Fifth, that the public display right include the display of digitized works on the Internet; and

Finally, that the right of communication to the public extend to interactive on-demand Internet activity.

PROPOSED INTERPRETATIVE RULES AND REGULATIONS FOR COPYRIGHT PROTECTION OF ONLINE WORKS

1. Scope of the Reproduction Right § 177.1

1.1 The exclusive right of reproduction includes all acts of reproduction, including the creation of digital copies of works, whether temporary or incidental;

2. Fair Use of Copyrighted Work § 185

2.1 The fair use doctrine shall be understood to allow the creation of incidental or temporary digital copies made for the sole purpose of perceiving a work;

3. The Distribution Right § 177.3

3.1 The exclusive right of first distribution encompasses all acts involving first distribution, including the importation of an original and each copy of the work into the jurisdiction of the Republic of the Philippines;

3.2 A digital transmission of a copy of a work shall be considered a distribution; furthermore, a digital transmission of a copy of a work into a computer system within the jurisdiction of the Republic of the Philippines shall be considered an importation of a copy of the work;

3.3 The exclusive right of distribution shall be limited to the first distribution of the original and each copy of the work; *provided*, that the reproduction right is not restricted thereby;

4. The Display Right § 177.5

4.1 A display is deemed made when a work or a copy thereof is made accessible by wire or wireless means in such a way that members of the public may access these works at a place individually chosen by them;

5. Other Communication to the Public § 177.7

5.1 Other communication to the public includes on-demand interactive Internet activity.

THE ANTI-RAPE LAW AND THE CHANGING TIMES: NATURE, ISSUES AND INCIDENTS

VENUS V. LIQUE

ABSTRACT

Rape has been traditionally defined as a violation of a woman's chastity by having carnal knowledge of her against her will. This definition has been held over from the Spanish Penal Code of eighteenth century vintage. Throughout the years, there has been a tremendous rise in the incidences of rape. In Manila alone, a rape happens every day and half of the inmates in death row are rapists.

By the 1970's, women have become more aware of their rights. They also realized the corresponding need to lobby for legislative reforms to protect these rights. Gradually, laws have been passed addressing these needs. These laws, however, were insufficient. The incidences of rape, magnified threefold by media, increased and the clamor for better laws became more pronounced. Muffled cries of pain and suffering were turned into pleas for justice. And the legislators heeded by enacting the new Anti-Rape Law.

As early as 1988, the attempt to effect a legislative reform was initiated. The debates on the floors of Congress were high strung. Some people turned into the discussion with a hope that the legislature will come up with a sensible and problem-sensitive statute. Others explored the intellectual creativity of the law makers to alter an entirely inflexible, not to say stringent, concept of rape. And still for others, it was but a source of absurdity and entertainment.

In September 1997, the bill that was subjected to much controversy was enacted into law. People ask whether the new Anti-rape Law will address the very problem that brought it into existence. Some have challenged the rationale behind the law and a number were already anticipating the results it will bring about. This thesis will look at the nature, issues and incidents of the new Anti-Rape Law, with the hope of focusing the justifications which make it a sound law. Is there a need to alter the concept of rape vis-a-vis the changing times? Is there a need to re-classify the crime of rape from a crime against chastity to a crime against persons? Can a man be a rape victim? These are some of the many questions that have been set forth as incidents of the new Anti-Rape Law. This paper will attempt to thresh out these issues with a view to providing an intelligent and hopefully enlightening discourse on the matter.

I. INTRODUCTION

Victor Hugo once said, "No army in the world can stop an idea whose time has come". Truly, the idea of a new rape law for the Philippines has become an urgent imperative in the light of present-day realities confronting women.[1]

A. Background of the Study

Law, like mankind, has genesis and growth. Progress of law, whether effected by legislation or by judicial process, has been shaped principally by the exigencies of social life, by the forces of logic, history and by accepted norms of society. In short, law as a living thing changes depending upon the needs and conditions of the times.[2]

The primary concept behind legislation is to address the needs of society. These needs are caused by the changes in the way people deal with each other. Essentially, law-making touches on and is primarily directed towards societal relationships with the end in view of maintaining harmony among the people who comprise the community. Ultimately, the law aims to achieve individual, as well as collective happiness, which may only be possible if the members of the community can live in an atmosphere of freedom, peace and security.

The existence of penal law, as a consequence, is unavoidable in order to determine the acts that need to be punished and the corresponding penalty therefor. The State, however, should avoid the crippling evils of imposing unjustified sanctions. This is particularly true with respect to areas where the State itself has both a moral and a social obligation to curb criminality by addressing the problems that create it in the first instance.

The evolution of penal laws has been constantly timed with the changing needs of the society like clothing that has to be changed, remodelled, or totally discarded depending on the demands of the occasion. Lawmakers have since then played an important role in shaping the course of national progress by ensuring that stability is attained by keeping peace and freedom at an equilibrium. Laws that particularly address the maintenance of order in society have been seen as the teeth that shall cut through criminality. Thus, reforms are constantly being undertaken to fill the gaps in the law. Such need for reform finds its utmost importance in penal law in Philippine jurisdiction which adheres to the Latin maxim *nullum crimen, nulla poena sine lege*.[3] There must always be a law prescribing a penalty for an act before the latter can be an offense. The principle enunciates the idea that an act is not a crime unless the law so declares. In the absence of a law prohibiting a certain act, such act is deemed not criminal. There is no need to prevent the commission of the act because the need

[1] SENATE DELIBERATIONS 26 (15 August 1996) (Statement of Senator Leticia Ramos-Shahani) [hereinafter Shahani)

[2] Bienvenido C. Ambion., *Preliminary Consideration to Penal Code Reform*, WORKING PAPER FOR THE CONFERENCE ON CRIMINAL LAW REFORM 1 (1965),*citing* CARDOZO, NATURE OF JUDICIAL PROCESS 112, 123 (1921)

[3] There is no crime when there is no law punishing it.

therefor has not yet arisen or because the effects thereof are not injurious to the common good which the law seeks to protect.

In criminal law, it is essential to lay the background for understanding the complementary concepts of crime and punishment. In all penal legislation, the primary object is to define what act constitutes a crime and provide a penalty therefor. The rationale behind criminalizing particular acts is, as aforestated, largely dictated by the needs of the society to be protected against any contemplated peril. The legislature must identify such needs of society and prescribe a just and humane penal system by virtue of the power vested in them by the people.

The principle that there is no crime if there is no penalty prescribed by law has several meanings. In a narrow sense, the prohibition is that no act shall be a crime unless it is punishable at the time of commission. It also follows that Penal laws shall not be retroactive in their appliction. The Revised Penal Code defines felonies as acts and omissions punishable by law.[4] It further states that criminal liability is incurred by any person committing a felony although the wrongful act be different from that which he intended.[5] In Chapter Three on Penalties, the Revised Penal Code prohibits the punishment with any penalty of any act not prescribed by law prior to its commission.[6] Thus, the following elements are significant when dealing with the principle of legality of criminal law regardless of the consequent effect of the proscribed act:

a. nature of the action;
b. the actor; and
c. the corresponding penalty.

These factors ensure that criminal laws are carried out in accordance with the limitations imposed on those acts covered by the general law and those that are punished by special laws.

B. Historical Evolution of Philippine Criminal Law

Act No. 3815 of the Philippine Legislature, otherwise known as the Revised Penal Code, expressly repealed the Old Penal Code together with the Provisional Law for the Application of its Provisions, and some specified or enumerated penal acts.[7] The Old Penal Code, which was largely based upon the Spanish Penal Code of 1870, became effective in the Philippines on 14 July 1887[8] by virtue of the Royal Order of 17 December 1886. Prior to this, penal provisions were embodied in a number of royal decrees such as the Laws of the Indies, the *Novisima Recopilacion*, and the *Autos Acordados* of the Real Audiencia de Manila.[9]

[4] Revised Penal Code, Act No. 3815, art. 3 (1932).

[5] Revised Penal Code, art. 4.

[6] Revised Penal Code, art. 21.

[7] Ambion, *supra* note 2, at 2.

[8] U.S. v. Tamparong, 31 Phil 321 (1915).

[9] Ambion, *supra* note 2, at 2.

The best known attempt to revise the provisions of the Old Penal Code was the Proposed Correctional Code of Rafael del Pan, completed in 1916. This embodied modern theories and ideas of criminology and emphasized the rehabilitative function of penal law. Unfortunately, this was not enacted into law. Some of the provisions of this proposed code were, however, adopted by the Committee that drafted the Revised Penal Code,[10] which became effective on 1 January 1932. With the advent of American sovereignty, General Merritt, Commander of the American Occupation Army, ordered the said Code and other municipal laws to remain in effect.

C. The Need for Criminal Law Reform/Revisions

It has been 64 years since the Revised Penal Code took effect and the task of coming up with a new law presents a great problem. The legislature has to craft a statute that will embody the basic precepts of criminal law, repeal or modify provisions that need to be synchronized with the changing concept of the crime, and incorporate all laws that have been previously amended or enacted. These purposes have to be served in such a way that in the end, the law will reflect the interests, perspectives and foresight, or lack of foresight, of the people who make it. Just as the norms of society change, laws also change with the times.[11] Congress has aptly seen fit that an alternative to such a humongous task is to prioritize changes on the provisions of the law? The priorities run parallel to the objective condition of the peace and order situation of society.[12]

The need for immediate amendment or alteration of Penal Code provisions exists in situations where there are gaps in the law or *lacunae juris*, where there are errors sought to be corrected, when antiquated provisions need updating, or where obsolete provisions must be abrogated. Another situation where amendment or abrogation may become a necessity is in the case of non-user or non application of penal provisions. A law may lapse by its own terms or provisions or may be declared unconstitutional or may be repealed.[13] Although efforts have been made to undergo penal code reforms, the Revised Penal Code continues to be in effect. The practice has been to amend, alter or repeal a particular provision of the law as the need arises through amendatory legislation.

From the time of its passage, the Revised Penal Code has undergone various changes which either resulted from the striking out of some of its provisions, by express or implied repeal, or in the modification of some laws to suit the needs of the times. One such attempt to tailor-fit criminal laws to be truly responsive to the needs of the persons at the receiving end is the introduction of an expanded and atypical concept of rape. Known as the Anti-rape Law, Republic Act No. 8353 re-classifies rape as a crime against persons, expands the definition of rape by including other sexual assaults, and degenderizes the same.

[10] *Id.*

[11] Shahani, *supra* note 1.

[12] SENATE DELIBERATIONS 23 (15 August 1996) (Statement of Senator Raul Roco) [hereinafter Roco].

[13] Ambion, *supra* note 2.

D. Objectives of the Study

This work aims to analyze Republic Act No. 8353, finding justifications for the need to amend the law on rape as provided in the Revised Penal Code. Each provision will be examined to determine whether the same, taken together with the other provisions, and viewed from the context of the law itself, satisfies the requirements of validity and legal soundness. More attention shall be given to issues that raise questions relative to any legal infirmity that may invalidate the law or any particular provision thereof.

