THE FOURTH RAPE: A CRITIQUE OF PEOPLE V. SUBINGSUBING AND AN ANALYSIS OF LAWS AND JURISPRUDENCE RELATING TO INCEST

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ABSTRACT

Sexual assault of a minor by a relative, or incest, is unquestionably a repugnant offense. Despite this, incest is a crime difficult to prosecute. Some of the problems can be traced to laws which are of pre-war vintage.

Presumably, incest is embraced in the crime of Qualified Seduction. However, incest victims rarely seek refuge under this felony. This indicates, perhaps, a major deficiency in its conceptualization. Instead, victims resort to a complaint for the crime of Rape.

But the crime of Rape was not designed to address the problem of incest. Although it can capture its gravity, the nature of incest manages to elude the strict definition of Rape. Three specific circumstances constitute Rape. Incest, unfortunately, is not one of them.

A case in point is that of People v. Subingsubing (228 SCRA 168). It involved both felonies of Qualified Seduction and Rape in the context of incest. In brief, the Court held that even if the incestuous act was admitted by the defendant, a charge for Rape could not prosper because the prosecution had failed to prove a crucial element – the use of force or intimidation. The unfortunate inference is that incest is no different from sexual intercourse between strangers in terms of the likelihood of the woman giving her consent.

And this is where the need for an understanding of incest comes into play. The peculiar nature of incest can supply a deficiency in the traditional rules on Rape which are based on law and jurisprudence. Incest is shrouded in a thick veil of secrecy which silences all the parties, particularly, the victim. The biggest injustice is to mistake this silence for acquiescence.

Because of this, a justifiable need to formulate new rules on cases dealing with incest arises. To this end, this paper will put forth the argument that when a charge of incest is made in a prosecution for the crime of Rape, the burden of proof should automatically shift to the defendant to prove that there was consent.

This proposition results in a conflict with constitutional ramifications. The presumption of innocence of the accused is pitted against the charge of the State to protect its youth. The latter obligation becomes more pressing with the realization that in incest, the natural guardians of the child perpetrate the crime. The duty of the State to the child must prevail.

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I. INTRODUCTION

"The Lord gave the following regulations. Do not have sexual intercourse with any of your relatives .... You know that whoever does any of these disgusting things will no longer be considered one of God's people." *Lv. 18:6,29*

A. Background of the Study

The closest encounter most people have with incest is confined to literature. The tale of *Oedipus Rex* immediately comes to mind. Known more for its incestuous content, the popularity of the Greek tragedy is partly attributed to noted psychoanalyst Sigmund Freud who coined the term "oedipus complex".

Freud portrayed incest as a subliminal desire on the part of the child to realize his or her sexual fantasies with the parent of the opposite sex. This observation laid the blame on the child and absolved the parent from responsibility in relationships with incestuous consequences. Freud's notions on incest were widely accepted and provided the basis for what authors have now labelled as the "myth of the seductive child."[1]

This perception did not last. In the seventies, two major movements unwittingly combined to radically change the view on incest. The first was *Feminism* which introduced a fresh, new perspective in the analysis of modern day social afflictions. In terms of understanding the nature of sexual offenses, the movement infused significant contributions which continue to bear fruit up to the present. Specifically on the subject matter of incest, feminist authors Sandra Butler and Louise Armstrong laid the foundation for future works.[2]

Another major influence was the *Sexual Revolution*. But the movement was a two-edged sword. On the negative side, it afforded popular acceptance of unorthodox sexual practices which occasionally included children. On a positive end however, it imbued sex and other sex-related matters with the importance worthy of serious scientific consideration. This provided feminist assertions with the much-needed scientific backbone.[3]

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[1] DIANA E.H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN, 3 (1986).

[2] *Id.*

[3] Terri Schultz, *Incest: The Forbidden Subject*, WOMEN'S MAGAZINE.

The unlikely combination of these two major influences changed the perception of incest. As the actual experiences of incest victims began to trickle in, an unknown side of incest was suddenly thrust into the public consciousness. Incest was no longer a simple case of sexual involvement between relatives; rather, incest began to connote sexual violence. Coercion and lack of consent had become its indispensable ingredients.

These newly-acquired insights had a major impact in the legislation of other states. Amendments were introduced toward this end. But in this jurisdiction, legislation lagged behind. Philippine society was, and still is, in the initial phase of accepting this phenomenon as a social affliction. The problem is compounded by the fact that the criminal statutes supposed to address this offense were enacted during pre-war times, hence, totally out of touch with its nuances.

There is an urgent need to adapt to these changes. The experiences of this country in the last two decades have provided fertile ground for incest. The political instability and economic dislocation during the Marcos and Aquino regimes had an immeasurable psychological impact. Many women were forced to work abroad and leave their families behind. Large segments of society were marginalized by the increased difficulty in finding regular sources of income. Militarization in the countryside resulted in hardship. Many children were orphaned; many more had to assume roles as adults early on with their lives. One of the uglier manifestations of these developments may appear in the form of incestuous abuse.

And statistics bear out this claim. According to the Department of Social Welfare and Development (DSWD) in 1992, there were 64 reported cases of incest.[4] By 1994, there were 314 cases,[5] or an increase by nearly 400%. And the figures are expected to increase. What is problematic is that actual cases of incestuous assault are grossly underreported and not usually pursued.[6]

On an individual level, incest deprives the young child of a stable adult life. Sexually abused persons experience difficulties in relating with

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[4] Women's Crisis Center Country Report: Philippines, p.14 citing DSWD Report (1992). [hereinafter WCC COUNTRY REPORT]

[5] Interview with Leonila Z. Renales, Social Welfare Officer III of the Bureau of Child and Youth Welfare, DSWD (Feb. 6, 1995).

[6] Interview with Ruby O. Dumpit, R.S.W., Senior Social Welfare Officer, DSWD-NCR (Jan. 16, 1994).

others. As a result, marriages fail and friendships end. These victims are forced to withdraw into themselves when memories of their childhood abuse are stirred.[7]

From the legal vantage point, incest presents an even more serious concern. It is a social evil that has to be contained. Not only does it wreak havoc on the psyche of the victim, it destroys the basic unit which comprises the social fabric – the family. The State therefore has the obligation to actively involve itself, if it is to give meaning to the principles on the youth and family so clearly enunciated in the fundamental law of the land:

> Section 1. The State recognizes the Filipino family as the foundation of the nation x x x x[8]
>
> Section 3(2). The State shall defend the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development;[9]
>
> Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being x x x x[10]

As a signatory to various international obligations, the Philippines is also obliged to institute legal measures for the protection and well-being of its young:

> Article 25(2). Motherhood and childhood are entitled to special care and assistance.[11]
>
> Article 23. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[12]

[7] Fr. Shay Cullen, SSC, *A Kind of Murder*, col. Reflections, PHILIPPINE DAILY INQUIRER, March 4, 1990.

[8] CONST., art. XV.

[9] CONST., art. XV.

[10] CONST., art. II.

[11] Universal Declaration of Human Rights, December 10, 1948.

[12] International Covenant on Civil and Political Rights, entered into force in the Philippines on January 23, 1987.

> Article 24(1). Every child shall have x x x the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.[13]
>
> Article 10. Special measures of protection and assistance should be taken on behalf of all children and young persons x x x x[14]
>
> Article 34(a). States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.[15]

What is unique about incest is that it thrives on secrecy. Not only is the child victimized in an atmosphere of secrecy, she also endures her suffering alone in her own private prison. Often, incest victims prefer personal anguish to the economic dislocation, separation, or shame that a disclosure would result in. The law then, is already at a disadvantage, because this atrocity, by its very nature, refuses to be known.

But an even bigger problem may lie ahead, if and when these victims choose to step into the open and seek vindication of their rights under the present legal system. Will the law be able to match their expectations? Perhaps, the better question is: Will it even be on their side? Unfortunately, as aptly demonstrated in the case of *People v. Subingsubing*,[16] the law can only offer an awkward gesture of sympathy.

And it really cannot be helped. Antiquated notions on sexual behavior totally anachronistic with the post-sexual revolution and AIDS-crisis times, continue to bind the criminal laws of this country. In the process, incest victims gamble on the question of whether it is worth the shame, intrusion and occasional backlash they will surely undergo if they speak out.

The unintended result of these half-baked efforts is that instead of encouraging the victims to come out, the law gives *yet* another reason for silence – the futility of their actions.

[13] *Id.*

[14] International Covenant on Economic, Social and Cultural Rights, entered into force in the Philippines on January 3, 1976.

[15] Convention on the Rights of the Child, entered into force in the Philippines on September 20, 1990.

[16] People v. Subingsubing, 228 SCRA 168 (1993) [hereinafter Subingsubing].

B. Objectives of the Study

The basic aim of this paper is to analyze existing criminal laws on incest, taking into account the recent insights on the problem, and to determine whether these laws remain sufficient and relevant to the times.

A critique of the *Subingsubing* case will serve as a start-off point and will be used as a factual reference. The case is useful because it illustrates how the legal system, despite its noble intentions, fumbles in its attempt to cope with the problem of incest, given the existing laws.

Finally, the writer will recommend additional measures to help address the problem of incest.

C. Limitations on the Study

The focus of this thesis is on the laws and jurisprudence applicable to incest cases. While the bigger problem may lie in the actual prosecution and trial of incest cases (*e.g.*, admissibility, manner of presentation of evidence, extension of prescriptive periods, etc.), this writer is of the opinion that these issues will only be pertinent once the basic laws addressing incest are properly in place. This study will attempt to take a more basic step. Hence, the aforementioned issues must be postponed to a more opportune moment for discussion.

Moreover, this writer regrets the fact that only the legal aspect of the problem can be addressed in this paper. While the rehabilitation of incest victims is equally important, it is not within the intended scope of the study. This limitation is also for the practical purpose of avoiding the dilution of the legal analysis.

Feminine pronouns were used in refering to incest victims for purposes of simplicity and convenience. This is also in recognition of the fact that the overwhelming majority of incest victims are female.

However, this is not meant to preclude the incidence of male incestuous abuse. In fact, as will be seen later on, one of the propositions of this paper is the removal of gender-based distinctions in the definition of sex crimes.

The use of masculine pronouns, on the other hand, when referring to incest aggressors was intentional. Except for one for instance, all cases of incest encountered by this writer involved male abusers.

Moreover, the gender of the abuser will have special bearing in partly explaining the occurrence of this form of abuse.

II. *PEOPLE v. SUBINGSUBING*

To highlight the problems encountered by incest victims under the present legal system, the case of *People v. Subingsubing* was chosen. It is important in several respects. First, it is the latest decision of the Supreme Court in many years involving the crimes of *qualified seduction* and *rape*. Second, it deals with incest, which is the main subject matter of this paper. Third, unlike previous cases of incestuous rape, the Court here, in no uncertain terms, spelled out its standing policy. Lastly, the case is an interesting study. It could have gone either way for the complainant or the defendant. How it did so and its legal repercussions will be extensively discussed in the succeeding chapters.

A. Facts of the Case

The complainant Mary Jane Espilan was only sixteen (16) years old when the alleged abuse started. At that time, she was staying with her grandmother in Mt. Province while her parents lived in Baguio. Living with Mary Jane and her grandmother was her uncle, the accused Napoleon Subingsubing. Mary Jane's mother and Napoleon were siblings.

The charge against Napoleon was originally for three (3) counts of rape. According to Mary Jane (whose testimony served as the primary basis for the prosecution), the first assault was on November 25, 1989 at 1:00 p.m.:

> "[She] and Napoleon were alone in the house, the grandmother having gone to the fields. When Mary Jane was about to go out to attend her afternoon classes in high school, *Napoleon forcibly pulled her to the bedroom of the grandmother, pointed his Garand rifle at her, then punched her in the stomach as a result of which the former lost consciousness.* When the complainant regained her senses, she noticed that she was *en dishabille* and her vagina was bloody. She felt pain in her private parts and is quite certain she was raped or abused. *The accused who was then standing outside the room warned the complainant not to tell anybody what happened or else he will kill her.* Hence Mary Jane did not report the incident to her grandmother or to anyone for that matter."[17] (Emphasis supplied)

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[17] Subingsubing, *supra* note 16, *citing* the lower court's findings (Rollo, pp. 138-140).

The next incident occurred several days later.

> "Mary Jane arrived from school and Napoleon was alone in the house. The latter again leveled his Garand Rifle at the former and pushed her into her bedroom ... Inside the room, the accused pulled down the skirt of Mary Jane, pushed her down on the floor, stripped off her panties and laid down on top of her with the zipper of his pants open. Forcing the complainant's legs apart, the accused abused or took advantage of the former the second time around."[18]

After the second assault, Mary Jane fled to her family's vacant house less than a kilometer away, where she remained for two days until the accused caught up with her. There, she was ravaged for the third and last time.

Until the filing of the complaint, Mary Jane kept all silent. She was fearful that the accused might actually kill her as he had threatened.

Four months later, Mary Jane's mother came to fetch her. She wanted Mary Jane to join them in Baguio during the summer vacation. It was only then that Mary Jane revealed what happened to her. Up to the very moment Mary Jane left, her grandmother had no inkling of what had ensued between her son and her granddaughter. The only thing unusual she noticed was the young girl's swollen breasts. A physical examination conducted later revealed that Mary Jane was pregnant.

The trial court found that prior to the molestations, Mary Jane was a virgin. She had no previous sexual experience. She did not even have a boyfriend. In open court, she pointed to her uncle as the sole culprit.

The accused told a different version of the story. He denied abusing his niece three times. On the contrary, he claimed that he had sex with her only once and with her full consent. He testified that:

> "... at around 10:00 o'clock in the morning of 25 November 1989, he arrived at his mother's house .... Shortly thereafter, [Mary Jane] arrived from school, massaged [his] back ... and then prepared their lunch. After eating, [he] went to his room to rest but was followed by the complainant who laid down beside him, placed her hand on [his] stomach, and then [they] embraced. They both removed their clothes and then had sexual intercourse. At this time, [Mary Jane] was smiling, tightly embracing the accused. After the intercourse, [she] put on her clothes, went to her room to change and *then went back to school* ...."[19] (Emphasis supplied)

[18] Subingsubing, *supra* note 16.

The lower court[20] ruled in favor of the complainant and sentenced the accused for two counts of rape. The accused was acquitted on the third charge because the complainant's testimony was found to be inadequate to sustain a conviction. The lower court surmised that "perhaps out of ... bitterness, the ... complainant wanted to ensure that the accused be meted out the highest penalty possible."[21]

The case eventually reached the Supreme Court. On appeal, the High Court[22] set aside the lower court's convictions and acquitted the defendant on the second count based on reasonable doubt. As to the first count, he was found guilty, not for *rape*, but for *qualified seduction*. In sum, the accused was held liable for only a single count of *qualified seduction*. He was acquitted as to the rest of the charges.

B. Analysis of the Supreme Court Decision

The Court stated at the outset the fundamental rule in the prosecution of *rape*. It is the prosecution which has the *onus probandi* in establishing the guilt of the accused. It said:

> "This is especially significant in rape cases for, generally, ... the only two (2) parties who can testify as to the occurrence [of the act] are the complainant and the accused. Very often, their respective testimonies are diametrically contradictory as to what really happened."[23]

Although the general rule is that the trial court's findings of fact are accorded great weight because of the their opportunity to observe the mannerisms, demeanor and attitude of the witnesses,[24] the High

[19] Subingsubing, *supra* note 16, at 173.

[20] Regional Trial Court of Bontoc, Mt. Province, Br. 36.

[21] Subingsubing, *supra* note 16, at 171.

[22] Second Division, penned by J. Padilla, and concurred by C.J. Narvasa *(Chairman)* and JJ. