rape victims. The emphasis on the objective and the concrete (such as physical injuries) which flows from the positivist tradition of the legal system, or on the black and white (as against relationships of facts or data) works against rape victims particularly in situations where, for rape victims, things are not simply black or white, or where the choices are simply not between rape and death or not simply to struggle or not to struggle, or when expressions of lack of consent do not come in evident form. The system seldom inquires whether the political, economic and psycho-social vulnerabilities of women that resulted from their disempowerment or subordinated status in society have any bearing at all on their capacity to give free, informed and intelligent consent.

Another problem with the dominant legal traditions is its tendency to treat elements of a given situation as discrete, or disconnected from each other and from the context. This is particularly true in rape cases where there is often lack of appreciation of the socio-cultural, economic, political context of the behavior of victims, or the psycho-social structure of the victim's mind.

### **Law and legal practice are about dominant culture**

In the end, concepts in rape are subject to interpretation – consent, resistance, virginity, medical findings, etc. At the same time, interpretation is about proper training, cultural values and personal biases and prejudices. The behavior of both the victim and the perpetrator is evaluated through cultural lenses. Finally, the results of the interpretation and evaluation are presented to the community as “the official determination of truth” based on “objective and impartial evaluation of evidence and application of the law.” This is the decision or judgment, so officious and formal, yet in the final analysis is but a product of interpretation and evaluation that are largely culturally-based.



## What can be done?

Addressing rape and working towards its elimination require comprehensive strategies aimed at countering the dominant culture that contributes to women's victimization, whether in the family, in the local community and in legal system. Promoting a healthy sexuality, tolerance for difference and promotion of the concept of personhood are just a few that must be focused on.

For those who work to address the needs of women and children victims of rape and for those who work in the legal system, competence, humaneness, respect for and promotion of human rights (in general and specifically of women, children and the marginalized or oppressed sectors) are a must.

Transforming our rape culture requires the participation of the community in rape prevention and building a humane and violence-free society. Consciousness-raising, advocacy and organization of women, men, children and the entire community towards this long-term goal should be undertaken.







**The Women's Legal Bureau, Inc.**  
Room 305, College of Social Work and Community Development  
University of the Philippines, Magsaysay Avenue, Diliman  
Quezon City 1101 Philippines  
(63-2) 921-4389/920-3063 fax (63-2) 921-4389  
wlb@philonline.com.ph  
[www.womenslegalbureau.org](http://www.womenslegalbureau.org)