E. Thesis Statement

The enactment of the expanded rape law is justified considering the present needs and situation of society. Republic Act No. 8353, however, suffers from several infirmities. There is a need to amend the law in order to remedy the defects which may cause injustice to the accused or cast some doubt on the validity of its provisions.

F. Limitations and Methodology of the Study

This thesis will focus on the nature, issues and incidents of the Anti-Rape Law. The same shall mainly be determined by making a comparative analysis of Republic Act No. 8353, the Revised Penal Code, Philippine jurisprudence on rape, the general trend in rape reform legislation in the United States and the feminist views on the subject.

The deliberations of both the Senate and the House of Representatives on the bills proposing to amend the rape law shall be discussed extensively. Considering that various bills have been introduced in relation to this law, this study will employ Senate Bill No. 950 with respect to the deliberations in the Senate and will use House Bill No. 6265 in reference to the deliberations in the House of Representatives.

II. HISTORICAL EVOLUTION OF THE CRIME OF RAPE

Since 1932, and for more than six decades, the Revised Penal Code provisions on rape have been in effect. The Code's provisions penalizes the act of having carnal knowledge of a woman against her will with *reclusion temporal*.

On June 18, 1960, Republic Act No. 2632 took effect. It created special complex offenses of rape, such as rape with homicide[14] and rape resulting in the victim's insanity.[15] On June 20, 1964, Republic Act No. 4111 was passed. The Act increased the penalties for rape committed with the attendance of the enumerated aggravating circumstances. On 15 August 1975, President Marcos issued Presidential Decree No. 767 amending Article 294 of the Revised Penal Code. The issuance was propelled

[14] The corresponding penalty is *reclusion perpetua* to death.

[15] The corresponding penalty is *reclusion perpetua*.

by the disparity between the penalty for rape when committed with a deadly weapon or by two or more persons and that for robbery with rape when committed under the same circumstances. The penalty for the former is *reclusion perpetua* to death while the penalty for the latter, which is more serious, is *reclusion temporal* in its medium period to *reclusion perpetua*.[16] Considering that the crime of robbery with rape, being a complex crime, is more heinous than the crime of rape when committed with a deadly weapon or by two or more persons, the penalty for both acts should be the same, when committed under the same circumstances. Article 294 (2) of the Revised Penal Code was amended by increasing the penalty from *reclusion temporal* in its medium period to *reclusion perpetua* to death when the robbery is accompanied by rape committed with the use of a deadly weapon or by two or more persons.

To respond to the public clamor to provide special laws for the protection of children, Republic Act 7610[17] was enacted. It criminalizes the act of having sexual intercourse with or committing lascivious acts on a child exploited in prostitution or subjected to other sexual abuse. Under the Revised Penal Code, when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted for rape or lascivious conduct. The death penalty was re-imposed in 1995 by virtue of RA No. 7659. The same act classified rape as a heinous crime and provided for additional qualifying and aggravating circumstances when the death penalty may be imposed.[18]

In essence, all the amendatory laws to the crime of rape dealt with increasing the penalties by considering attendant circumstances that were previously not covered and which rendered the commission of the crime more heinous. No attempt was made at changing the concept of rape nor at providing for other means of its commission. The lawmakers maintained the traditional concept of rape as a violation of a woman's chastity by having carnal knowledge of her against her will or when she is otherwise deprived of reason or is incapable of giving a valid consent thereto.

[16] The disparity is due to the failure to make a corresponding increase in the penalty for robbery with rape after increasing the penalty for rape when committed with a deadly weapon or by two or more persons.

[17] The law was enacted on 17 June 1992.

[18] Aside from the aggravating circumstances provided in the Revised Penal Code, as amended, rape committed with the following attendant circumstances shall be punished by death:

1. when the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law-spouse of the parent of the victim.
2. when the victim is under the custody of the police or military authorities.
3. when the rape is committed in full view of the husband, parent, any of the children or other relatives within the third degree of consanguinity.
4. when the victim is a religious or a child below seven (7) years old.
5. when the offender knows that he is afflicted with the Acquired Immune Deficiency Syndrome (AIDS) disease.
6. when committed by any member of the Armed Forces of the Philippines or the Philippine National Police or any law enforcement agency.
7. when by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation.

III. BACKGROUNDER ON THE NEW RAPE LAW

A. Constitutional Recognition of Women's Rights

One of the remarkable features of the 1987 Constitution is the recognition of women's rights as embodied in the Declaration of State Policies. Article II, Section 14 provides as follows: "The State recognizes the role of women in nation building and shall ensure the *fundamental equality* before the law of men and women (emphasis supplied)."

This new provision aims at providing equality, and at the same time realizing the inherent difference between men and women. Beyond stating that women do have a role in nation-building, the provision makes the more important assertion that there exists a fundamental equality between women and men before the law.[19] The Constitution, in speaking of fundamental equality realizes the similarities and differences between the two genders. Although women are different in biological make-up, feminists have long sought for a recognition of rights that are normally given to men.[20] They have pushed for the realization that both genders deserve to be granted the same amount of opportunity and protection under the law. Women, however, still sought for a different kind of treatment in situations where they can easily be exploited.

The Constitution is regarded as the body of rules and maxims that establishes certain fixed principles on which government is founded.[21] With respect to certain basic and inherent individual rights, it is not the Constitution that creates or confers them. It merely recognizes and protects these rights— it does not bring them into existence.[22] Verily, the provision on women's rights, though included for the first time in the Constitution, is more appropriately an acknowledgment of the glaring reality that women play an important role in nation building. It is thus apt to give recognition to women and be the aware that though equality is ultimately sought to be achieved, the times mandate that ample protection to women's rights be given sufficient attention. In this respect, the idea of equality in inequality finds application. Rape is a crime where the biological differences between the parties matter and the manifestation of gender discrimination in the treatment of the female victim is the greatest. The difficulty lies in the social, procedural and judicial attitudes and practices.[23]

B. The Beijing Conference on the Protection of Women's Rights

The Fourth World Conference on Women under the auspices of the United Nations was held on September 4 - 15, 1995 in Beijing, China. The forum recognized

[19] JOAQUIN BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY 54 (1988).

[20] Joan Wallach Scot, *Introduction* to OXFORD READINGS IN FEMINISM, (Joan Wallach Scot ed., 1996).

[21] 11 AM. JUR. 2d 606.

[22] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 3-4 (1989).

[23] *Legal Advocacy The Rape Bill, in* PAGDAYAG, PILIPINA LEGAL RESOURCES CENTER (12th ed.1990).

that violence against women is an obstacle to the achievement of the objectives of equality, development and peace. "Violence against women" was defined as any act of gender-based violence which is likely to result in, physical or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.[24] In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. This reality has resulted in unequal power relations between the two genders which, in turn, has led to domination over and discrimination against women— thereby crippling the latter's potential for achievement and growth. In its platform for action,[25] the participants drafted out an agenda for the government and community agencies of the participating countries. The strategic objective consists of encouraging the implementation of integrated measures to prevent and eliminate violence against women. Among the major points threshed out are the following:

- Enact and/or reinforcé penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;

- Adopt and/or implement and periodically review and analyze legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and prosecution of offenders; take measure to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;

- Adopt laws, where necessary, and reinforce existing laws that punish police, security forces or any other agents of the State who engage in acts of violence against women in the course of the performance of their duties, review existing legislation and take effective measures against the perpetrators of such violence.

In due course, the Senate issued a resolution directing the Senate Committee on Women and Family Relations to conduct an inquiry in aid of legislation into the integration and implementation of the Beijing platform for action. [26]

[24] Report of the Main Committee, Fourth World Conference on Women, Beijing, China, 14 August 1995, 2.

[25] *Id.*

[26] Senate Resolution No. 401, (30 April 1996).

C. *The Essence of Rape*

A full comprehension of rape may be had by considering the historical significance it has acquired. Through out the ages, this heinous criminal act has been used as a tool for the subrogation of women be it in war or peace time. It may be recalled that in the war in Bosnia Herzegovina, rape was consciously adopted as a means of ethnic genocide and the rapes of women in Bosnia-Herzegovina were not confined to the penile penetration of the vagina. Rape therefor is a significant term. No other term, though synonymous, can capture its essence.[27]

In our jurisdiction, rape has always been regarded as one sordid violation of a woman's honor. It has been classified as a crime against chastity. The word chaste is derived from the word "castus" which connotes purity suggesting that the victim should abstain from extra marital or pre-marital sexual conduct.[28] This colonial connotation of rape was sought to be abolished considering the need to perceive the act from the view point of the victim who suffered a violation of her person rather than her chastity. The essence of the crime of rape is not the fact of intercourse, but the injury and outrage to the modesty and feeling of the woman, by means of carnal knowledge feloniously and forcibly effected.[29] Due to the predominant role of physical violence in many rape cases, several writers have argued that rape should be treated not as a sex crime but as an assault against the person with sex as the weapon.[30]

The Supreme Court in *People v. Reyes*,[31] had occasion to rule on the nature of the crime of rape:

> The State's policy on the heinous offense of rape is clear and unmistakable. Life is made forfeit under certain circumstances. At first blush, the harshness of the penalty may be cause for concern, considering that by the very nature of its commission, it is both sordid and joyless, the pleasure derived, if any, being minimal. To be thereafter sentenced to a long period of confinement, perhaps for the rest of one's life, even to suffer death may appear excessive. Nonetheless, there is sound reason for such severity. It is an intrusion into the right of privacy, an assault on human dignity. No legal system worthy of the name can afford to ignore the traumatic consequences for the unfortunate victim and previous injury to the peace and good order of the community.

Taken together, the Constitution itself and the Penal Code provisions on rape, by providing severe penalties for its commission, show the legislative intention to curb rampancy of that sexual offense to protect women against the unbridled bestiality of persons who cannot control their libidinous proclivities.[32]

[27] Sibol's Position on the Anti-Rape Proposals, Prepared by the Women's Legal Bureau, Inc. for Sibol (19 July 1996).

[28] Rangita de Silva, *Working Towards New Rape Legislation: A Review of the Philippines Bill*, LAW AND SOCIETY TRUST REVIEW,16 (January 1, 1992). [hereinafter Reyes]

[29] LEONARDO P. REYES, THE LAW ON RAPE 4, *citing* State vs. Rome, 56 Ariz 174, 185 (1994).

[30] FIELD HUBERT & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 55 (1980).

[31] 60 SCRA 126 (1974).

[32] People v. Babasa, 87 SCRA 672 (1980).

D. The Feminist Movement Behind the Anti-Rape Law

In March 1992, thirteen women organizations and support groups decided to join forces to form the *Sama-samang Inisyatiba ng Kababihan sa Pagbabago ng Batas at Lipunan* (Sibol). Sibol aims, among other things, at working for changes in the law with violence against women as a priority issue, and rape, its initial focus.[33] The women behind the force took on the task of reviewing the existing provisions on rape and formulating a legislative proposal.

In 1995, Sibol drafted an anti-rape bill. This bill was filed in the Senate as Senate Bill No. 812 and in the House of Representatives as House Bill No. 4228. The Sibol Rape bill proposed a definition of rape that veered away from the traditional phallocentric view of rape and more aptly captured the essence of the crime— that rape is a violation of a woman's dignity. The bill did not distinguish between genders. They underscored the fact that rape does not merely consist of forced penile penetration but of the perversity of imposing one's self upon another in a parody of sexual union.[34]

In their call for a responsive legislative action, the group echoed the sentiments of women who are also confronted with the reality of violence against their persons and dignity even as they struggle to work, raise families, and live dignified lives under deteriorating living conditions. For women, the culture that breeds violence against them is the very same culture that lays the blame on them for the rape, trivializes the violation, defines rape for them in denial of their experience, and puts them on trial for their personal background.[35] They thus raised the gender-bias of legislators and their seemingly insensitive reaction to the clamor for reforms in the law. Sibol contrasted the so called "universality" of rape with the "universality" of the sentiments of victims of sexual violence.

> The so-called "universal" understanding of rape as penile penetration of the woman's genitals is not necessarily women's understanding of the concept. The present[36] legal definition of rape could not have come from the women who experienced the horrors of being at the receiving end of men's creative violent fantasies. It is not true that the penis-centered definition of rape is universal. Progressive rape laws that encompass other acts like forced anal intercourse have already found their way into the statute books of some countries and states in the U.S.[37]

The matrix that energizes this bill is the breakthrough of power occurring in women's struggle to reject the sexism of inherited constructions of female identity

[33] *A Primer on the Sibol Rape Bill*, Women's Legal Bureau, Inc., (unpublished) [hereinafter Sibol Rape Bill].

[34] Cruz Grace T., *"The Law on Rape"*, HERsay, Eleanor C. Conda, Evalyn G. Ursua, Riza Faith Ybanez, ed., Women's Legal Bureau, Inc. p. 5 [hereinafter *Law on Rape*].

[35] Philippine Daily Inquirer, July 21, 1996.

[36] Referring to the traditional concept of rape.

[37] Sibol Statement on the Anti-Rape Bill (23 February 1994).

and to provide new legal constructs that affirm their own worth.[38] Transcending the archaic signification of women subjugation to men as reflected in the inadequacy of the laws that seek to protect them, Sibol has come upon a realization that the best interest of women must be promoted and defended primarily by women themselves. This is not a form of reverse sexism, but merely, a sober assessment that tradition and privilege do not welcome change.[39] It is merely assumed that rape, along with battering, sexual harassment and other behavior is sometimes an inevitable and "natural" hazard of being a woman when confronted with criminally inclined men. Rape is not simply a sex crime but a violent exercise of power. Studies reveal that rapists are not always after the sex, but the power emanating from the degradation, pain and humiliation of their victim. Rape is not simply a release for men's lust but a means by which men ferociously assert power over women.[40]

E. Legislative Actions Towards a New Rape Law

As far back as 1988, a bill proposing to amend the law on rape, in response to the clamor of feminist groups to afford protection to women against violence, was introduced in the Senate. A similar bill was introduced in the House of Representatives but the same died a natural death. In 1995, the deliberations on Senate Bill No. 950 which consolidated Senate Bills Nos. 208, 272 and 812[41] and which was principally sponsored by Senator Raul Roco took a serious turn and was deliberated on actively in anticipation of its passage. The said bill reflected many features of the several bills earlier introduced which had proposed that rape be classified and defined as a crime against persons.

A week after the bill was approved by the Senate on third reading, the House of Representatives began deliberations on House Bill No. 6265 providing for a new rape law. Representative Bakunawa cited the urgency to pass a rape law seen through the eyes of women and based on their realities and experiences. She mentioned that Filipino women have convinced the Executive Department of the rightness and justness of their cause so much so that in his State of the Nation Address, President Ramos considered the rape bill as an urgent legislative measure of his administration and as one of his top concerns in the Social Reform Agenda.[42]

The bills were unanimously approved by both houses[43] which paved the way for a consolidated version of the two bills deliberated on in the Bicameral Conference Committee. Republic Act No. 8353 was passed into law on 30 September 1997.

[38] Sponsorship speech of Sen. Miriam Defensor-Santiago on S.B. No. 950 (4 June 1996).

[39] *Women in Politics Program*, Congressional Research and Training Service, Inc. (unpublished).

[40] *Law on Rape*, *supra* note 34.

[41] These bills were earlier introduced proposing an expanded rape law.

[42] Deliberations on HB 6265, HOUSE JOURNAL No. 8-16, 30 (20 August 1996).

[43] The Senate approved S.B. No. 950 on 15 August 1996 while HB No. 6265 was approved on November 11, 1996.

IV. TRADITIONAL CONCEPT OF RAPE

A. As Defined by Law

Prior to Republic Act No. 8353, rape under the Revised Penal Code is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation;
2. When the woman is deprived of reason or otherwise unconscious; and
3. When the woman is under twelve years of age or is demented.[44]

Under this concept, rape is committed by having carnal knowledge of a woman against her will either because she was forced upon or intimidated or is incapable of giving consent to the sexual act because she is deprived of reason, unconscious or impaired to fully comprehend the nature and consequences of the act.

The crime of rape, found in Title Eleven of the Revised Penal Code, was classified as a crime against chastity.

B. As illustrated by jurisprudence

The Revised Penal Code does not provide for a definition of carnal knowledge. From jurisprudence, the latter has evolved into a clear-cut concept:

> The law may now be considered as settled that complete or total penetration of complainant's private organ is not necessary to consummate the crime of rape. The slightest penetration will suffice. Neither is the rapture of the hymen essential for the offense of consummated rape. It is enough that there is proof of entrance of the male organ within the labia of the pudendum. Therefore it is unnecessary to show to what extent penetration of the woman's body has been made. It is adequate if the woman's body is entered.[45]

Prescinding from the above, carnal knowledge exists with the slightest penile penetration of the female organ. Rape is consummated by the mere touching of the penis and the labia of the woman's genital. Jurisprudence has likewise illustrated that the breaking of the hymen,[46] the bleeding of the vagina, and the presence of spermatozoa[47] are not essential to constitute consummated rape. Considering that no external signs of injury are required for a conviction, courts have been careful in appraising the evidence in a prosecution for the crime of rape. Such evidence is normally limited to the testimony of the victim and the defense of the accused.

Since rape is a crime committed in secrecy, it normally involves only the victim and the assailant as the two witnesses to the crime. Considering the gravity of the

[44] Revised Penal Code, art 335.

[45] People v. Bacani, 181 SCRA 393 (1990).

[46] People v. Echegaray, 257 SCRA 561 (1996).

[47] People v. Canada, 253 SCRA 277 (1996).

accusation, courts have laid down the following principles in a prosecution for a crime of rape:

1. an accusation for rape can be made with facility; it is difficult to prove but it is more difficult for the accused, though innocent, to disprove it;

2. in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant should be scrutinized with extreme caution; and

3. the evidence for the prosecution must stand or fall on its own merits, and cannot be allowed to draw strength from the weakness of the evidence for the defense.[48]

Through the lapse of time, the Supreme Court has variably treated an accusation for rape by weighing the evidence for the prosecution *vis-a-vis* that for the defense. On one hand, it has allowed convictions for rape even on the strength of the lone testimony of the prosecution. On the other, jurisprudence has established the rule that an accusation for rape can be easily concocted, thus the need to scrutinize the evidence and to render a conviction only when clearly warranted.

Often, the court puts great weight on the presumption that an accusation of rape, with all its negative connotations and consequential smear on a woman's reputation, cannot be easily concocted. Philippine society has remained traditional in viewing rape. A rape victim has to suffer the trauma of revealing that the crime has destroyed her chastity rather than her personhood. In view of the inbred modesty and the consequent revulsion of a Filipina against publicly airing things that affect her honor, seldom would a complainant reveal and admit the ignominy she had undergone if it were not true. Besides, by so testifying, she makes public a painful and humiliating secret which others would have simply kept to themselves forever. She could jeopardize her chances of marriage or foreclose the possibility of a blissful married life as her husband may not fully understand the excruciatingly painful experience which would always haunt her.[49]

With respect to victims of tender age, the courts have been more compassionate. It is presumed that an unmarried teenage lass will not ordinarily file a complaint for rape against anyone if it were not true. Despite the courageous act of filing a complaint, rape nevertheless exacts a heavy psychological and social toll on the offended party. Said victim is usually victimized twice: 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.[50]

[48] People v. Quintal, 125 SCRA 734 (1983).

[49] People v. Gecomo, 254 SCRA 82 (1996).

[50] People v. Melivo, 253 SCRA 347 (1996).

In effect, jurisprudence has laid down the basic rule that unless there be reason to believe that the rape story has been fabricated, when a victim says that she has been raped, she says in effect all that is necessary to show that rape has been committed.[51] This proposition has evolved in case law to mean that a conviction for rape may be sustained on the sole uncorroborated testimony of the complaining woman. Rape is inherently a crime that is rarely committed in the presence of witnesses. As such, the law recognizes that it is a charge so easily made and so hard to be refuted. The Supreme Court, in explaining the evidentiary value of testimonies of rape victims, ruled as follows:[52]

> Thus, to obviate the danger and impiety of falsehood, and to repel any inference that the story may have been a mere fabrication, every story of defloration must never be received with precipitate credulity. To sustain a conviction, the testimony of the offended woman must be inherently clear and convincing and not materially discredited or impeached. And if corroborated by other evidence, the same must have reasonable tendency to connect the defendant with the commission of the offense.

V. TRADITIONAL CONCEPT VS. NEW CONCEPT: A CASE OF LEGAL EXPERIMENTATION

The legislative power is vested in Congress.[53] This power is plenary,[54] and like the boundaries of the ocean, is unlimited.[55] Subject to the limits provided by the Constitution, the full power of enacting, amending and repealing laws is exercised by the legislature.

The principal intent for enacting a new law expanding the definition of rape is to address the increasing problem of rape incidents, carrying with it the seemingly aggravating abuse on women and children. Senator Leticia Ramos-Shahani urged members of the Senate to pass a rape reform bill that is reflective of the interests, perspectives and foresight of people who make laws. Just as the norms of society change, so too should laws change with times.[56]

The unfortunate delay in passing the Anti-Rape Law is indicative of the reluctance of the lawmakers to experiment with a new, not to say radical concept of rape. Several bills on the subject have been filed in both Houses of Congress as early as 1988. Despite efforts exerted by their authors, the bills were met by strong opposition. In 1995, Senate Bill No. 950 was filed proposing to amend rape as punished under the Revised Penal Code. Conspicuously, the time was ripe to face a

[51] People v. Soterol, 140 SCRA 400 (1985); People v. Poculan, 167 SCRA 176 (1988).

[52] People v. Ulpindo, 256 SCRA 201 (1996).

[53] PHIL. CONST. art. VI, § 1.

[54] BERNAS, *supra* note 19, at 66.

[55] Government v. Springer, 50 Phil 259 (1927).

[56] SENATE DELIBERATIONS, p. 26 (15 August 1996).

radical change in legislative history. The lawmakers have finally reconsidered a rape reform law amidst strong antagonism from conservative members who preferred to adhere to the carnal knowledge statute.

The new rape law is a revolutionary one in the sense that it veers away from the traditional concept and introduces very modern ideas of how rape can be committed. In the United States , since the latter part of the 1970's. Rape reform legislations have been undertaken in the United States since the latter part of the 1970's. During that period also 33 states have amended their rape status or laws governing sex offenses. Some states, however, have only passed technical amendments or made minor changes. Many states have entirely rewritten their laws governing rape.[57] Many features of the American rape laws have been changed. Some states have adopted rape statutes that totally precluded the admissibility of evidence regarding the sexual conduct of the victim with third parties. Some have enacted provisions of sex-neutral rape, or of sexual penetration including acts other than vaginal intercourse or have replaced the concept of rape with a reformulation of the offense into sexual assault, sexual battery, or criminal sexual conduct. A common pattern in rape reform statutes is the replacement of the single crime of rape, or the two crimes of rape and statutory rape, by a series of graded offenses, including lesser offenses with minor penalties. Many states have defined offenses in terms of degrees in order to establish gradations of penalties of various prohibited acts while others have preferred to accomplish a similar result by defining aggravating circumstances.[58]

Many of these features are found in the anti-rape law.

VI. THE ANTI-RAPE LAW : A CLOSER VIEW

A. Classification of the Crime

Republic Act No. 8353 is entitled "An Act Expanding the Crime of Rape, Reclassifying The Same as Crime Against Persons, Amending for the Purpose Act No. 3815 as Amended, Otherwise Known As The Revised Penal Code, And For Other Purposes." Section 2 thereof provides as follows :

> Rape as a Crime Against Persons - The crime of rape shall hereafter be classified as a Crime Against Persons Under Title Eight of Republic Act No. 3815, as amended, otherwise known as the Revised Penal Code. Accordingly, there shall be incorporated into Title Eight of the same Code a new chapter to be known as Chapter Three on Rape ...

The re-classification of rape from a crime against chastity to a crime against person has been earnestly pushed by the authors of the bills. The reason behind such move is to eliminate the colonial connotations of the crime of rape when women

[57] CRUZ, *supra* note 22, at 154.

[58] *Id.*

were considered chattels in the olden times. The predominance of physical violence in many rape cases changed the notion of rape from a sex crime to an assault against the person with sex as the weapon.[59] Such a change is brought about by the realization that the chastity of a woman has no significant bearing on the crime of rape. Chastity is not even an element of the offense. In reality, rape is an assault on the person of the woman with the male organ as the weapon of aggression.[60]

The re-classification enables any person[61] to institute the filing of the complaint.[62] On one side, it facilitates the filing of complaints because the reclassification takes out the crime from one that may only be prosecuted *de officio*.[63] On the other, it intrudes into the privacy of the victim who may have chosen to keep the crime in secret for personal reasons.

Considering that Republic Act No. 8353 amends the provisions of the Revised Penal Code, the crime of rape is incorporated into Title Eight of said Code. The various provisions are designated as Articles 266-A to D following Article 266[64] of the original text.

B. Rape: When and How Committed

1. RAPE UNDER PARAGRAPH ONE

Rape is committed under paragraph one of RA No. 8353 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 years of age or is demented, even though none of the circumstances mentioned above be present.

Rape under this paragraph retains the basic concept of the carnal knowledge found in the Revised Penal Code. For its commission, rape must involve carnal knowledge of the woman accomplished through any of the means mentioned under paragraphs (a) to (d) thereof. Carnal knowledge is the actual contact of the sexual

[59] *Id.* at 3-4.

[60] ROCO, *supra* note 12.

[61] The previous version of SB No. 950, enumerated the persons who can file the complaint. An amendment to include a provision to state that any person can file it was considered.

[62] SENATE DELIBERATIONS, 17 (6 August 1996).

[63] Revised Rules of Court, Rule 110, § 5.

[64] Slight Physical Injuries and Maltreatment.

organs of a man and a woman. It denotes penetration, however slight. The new law speaks of the "offended party" instead of the "woman" although the first paragraph considers that it is only the woman who can be a victim of rape commited under any of the four enumerated circumstances. This revision is to comply with the requirements of the second paragraph which speaks of genderless rape committed with any of the means mentioned in paragraph one.

a. Through force

Force is a constraining power, compulsion or strength directed to an end. Usually the word occurs in such connection as to show that unlawful or wrongful action is meant.[65] Force is a necessary ingredient in the commission of the common-law crime of rape and is essential in every case in which the complainant had the use of her faculties and physical powers at the time and was not prevented by terror or the exhibition of brutal force.[66]

Force or violence required in rape cases is relative. When applied, it need not be too overpowering or irresistible. What is essential is that the force used is sufficient to consummate the purpose which the offender had in mind, or to bring about the desired result.[67] External signs of physical injuries need not be present and the absence of the same does not negate the commission of the crime of rape. Force need not be irresistible. All that is necessary is that the force used by the accused is sufficient to consummate his evil purpose.[68]

b. Through threat

The commission of rape through threat is a new provision. Threat has been defined as a declaration of the intention or determination to inflict punishment, loss or pain on another, or to injure another by the commission of some unlawful act.[69] Despite its absence, however, threat has been considered by the courts as almost synonymous to force. The effect of such a factor is to deprive the victim of the power to repel the contumacious act. It creates in her mind an imaginary force that practically ties her hands and renders her incapable of resisting the assault. When threats and intimidation are employed, the victim submits herself to the embrace of her rapist because of fear.[70] It creates a real apprehension of dangerous consequence, or bodily harm. It has the effect of overpowering the mind of the victim that she dares not resist.

[65] BLACK'S LAW DICTIONARY 773.

[66] 65 AM. JUR. 2D 764.

[67] People v. Pasco, 181 SCRA 233 (1990).

[68] People v. Arengo, 181SCRA 344 (1990).

[69] BLACK'S LAW DICTIONARY 1651.

[70] People v. Villanueva, 254 SCRA 202 (1996).

c. Through intimidation

The crime of rape can be committed even if no force is used. Intimidation is sufficient.[71] Intimidation is the act of deterring a person by threats. It consists in causing or creating a fear in the mind of a person or in bringing a sense of mental distress in view of the risk or evil that may be impending, real or in imaginary.[72] It is unlawful coercion, or duress or putting the victim in fear.[73]

Intimidation must be viewed in the light of the victim's perception and judgment at the time of the rape. Thus, there is a need to judge the existence of intimidation as gathered from the facts of the case. In this respect, no hard and fast rules can be applied uniformly in every case. It is therefore enough that it produces fear which is manifested by the unwilling submission of the victim to the consummation of the sexual act. Intimidation also explains why there are no traces of struggle which would indicate that the victim fought off her attacker.[74]

d. When the victim is deprived of reason or otherwise unconscious

Rape is accomplished against the will of the prosecuting witness. The word "will" as employed in defining the crime of rape is not construed as implying the faculty of mind by which an intelligent choice is made between objects but rather as synonymous with inclination or desire. In that sense, it is used properly with reference to persons of unsound mind.[75] It is generally held that the words "against her will" mean the same thing as "without her consent." Such clarification is more accurate, since the crime may be committed when the woman exercised no will at all, as when she is unconscious from the use of intoxicants, or *non compo mentis*.[76]

For carnal knowledge of a woman deprived of reason to constitute rape, the deprivation contemplated by law does not need to be complete. Mental abnormality or deficiency is enough. Rape may be committed while the woman is sleepy, because such lethargy may be a result of an illness or a drug administered by the offender.[77]

e. Through fraudulent machination

The law introduces a new means by which rape may be committed. Fraudulent machination and grave abuse of discretion were not included as a means of committing rape under the Revised Penal Code.

[71] People v. Garcines, 57 SCRA 653 (1974).

[72] REYES, *supra* note 29 at 11 *citing* People v. Marco, 12 C.A.R. (2s) 383.

[73] BLACK'S LAW DICTIONARY, 957.

[74] Echegaray, 257 SCRA 277.

[75] 36 WORDS AND PHRASES 109 (1962), *citing* Crosswell v. People, 13 Mich. 427, 432, 87 Am. Dec. 774.

[76] 65 AM. JUR. 2d 762.

[77] ANTONIO L.GREGORIO, FUNDAMENTALS OF CRIMINAL LAW REVIEW 984 (1997), *citing* Viada.

Fraudulent machination as a means of accomplishing rape was introduced by Senator Juan Ponce Enrile. Explaining his amendment, the senator gave the following example:

> For instance, in the middle of the night, a man approaches a woman and the woman allowed the man to have carnal knowledge with her in the belief that the man is the husband of the woman without the man asserting that he is not actually the husband. I would consider this actually a fraudulent machination . . . .
>
> This is particularly true in the case of twin brothers.

The amendment was approved without any objection.[78]

f. Grave abuse of authority or relationship

This manner of committing rape was visualized to penalize persons who succeed in having sexual intercourse with a woman by using their moral ascendancy over the latter. Professors or teachers may have carnal knowledge of minors or their students without force or deprivation of reason. They succeed in doing so because the poor victim submits to the authority or the offender. With respect to abuse of relationships, sexual carnal knowledge may be had in incestuous relationships or similar category of relationship.[79] The key word to consider is not necessarily "order" but "abuse" and anything that signifies abuse of authority.[80]

g. Under twelve years of age

This rape is what is generally termed as statutory rape. When the offended party is less than twelve years old, rape is committed although there was consent to the sexual act. The law does not consider that kind of consent voluntary and presumes that the offended party does not and cannot have a will of her own.[81] The fact that there was no struggle or outcry from the offended party is immaterial in the rape of a child below twelve years of age and there could still be a conviction despite the absence of force and intimidation because any consent given by the victim is ineffectual on account of her tender age.

There have been proposals to increase the age of consent from twelve to thirteen or fourteen years considering that greater protection should be afforded the children. The final version of Senate Bill No. 950 provides for the age of fourteen while its counterpart, House Bill No. 6265, provides for twelve. During the Bicameral Conference Committee Meetings, the House panel felt very strongly against increasing the age for statutory rape from twelve to fourteen. The reason forwarded for the reconsideration to retain the previous age for statutory rape is that the children of this generation are at the age of discovery at thirteen or fourteen. It may just be

[78] SENATE DELIBERATIONS, 9 (6 August 1996).

[79] *Id.* at 20.

[80] H.S. JOURNAL NO. 17-23, 36 (24 September 1996).

[81] People v. Conchada, 88 SCRA 683 (1979).

that in these acts of innocent discoveries, carnal knowledge of the girl may have been effected.[82] Considering that the imposable penalty is death, the increase in the age of statutory rape may prove to be unduly harsh.[83] The panel agreed with such proposal.[84] The age of twelve has been retained.

h. When the woman is demented

During the Senate deliberations, a confusion between the phrase "deprived of reason" and the word "demented" arose. This arose from a question on the definition of insanity and whether the same will fall under the former or the latter. Senator Juan Flavier explained that dementia, from a medical point of view, has to be classified according to the precise ailment. He explained the matter as follows:[85]

> *If we use the word "demented," that is the generic term that will encompass everything.* But if we approach it medically, then we will have to classify the disorders according to the precise ailment. For example, there is such a thing as dementia praecox which is to say that one's memory is affected when he is young. There is one that comes out when one is older or elderly, that is where the Alzheimer-type comes in. Then there is also the question of degree of mental ability, and it is a form of dementia. But it is pegged on the I.Q. of the individual, so that is where the classification of imbecile and all of that come into the picture. (emphasis supplied)

Clearly, the word "demented" refers to an offended party whose incapacity to consent consists of a psychological or mental abnormality which may either be congenital or acquired. Sexual intercourse with a mental retardate is definitely rape[86] because the woman is totally incapable of intelligibly understanding the nature and consequences of the act and is thus unable to give a valid consent thereto.

2. RAPE COMMITTED UNDER THE SECOND PARAGRAPH

Paragraph two of Republic Act No. 8353 constitutes the most drastic revision in the new rape law. It expands the definition of rape by covering other forms of sexual assault and makes rape a gender neutral crime. The law provides as follows :

> Rape is committed-
>
> 1. By any person, who, under any of the circumstances mentioned in paragraph 1 hereof, 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 the person.

Rape has been expanded to include other sexual acts not previously covered by

[82] Bicameral Conference Committee on Youth, Women and Family Relations (3 June 1997) 8.

[83] *Id.*

[84] *Id.* at 62.

[85] SENATE DELIBERATIONS, *supra* note 78, at 12.

[86] People v. Sunga, 137 SCRA 131 (1985).

the old law. Since carnal knowledge as defined denotes penile and vaginal contact, other sexual acts, not falling within this definition, even just as depraved, will not constitute rape. The inclusion of paragraph two adopts the view that penile penetration should not be the sole indicum of rape.[87] Years of intensive work with and for women who have been violated have brought the conclusion that for women, it is immaterial whether the violation was acheived through the vagina, anus or mouth, or whether what was used was the penis, instruments or objects. Studies conducted indicated that from the violator's point of view, there is nothing sexual or erotic in these kinds of violations. The acts are all about power and control.[88]

The Senate Bill originally limited rape victims to women. During the deliberation, however, a proposal to degenderize rape was approved. The move was to recognize the need that the gender of the victim or the offender should not be considered material in keeping with the re-classification of rape from a crime against chastity to a crime against person.

There are several ways of committing rape under this paragraph but the general idea is that its commission is effected by the insertion or introduction of the penis or any other instrument or object into another person's genital, anal orifice or the penis into another person's mouth. This manner of commission is considered of a lesser degree, thus, the imposable penalties are several degrees lower.

The acts contemplated by this provision can be categorized into two:

1. Under the first category, the sexual assault is committed by inserting the offender's penis into the mouth or anal orifice of the victim. By the words of the law, this act can only be accomplished by a male offender but the victim may either be of the two sexes. With the use of the word penis, the law clearly speaks of only male persons. The victim's gender, however, is not categorized as long as the penis is inserted into the mouth or anal orifice of the offended party. It is important to note that the word genital is not mentioned, otherwise, the rape, if done against a woman, would be committed by carnal knowledge and thus fall under paragraph one.

2. The second category speaks of the commission of rape by inserting any instrument or object into the genital or anal orifice of the victim. Both the offender and the offended party need not be of a particular gender. Under this rape, the offender may either be a male or a female and the crime may be committed against any victim belonging to either sex.

The above acts must be committed by any of the means mentioned under paragraph one.

[87] *Law on Rape, supra* note 34.

[88] Sibol's Position on the Anti-Rape Proposals.

C. Penalties

1. UNDER PARAGRAPH ONE

Article 266-B. ***Penalties.*** Rape under paragraph 1 of the next preceding article shall be punished by *reclusion perpetua.*

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death.

When by reason or on occasion of the rape, the victim has become insane, the penalty shall be *reclusion perpetua* to death.

When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be *reclusion perpetua* to death.

When by reason or on the occasion of the rape, homicide is committed, the penalty shall be death.

Rape committed under paragraph one is generally punishable by *reclusion perpetua.* The law, however, enumerates certain instances when the court may impose the penalty of *reclusion perpetua* to death in its discretion, and instances where death should mandatorily be imposed. The above-mentioned qualifying circumstances and the corresponding graduated penalties have been substantially retained from the old rape law. Several amendments were however introduced. Under Article 335 of the Revised Penal Code, when the victim becomes insane as a result of the rape, the penalty imposed is death. Under the new rape law, the imposition of the penalty of death is not automatic should the resulting insanity be of a temporary nature. Moreover, the imposition of the penalty of *reclusion perpetua* to death, in a situation where a homicide is committed in an attempted rape, has been modified to exclude rape in its frustrated stage to comply with jurisprudential rule that rape can only be attempted or consummated.[89]

There are other circumstances when the death penalty shall be imposed in the commission of the crime of rape. These circumstances further aggravate the offense and make the act more criminal and more heinous. The criminal mind of the offender is deemed more perverse and the damage done on the offended party, greater. As such, the requirement for a more severe penalty is evident. The imposition of the death penalty in these cases is mandatory and is a clear sign of the extreme offensive character of the act proscribed. Hence, the death penalty shall also be imposed if the crime of rape is committed with any of the following aggravating or qualifying circumstances :

1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common law spouse of the parent of the victim;

2. When the victim is under the custody of the police or military authorities or any law enforcement or penal institution;

3. When the rape is committed in full view of the spouse, parent, any of the children or other relatives within the third civil degree of consanguinity; When the victim is a religious engaged in legitimate religious vocation or calling and is personally known to be such by the offender before or at the time of the commission of the rape; When the victim is a child below seven (7) years old;

4. When the offender knows that he is afflicted with Human Immuno-Deficiency Virus (HIV) / Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmissible disease and the virus or disease is transmitted to the victim;

5. When committed by any member of the Armed Forces of the Philippines or para-military units thereof or the Philippine National Police or any law enforcement agency or penal institution, when the offender took advantage of his position to facilitate the commission of the crime;

6. When by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation or disability;

7. When the offender knew of the pregnancy of the offended party at the time of the commission of the crime; and

8. When the offender knew of the mental disability, emotional disorder and/ or physical handicap of the offended party at the time of the commission of the crime.

Basically, the above enumeration corresponds to the aggravating or qualifying circumstances when the mandatory penalty of death is imposed under the former rule. The application of this provision is without prejudice to the appreciation of other aggravating circumstances defined in the Revised Penal Code.[90] They shall be properly considered in keeping with the rules laid down by the latter.

Though the new law substantially retains the provision of the old law, several revisions and amendments are apparent :

- Under paragraph 2, the phrase "any law enforcement or penal institution" has been added. This is supplied to address the increasing incidents of prison rape.

- The word spouse has been used to replace husband under paragraph 3

[89] People v. Erinia, 50 Phil. 998 (1927).

[90] Revised Penal Code, art. 14.

considering that rape may be committed even against the husband.

- Paragraphs 4 and 5 used to be contained in a single enumeration under the old law.
- The term "religious" has been expanded to avoid the misapplication of the provision to non-legitimate religious vocation or calling.
- Paragraph 6 has been expanded to include Human Immuno-Deficiency Virus (HIV) or any other sexually transmissible disease with the proviso that the disease be transmitted to the victim.
- Under paragraph 7, members of para-military units, any law enforcement agency and penal institutions have been included with the proviso that the offender took advantage of his position to facilitate the commission of the crime.
- Paragraphs 9 and 10 are new provisions.

2. UNDER PARAGRAPH TWO

Rape under paragraph 2 of the next preceding article shall be punished by *prision mayor.*

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *prision mayor* to *reclusion temporal.*

When by reason or on occasion of the rape, the victim has become insane, the penalty shall be *reclusion temporal.*

When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be *reclusion temporal* to *reclusion perpetua.*

When by reason or on the occasion of the rape, homicide is committed, the penalty shall be *reclusion perpetua.*

Reclusion temporal shall also be imposed if the rape is committed with any of the ten aggravating/qualifying circumstances mentioned in this article.

The expansion of the definition of rape to include other sexual assaults does not carry with it the imposition of the same penalties. Sexual assault should be treated differently from rape by carnal knowledge, thus the penalties provided for the former are several degrees lower. The pattern used in imposing the proper penalties under the first paragraph is observed in the latter paragraph, with the rule on exclusion of rape with a resulting homicide. In such a case, the penalty imposed is one degree higher.[91] Being a complex crime, the gravity of homicide is considered.

[91] *Prision mayor* to *reclusion temporal* vs. *reclusion temporal* to *reclusion perpetua* and *reclusion temporal* vs. *reclusion perpetua*

D. Effect of Pardon

Article 266-C of Republic Act 8353 provides:

> . . . . ***Effect of Pardon.*** The subsequent valid marriage between the offender and the offended party shall extinguish the criminal actions or the penalty imposed.
>
> 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.*

Paragraph one speaks of a subsequent valid marriage between the offender and the offended party as a ground for the extinguishment of both the criminal action and the penalty imposed. The Revised Penal Code contains a similar provision under Article 344 under the heading "Provisions Relative to the Preceding Chapter of Title 11" and applies to the crimes of adultery, concubinage, seduction, abduction, rape, and acts of lasciviousness. The amendment clarifies the requirement of the validity of the marriage for the application of the provision. It is contemplated that by allowing herself to be married to the offender, the victim has condoned the rape.

Paragraph two is a new provision. There is a great deal of question involved in applying this provision primarily because the same can only be a necessary consequence of marital rape.

E. Presumptions

Article 266-D is a new provision. It provides as follows:

> *Presumptions.* Any physical overt act manifesting resistance against the act of rape in any degree from the offended party, or where the offended party is so situated as to render her/him incapable of giving valid consent, may be accepted as evidence in the prosecution of the acts punished under Article266-A.

Essentially, this provision means that the court may receive any evidence of resistance or incapability to give valid consent of the offended party. Resistance may be any physical overt act manifesting the unwillingness or non-consent against the act of rape. Such resistance may be in any form and in any degree.

Given the above background on the essential provisions of the New Rape Law, each of said provisions must be analyzed in relation to the limitations imposed by the law and the Constitution on all penal legislations in general. The nature of the crime of rape must also be considered together with the rights of the accused in a prosecution for such crime.

VI. ANALYSIS

The Anti-Rape Law, its concept, nature and incidents did not create itself. It is a deliberate effort to effect legislative reform to meet the demands of the changing times.

It is undoubted that the rate of rape incidents has increased— one need not look at statistics to prove this fact. The news in the papers, on television, on radio, or even those from one's own neighborhood speak of the grim experience the victims have experienced in the hands of rapists.

Rape occurrences have steadily increased. In 1993, there were 1,828 reported rape cases. This increased by twenty five (25%) percent in 1995 when 2,285 rape cases were reported. For the first quarter of 1996, rape increased by forty (40%) percent.[92] The victims have been alarmingly younger and the circumstances attendant to their commission have taken various forms and are committed in their most heinous and brutal dimensions. Aside from the traditional way of committing rape, offenders have resorted to non-conventional means of satisfying their sexual pleasures.

Concededly, the need to change the concept of rape has arrived.

A. The Need for Re-Classification

The re-classification of rape from a crime against chastity to that of a crime against persons is a wise reform. In the past, rape was considered as a type of deviance but this is no longer an acceptable label for this kind of behavior. Rape is now considered a violent, personal, assaultive type of criminal behavior.[93] Rape is not only a violent assault against women and womanhood. It is a reprehensible offense against the family as an institution and humanity itself. It directly affects the woman's reproductive organs and demeans the very sanctity of the conception and birth of every human being. Chastity has nothing to do with rape. More than an attack against the chastity of a woman, its commission is violative of the respect and honor due to the person.

Legislators have not been unaware that the re-classification of rape carries with it some untoward consequences.[94] For one, under the old law, rape is a personal crime and can only be prosecuted *de officio*.[95] For some protective purpose, only the offended party and the persons enumerated by law may file a complaint for rape.

[92] HOUSE JOURNAL No. 8-16, 34-35 (20 August 1996).

[93] Renee Banks Douglas and Colangelo, Jr Thomas (*Rape: An Explanation and Preventive Perspective from Law Enforcement Educators*) 8 VCCA J. 24-29 (1993).

[94] SENATE DELIBERATIONS, 38 (23 July 1996).

[95] Rape can only be prosecuted upon a complaint filed by the offended party or her parents, grandparents or guardian under Article 344 of the Revised Penal Code.

This allows the non-prosecution of rape cases when the offended party chooses to be silent for reasons personal to her. At one instance, the limitation serves a good purpose, specially when other matters personal to the victim may be jeopardized. An offended party has to be allowed some leeway in addressing the problem and finding solutions therefor. Some personal prerogatives may be higher in the ladder of priorities of the victim and as long as the decline to prosecute an action for rape is voluntary, then the purpose is served. In the end, and to some beneficial extent, only the offended party has the right to course his/her own life and what may become of it should the rape incident be kept or divulged.

On the other hand, the legislators believe that one of the reasons for the apparent reluctance of rape victims to file a case is fear. It is on this occasion that some other persons must come forward to report the incident as an initiatory step towards filing an information. The dangers, however, in the change introduced by the new law may have undesirable consequences and create an irreversible damage both on the accused and the supposed offended party. A charge of rape can easily be concocted thus resulting in malicious imputations of the crime. Still not far from an anticipated danger, the offended party may have personally chosen to keep quiet. To allow other persons to make the decision for the offended party creates an injustice. To a certain point, the persons, against whom the greater offense has been caused must be kept at peace.

Initially, Senate Bill No. 950 provided for a list of persons who may file the complaint.[96] The list was later excluded considering that rape is now classified as a crime against persons and which may be prosecuted at the instance of any person. This should however be weighed with the offended party's right to privacy and the consequential damage that may be caused should the right of choosing to file a complaint be given to other persons. Evidently, the legislators have studied the consequences of the re-classification of rape. Considering the public policy behind the law of aiding rape victims who are rendered helpless after the crime and incarcerating the offenders, some personal rights of the offended party must give way to the intrusion and the assistance of the State.

B. When and How Committed

1. UNDER PARAGRAPH ONE

a. In general

Except for the amendments introduced by the new law, rape as punished under

[96] a) the offended party
b) her parents and legal guardian
c) her grandparents or collateral relatives
d) the officer or social worker of the Department of Social Welfare and Development, or of a duly licensed child caring institution, orphanage, home for the aged, mental hospital or other similar institutions under whose care or custody the offended party is committed; and
e) concerned, responsible resident of the baranggay where the crime was committed but only if any of mentioned in the four preceding paragraphs have expressly given their consent to the filing thereof.

the Revised Penal Code has been preserved. Under this provision, only women may be rape victims, thus closing the doors to any prosecution for rape by having carnal knowledge of men. A number may say that the retention of the gender selection of this type of rape is unjustified; that men may also be rape victims by carnal knowledge.

There are some insights and justifications to support the latter proposition. The re-classification of rape from a crime against chastity to a crime against persons justifies a reconsideration of the aforementioned proposition. Even though there may have been carnal knowledge, such act must have been committed in such a manner that the supposed male rape victim was forced into it in and did not consent to the act. For instance, when a woman threatens a man to lie with her by poking a gun at him when his hands and feet are tied or when he is otherwise deprived of all means to defend himself, all the elements necessary to constitute rape when committed against a woman, are present. The intercourse had is definitely against the will of the man. When carnal knowledge is involved, only a woman can be the offended party. Again, there may be some light in this aspect considering that when sexual intercourse occurs between a male and a female, but the former is in such a condition that he did not will, much less consent to, the act, then the party who did not give consent, regardless of gender, suffers a violation of his person. The effect is the same, but the treatment is different. One is proscribed by law, the other remains unpunished.

b. Means of Committing Rape

As previously discussed, of the several means of committing rape enumerated in the law, three amendments have been introduced. The three means previously not contained in Article 335 of the Revised Penal Code are threat, fraudulent machination, and grave abuse of authority.

The authorities agree that the sexual act must be committed against the will of the woman and without her consent, not technically but actually and in fact. Otherwise, it will not be rape.[97] Under the circumstances which are enumerated in the law and which are not put in issue, it is evident that the same are indicative of the absence of will or consent. For instance, a woman deprived of reason cannot be expected to give a valid consent to the carnal knowledge considering that she lacks her mental faculty to know and understand the nature and consequences of the act. There is thus, manifest absence of consent. On the other hand, fraudulent machination and grave abuse of authority may be said to touch on the aspect of consent but the effect of such may not be to totally deprive the woman of her capacity to give a valid consent.

i. Threat

It is proper to include threat. The latter is very similar to force and intimidation in terms of the effect created and the resulting incapacity of the offended party to give consent to the sexual act. In this regard, there is no issue as to the propriety of

[97] 65 AM. JUR. 2D 765.

its being included as a means of committing rape. However, with respect to fraudulent machination and grave abuse of authority or relationship, there are some consequent dangers that have to be put into focus.

ii. Fraudulent machination

In the Senate deliberations, no definition of fraudulent machination has been offered to shed light on the need to include the same in the law. The Enrile amendment proposed to include the far-reaching concept of fraudulent machination by a single example. The conceived fraudulent machination is having carnal knowledge of a woman by misrepresentation. According to Senator Enrile, rape may be committed by a man who misrepresents himself to be the husband of the woman.

Fraudulent machination, however, may still be committed in other ways different from the example just given. To reiterate, rape is committed by having carnal knowledge of, or sexually assaulting, the offended party against the latter's will without his/her consent. There can be no rape if there was any kind of consent. The whole act from beginning to end must be forcible and against her will. If the victim gave any kind of consent, it will not be rape. It does not matter how that consent was obtained or how reluctantly it might have been given. If there was the least part or manifestation of consent on the part of the offended party during the intercourse, then a person charged with rape cannot be convicted of such crime.[98]

Fraud does not result in lack or absence of consent but in the mere vitiation thereof. There must be a defined line between coercion and bargain. Since the crime of rape exists only if the intercourse is accomplished by force and without the consent of the woman, it has been held that a prosecution for rape can not be maintained even where fraud has been practiced for the purpose of securing consent.[99]

The very sweeping mention of fraudulent machination, without an indication of the particular manner in which it may be committed opens the door to imperfect judicial interpretation. This runs counter to the very idea of rape that for a conviction to lie, there must be total absence, not a vitiation of consent. There is a great difference between non-consent and consent given condition. If this were allowed, grave injury to the rights of an accused will be caused.

In some jurisdictions, statutes have been enacted punishing intercourse obtained by fraud as rape. But these statutes, in order to pass the test of generality, contain clauses which limit the application of the terms "fraudulent machination." One branch of such fraud consists in the impersonation of the woman's husband.[100] A similar limitation should be provided in the present statute. Otherwise, confusion will arise with respect to cases when fraudulent machination will be held to be present.

[98] Avery v. State, 77 S.E. 892,12 G.A. App. 562.

[99] 65 AM. JUR. 2D 775.

[100] *Id.* at 768.

iii. Grave abuse of authority or relationship

The Anti-Rape Bill proposed by Sibol earnestly pushed for the inclusion of grave abuse of authority and relationship as a means of committing rape. When attendant in the crime of rape, it contemplates a situation where the offender exercises some authority over the offended party or enjoys moral ascendancy over her/him and uses his authority or ascendancy to facilitate sexual intercourse. The offender need not use force or threat or intimidation, nor is it necessary for the offended party to be deprived or reason or unconscious for the act to constitute rape.[101]

In their proposal Sibol expressly sought a repeal of Article 337 of the Revised Penal Code on Qualified Seduction committed as follows:

> The seduction of a virgin twelve years of age and under eighteen years of age committed by any person in public authority, priest, home-servant, domestic, guardian, teacher, or any person, who, in any capacity, shall be entrusted with the education or custody of the woman seduced.

Sibol seeks to redesignate the acts described therein as rape committed through grave abuse of authority or relationship. Their proposal is grounded on the fact that the requirements of age and virginity or at least of good reputation of the offended party restrict prosecution to a very limited sense.[102] The group cited as reason the prevailing situation that most sexual violations against women are committed not by strangers but by men either known to them or with whom they have familial or friendly relations. The new provision considers relationship and the proximity thereof between the offender and the offended party as aggravating, rather than mitigating, the reprehensibility of the act. Many cases of rape have been carried out precisely because persons who have authority over their victims took advantage of their positions to impose their will on a woman. Sibol argues that rape need not be carried out through physical force. A person can impose his will against another person by taking advantage not only of his strength but also of his position in relation to the victim.[103]

The inclusion of grave abuse of authority or relationship as among the circumstances when rape may be committed is another dangerous legislation. Under this ground, consent is still in existence although procured through some imposition of unwarranted authority. To illustrate, consider the case when an employer succeeds in having sexual intercourse with an employee on the former's threat of dismissal. True, the economic consideration may have been an influential factor in making a decision but this presumes that the victim is in such a condition as to regard her employment more important than her honor. Should such be the case, the law should not condone a decision hinged on misplaced priorities. A prudent man would know

[101] Sibol Rape Bill, *supra* note 33.

[102] *Id.*

[103] Appeal to the Members of the Bicameral Conference Committee on the Anti-Rape Bill.

which choice to make when put in a decisive position and the employee has enough protection under the Sexual Harassment Law should the threat of dismissal be actually carried out.

With respect, however, to abuse of relationship, the treatment should be tilted in favor of the offended party when the latter is in a situation that deprives him/her of putting up reasonable resistance against the act. A great number of incestuous rapes are readily witnessed and its prevention lies on a more sensitive approach towards the problem. A father, though not exercising considerable force, threat or intimidation upon the child-victim, may have such influence on the latter as to make the latter blindly accept the commission of the crime against him/her. In such a case, the father may be guilty of rape under this circumstance. This provision finds application in cases where, though the case is taken out of statutory rape because the victim is above twelve years old, if circumstances warrant that the victim is in such a condition as to render her incapable of putting up reasonable defenses against the act, then a prosecution and conviction for rape will lie. For instance, a girl at the age of 13 may not be totally regarded as having passed the age of consent. Considering the youth and innocence of the victim, the law must be vigilant for such person's protection. It is thus important to consider the application of this provision on a case-to-case basis.

2. UNDER PARAGRAPH TWO

The second paragraph of the New Rape Law degenderizes the crime of rape. As previously mentioned, the acts proscribed under this provision consist of the following :

1. the insertion of the penis into another person's mouth or anal orifice; and
2. the insertion of any instrument or object, into the genital or anal orifice of another person.

Both acts can be committed against any person. On the other hand, the offender under paragraph one can only be a male, while the offender under paragraph two can be any person, male or female. Thus, the degenderization of the crime of rape under this paragraph is limited to the offended party.

In general, said acts can be termed sexual assaults. In fact, the original draft of H.B. No. 6265 explicitly defines said acts as sexual assault independently of rape. The penalty imposed is lower than the penalty attached to the commission of an offense under the first paragraph of the law. The legislature deems said acts as criminal although prescribes a punishment therefor lesser in degree than that prescribed under the traditional concept of rape.

The proscription of the act under the second paragraph is based on forcible sexual acts which do not involve intercourse. Such acts are also assaults against the dignity and person of the victim. The offended party is forced to perform activities which consist of unnatural sexual conduct. The offender uses his penis not as a sexual

organ but as a weapon of invasion into the private parts of the victim. Such act, though not constituting carnal knowledge of the offended party, is deemed by law as punishable because of the deep psychological damage that is inflicted on such party. As such, society seeks to prevent the same in like manner as the acts of rape under the traditional concept thereof, enumerated under paragraph one of the law. The inadequacy of the remedies under the provisions on acts of lasciviousness[104] propelled the idea to put particular offenses, which normally would fall under this category, in the same plain as rape. The degradation of the offended party's person is equally strong.

The second act under this paragraph embodies the complete degenderization of the crime of rape. In performing said act, the criminal is motivated by some perverse, offensive, and unnatural sexual desire. Such person seeks to satisfy said desire through the insertion of objects into the private parts of the offended party. The offender does not use any part of his body to commit the act, but rather employs an external object as an extension of his sexual organ to commit an assault against the dignity and person of the victim. Society sees the need of preventing these untoward acts as increased number of persons find sexual satisfaction and power domination in performing degrading acts upon the victim's person. It is immaterial whether the rape was committed not by carnal knowledge and the acts will still constitute rape if the entry into particular openings of the offended party's body is forcibly and maliciously undertaken..

C. Penalties

The law provides for a graduation of penalties depending on the manner of commission of rape and the attendant circumstances. This is a very logical approach to the objective sought to be achieved. The definition of the crime has been expanded without meting out the same degree of penalty when other acts are deemed to be less perverse than the others. In areas that need to be dealt with more severely, the law provides the correspondingly heavier penalties.

D. Effect of Pardon

The first paragraph of Article 266-C of Republic Act No. 8353 is a substantial reproduction of the pardon in the old law. The subsequent valid marriage is treated as a condonation of the crime and carries with it the extinguishment of the criminal action and the penalty. The inclusion of the word "valid" is seen as a protective measure to the offended party. Under the old law, the marriage need not be valid for pardon to produce its effects.

It is not a secret that some offenders offer marriage to the victim for the sole purpose of escaping liability. But this practice has been tainted with certain manipulative actions that allow the offender to dissolve the marital relationship later on. This notwithstanding, the law is unduly harsh when the marriage is declared void from its inception for some reasons not attributable to the accused. To contrast

[104] Revised Penal Code, art 336.

two scenarios, a man who, under all circumstances, may be guilty of rape, married the offended party but the marriage is void for lack of a marriage license. Under this scenario, the offender knows of the infirmity in the marriage and had in fact procured a fake marriage license to ensure that the marriage is avoided later on. On the other hand, the same man offers marriage to the offended party and the marriage was celebrated without a marriage license, without any idea that such fact voids the contract. In the second case, the pardon should still be effective and the criminal action and penalties should be extinguished. There must thus be, malicious intent in the contracting of the void marriage. Such limitation ensures protection to the offender who has already been initially granted a recourse of being released from liability.

The second paragraph, as earlier adverted to, poses a very serious question and is a cause for confusion. It provides:

> 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*.

The provision can only apply if marital rape were punished under the new law. Thus, the very first issue to be resolved is: whether or not marital rape under Republic Act No. 8353 exists.

In the absence of any qualification under Article 266-A, that the acts may only be committed against a person, not being the wife of the offender, the logical conclusion would be that the law includes marital rape. Otherwise stated, if the provision does not contain any qualification that the offended party must not be the wife of the offender, it follows that marital rape is contemplated. In some jurisdictions, the law is so worded as to define rape as having carnal knowledge of a woman, other than the wife under any of the enumerated circumstances.

It is important to note, however, that even in the old law, the construction is not such as to expressly exclude the wife from being an offended party, yet marital rape is non-existent. The only instance when an accusation for rape will lie against the husband is when carnal knowledge was forcibly effected by the husband when the spouses are legally separated. It thus poses an issue as to whether the law includes rape committed against the wife. The questionable provision definitely cannot stand if marital rape is not contemplated by the law. The effect cannot stand without the cause in the same manner that the pardon by the wife will find no application if no marital rape exists.

Some may argue that the law is unambiguous and should be applied without need of construction. It will further be advanced that the law does not expressly prohibit marital rape and thus should be presumed to exist in the absence of any qualification in the term "woman" or "any person" as the rape victim. It is, however, submitted that the ambiguity in the law is more apparent than real.

Marital rape was included in the original drafts of Senate Bill No. 950 and House

Bill No. 6265. A long discussion on whether marital rape should be confined to certain identified instances was had. In the final draft of the Senate version, the circumstances limiting marital rape were deleted while that of the lower House provides that it can not be prosecuted unless the parties are legally separated or separated in fact for at least six months. Both bills, however, contain a clause that the fact that the offended party is the wife of the offender does not serve as a legal impediment for a prosecution for rape for acts mentioned under Article 266-A.

Considering the difference in the provisions, the Bicameral Conference Committee should have threshed out the matter and come up with a way to reconcile the two conflicting provisions. The issue was not even touched upon in the deliberations as reflected in the records. Two conclusions may be drawn from the omission. First, the panel simply decided to drop the issue of marital rape and exclude it totally from the coverage of the law. Second, they decided that it shall be covered without need of an express provision and without further limitation. One may argue for either side and the same may be proper considering the possibility that each may have been the contemplation of the law makers and each may be substantiated by hard evidence. But considering that the two conclusions are totally contradictory and that only one may be given effect, it is more reasonable to hold that the law contemplates the exclusion of marital rape.

The state of Philippine penal law on rape prior to the introduction of R.A. No. 8353 was to totally exclude marital rape from its coverage. This notwithstanding the use of the all embracing term "woman" as the offended party. It follows that since the wife falls under the very general classification of woman, she may be properly designated as a victim provided that all the other elements of rape are present. But the failure to make a qualification did not result in the inclusion of marital rape. Considering that the first paragraph of Article 266-A has been substantially reproduced from Article 355 of the Revised Penal Code, to all intents and purposes, it is to be presumed that the lawmakers intended that the same be preserved rather than expanded, without an express statement that other matters previously excluded shall now be included. It is a very dangerous proposition to state that there is no need for qualification since the general term "woman" includes everyone belonging to the female gender, whether she be the wife of the offender or not.

This danger can best be tested by a simple example applying the disputed provision to a situation where two parties who are lawfully married and are living together at the time of the commission of the offense. The husband had carnal knowledge of the wife while the latter is in a state of insanity. An information for rape was filed. Under these very bare facts, the husband is liable. There is carnal knowledge of the wife and such act was not willfully entered into by the latter because she was deprived of reason and thus, cannot validly give her consent. Any later act of carnal knowledge will not serve to condone the previous acts because in all of them, the wife had no capacity to consent. This concept runs counter to the principles of the Constitution where the State vows to protect the sanctity of the family.[105] Surely, the legislature does not have an unbridled discretion to pass a law that evidently violates the Constitution.

[105] PHIL. CONST. art. II, § 12.

The need for punishing marital rape should not be discounted. Countless stories of battered wives and their grim experiences in the hands of their husbands have been told enough to arouse the sensibility to punish them accordingly. The law, however, must state certain limitations and provide for specific instances when marital rape will have effect. To allow the law to encompass each and every instance when the husband forcibly succeeds in having carnal knowledge of his wife or when he is able to accomplish the same when the wife is not in a position to give a valid consent, would violate the Constitution. The State recognizes the sanctity of the family and vows to protect the family as a basic social institution.

American jurisprudence expressly excludes marital rape. Convictions for sexual acts committed by the husband against the wife under the latter's protests cannot be considered rape. It is fundamental that the relationship between husband and wife imposes on each of them certain legal marital rights apart from property rights and interests.[106] Particular rights of consortium are bound together in social and legal contemplation. It has been defined to include, in addition to mutual services, elements of companionship, felicity and sexual intercourse, all wielded into a conceptualistic unity.[107] Under ordinary circumstances a husband cannot be guilty of actual rape, or an assault with intent to rape his wife, even if he has, or attempts to have, sexual intercourse with her forcibly and against her will. The reason for this, it has been said, is that when the woman assumes the marriage relation, she gives her consent to the marital relation which the law will not permit her to retract in order to charge her husband with the offense.[108] To hold that the wife can sue the husband for rape for a sexual intercourse to which she did not consent, without any limitations or parameters, will prejudice the family.

Moreover, the new law seeks to introduce the concept of genderless rape. By this, a man or a woman may be an offender or an offended party. It thus follows that marital rape may either be committed by the wife or the husband depending on the manner of commission. Despite this, the law, in speaking of pardon in marital rape, only includes pardon of the husband by the wife. It is thus a one-sided privilege that can only be granted by the wife in favor of the husband. If the wife is the offender and the husband is the offended party, the former can never be pardoned because such right is not granted to her. This is clearly violative of the equal protection clause of the Constitution.[109] If it is argued, however, that only the wife can be a victim of marital rape, the husband will be put in a disadvantageous position because the wife can not be guilty of committing any sexual assault upon his person. Again, this view suffers from constitutional infirmities. If marital rape can only be committed against the wife by the husband, then the husband should also be able to question the constitutionality of the said provision by invoking a violation of the equal protection clause.

[106] 41 AM. JUR. 2D 22.

[107] Dini v. Naiditch, 170 N.E. 2d 881.

[108] Sharp v. State, 188 Ind. 276, 123 N.E. 261.

[109] PHIL. CONST. art. III, § 1.

E. Presumptions

The proposal to include this provision came about because of certain Supreme Court decisions which laid down the rule that rape can only be committed when the woman did not give her consent or after the latter was watered down by the total lack of power to give a reasonable resistance.

> In every case of rape by the use of force, where the complainant had the possession of her mental faculties and physical powers at the time of the alleged rape, neither overcome by terror nor threatened with some deadly weapon, a showing of resistance to the sexual assault becomes imperative. Of course, she need not resist to the point of being beaten to insensibility, but there must be on her part the utmost reluctance and resistance to the best of her ability and strength to establish the two elements of rape by use of force — carnal knowledge by force by one the parties, and non-consent thereto by the other.[110]

Sibol's position is that the requirement is biased against the woman victim. Resistance may not always be the best course of action, as the offender might very well decide to savagely beat her up or even kill her. Or she may have been so overcome with fear as to be unable to command her body to fight back, despite the absence of strong threats of violence, or of weapons, from the offender.[111]

Article 266-D is a new provision. Reading it without resorting to extraneous materials will give the impression that the heading of the article does not bear any relationship with the text of the provision. The article states that any physical overt act of resistance against the act of rape or where the party is so situated as to incapacitate such person to give consent may be accepted as evidence in the prosecution for rape. Essentially, this has reference to the admissibility of the evidence of non-consent. Leaving it at that, no presumption is created. It is thus very hard to reconcile the heading and the text of the provision. The relationship between the two cannot be determined. It is not clear how the law will create a presumption when the text speaks of admissibility of evidence. A reading of the records of the Bicameral Committee Conference is helpful.

During the deliberations, the Senate and House panels were in disagreement as to the wording of the law in such a manner that the same may be easily understood, convey its real purpose and not violate the rights of the accused. Senator Leticia Ramos-Shahani wanted to push for a law that will create a presumption of rape on the basis of the prosecution evidence that the victim did not consent to the sexual intercourse as manifested by physical acts of resistance or the incapacity of the offended party to make a valid consent. Such position was met heavily by disagreement on the ground that the same will be violative of the constitutional presumption of innocence of the accused. If allowed to be passed, the law will only require that evidence of resistance of non-consent be offered by the prosecution and the burden of proving innocence will be shifted to the accused.

[110] People v. Ymana, 171 SCRA 174 (1989).

[111] Sibol Rape Bill, *supra* note 33.

As a workable solution, they have agreed that the law will create a presumption of non-consent if evidence of any overt physical act, in any degree, or the fact that the offended party is incapable of giving a valid consent, is offered in court. The latter solution is ideal considering that it does not violate the presumption of innocence but only creates a presumption of non-consent. The wording of the law, however, is not reflective of the purpose. As earlier mentioned, it only speaks of the admissibility of the evidence without creating a presumption of the fact to which the evidence is attached. Such principle need not be provided in the text of the law because the admissibility of such evidence is already covered by the rules of court on evidence. Ordinarily, such evidence will be considered accepted to show the fact of resistance or non-consent. The provision is thus a surplusage because the need for its inclusion is not necessary.

VII. RECOMMENDATION

The reason behind the passing of the Anti-Rape Law is noble. It attempts to respond to the changes in the concept of rape as a form of assault reflected from the eyes of the victim. It took ten years for the legislators to finally pass the law and it is to be inferred that those years have helped them see the real problem, make out solutions, and orient and re-orient themselves with its nature, issues and incidents. A law, ten years in the making, should bear the presumption that the same has been carefully, intelligently and painstakingly studied. But the radical nature of the new law is a problem in itself. Maybe the question of whether or not the Philippine society is prepared to have a revolutionary concept of rape has been answered affirmatively. But the question should not end there.

The most difficult task to hurdle is to keep sanity in the law. There is great danger in criminalizing acts which are otherwise innocent. There may be acts which should be punishable but the legislators kept them from the coverage of the law to temper the effects of very radical changes.

Taken as a whole, the Anti-Rape Law is good law. But this conclusion is without prejudice to those parts which have to be revisited and reconsidered. There is thus a need to amend the law to make it more responsive to the ideals that were behind its passage. There are certain identified defects that have to be cured by legislative action. As a summation, the following are the provisions that have to be deleted, modified or amended accordingly:

> 1) Fraudulent machination as a manner of committing rape should be amended by providing for the limitation of the application of the provision. As earlier discussed, fraud, in its general sense, only results in the vitiation of consent to the sexual act. For rape to exist, there must be a total absence of consent. A consent procured upon a pretension, false promise or misrepresentation does not render the act, on which the promised is hinged, rape. The person still consented to the act, albeit conditionally;

2) Grave abuse of authority should be deleted. A victim has to be rendered totally incapable of giving consent for a prosecution and conviction for rape to lie. Under this circumstance, the fact that the victim was compelled to do the act for fear of a lesser danger should not be considered total absence of consent.

3) The first paragraph of Article 266-C should include a proviso that the nullity of the marriage should not have been purposely or knowingly ensured by the offender. This will guard against the harshness of the law in reviving the criminal action or penalty on the ground that the subsequent marriage is null and void if the offender did not know of such ground for nullity;

4) The legislature has to revisit the entire second paragraph of Article 266-A. They have to make a definite decision and clarify certain issues respecting the propriety of including marital rape under the law. If the latter is left as it is, a lot of confusion will be created. It is thus recommended that Congress provide for paramaters and/or limitations on the application of marital rape. Should it come out that the inclusion of marital rape is legally not acceptable, this particular provision should be deleted;

5) Article 266-D has a very important purpose but the wording of the provision will not and cannot achieve such purpose because the idea is not truly reflected in the law. There is need to amend this provision by providing a presumption of non-consent when evidence of such fact or the incapacity of the offended party to give a valid consent is presented.

Some errors in the wording and appreciation of the provision are apparent. As such, a law needs to be passed to amend Republic Act No. 8353. To cover the points discussed for their incompatibility or failure to convey the real intents, the substance of the anti-rape law, as amended should read as follows:

Sec.2. Rape as a Crime Against Persons.- The crime of rape shall hereafter be classified as a Crime Against Persons under Title Eight of Act No. 3815, as amended, otherwise known as the Revised Penal Code. Accordingly, there shall be incorporated into Title Eight of the same Code a new chapter to be known as Chapter Three on Rape, to read as follows:

Chapter Three
Rape

Article 266-A. Rape; When and How Committed. - 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) When the offender misrepresents himself to be the husband of the offended party;

d) Through grave abuse of relationship;

e) When the offended party if 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 hereof, 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.

Article 266-B. Penalties.- Rape under paragraph 1 of the next preceding article shall be punished by reclusion perpetua.

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death.

When by reason or on the occasion of the rape, the victim has become insane, the penalty shall be reclusion perpetua to death.

When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be reclusion perpetua to death.

When by reason or on the occasion of rape, homicide is committed, the penalty shall be death.

The death penalty shall also be imposed if the crime of rape is committed with any of the following aggravating/qualifying circumstances:

1) When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.

2) When the victim is under the custody of the police or military authorities or any law enforcement or penal institution.

3) When the rape is committed in full view of the spouse, parent, any of the children or other relatives within the third civil degree of consanguinity.

4) When the victim is a religious engaged in legitimate religious vocation or calling and is personally known to be such by the offender before or at the time of the commission of the crime.

5) When the victim is a child below seven (7) years old.

6) When the offender knows that he is afflicted wit Human Immuno-Deficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmissible disease and the virus is transmitted to the victim.

7) When committed by any member of the Armed Forces of the Philippines or para-military units thereof or the Philippine National Police or any law enforcement agency or penal institution, when the offender took advantage of his position to facilitate the commission of the crime.

8) When by reason or on the occasion of rape, the victim has suffered permanent physical mutilation of disability.

9) When the offender knew of the pregnancy of the offended party at the time of the commission of the crime.

10) When the offender knew of the mental disability, emotion disorder and/or physical handicap of the offended party at the time of the commission of the crime.

Rape under paragraph 2 of the next preceding article shall be punished by prision mayor.

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be prision mayor to reclusion temporal.

When by reason or on the occasion of rape, the victim has become insane, the penalty shall be reclusion temporal.

When the rape is attempted and a homicide is committed by reason or on the occasion thereof, the penalty shall be reclusion temporal to reclusion perpetua.

Reclusion temporal shall also be imposed is the rape is committed by any of the ten aggravating circumstances mentioned in this article.

Article 266-C. Effect of Pardon.- The subsequent valid marriage between the offender and the offended party shall extinguish the criminal action or the penalty imposed.

Article 266-D Presumptions.- Any evidence of physical overt act manifesting resistance against the act of rape in any degree from the offended party, any circumstance showing that the offended party is so situated as to

render her/him incapable of giving valid consent, shall create a presumption that sufficient resistance was given or that the offended party did not give his/her consent in the prosecution of the acts punished under Article 266-A.

VIII. CONCLUSION

If the Philippines were to achieve progress, the problem of criminality should be addressed accordingly. Rape is a detestable crime. It speaks of the inhuman character and the obvious insensitivity of the offender to the basic principles of peace and harmony in the community where he lives. This deviant character deserves to be sanctioned.

The enactment of the Anti-Rape law is a good approach to solving the problem of the rising incidences of rape. The women sector is given the oppurtunity to participate in the making of decisions that are determinative of their rights and privileges. Aside from the fact that it facilitates the prosecution of the crime, the new law criminalizes certain acts which were not covered by the Revised Penal Code and provides heavier penalties for certain acts which were punishable under lesser offenses. It will help the State deter rape. In the end, the consequent problem of disorder in society will be resolved and progress will be easier to achieve.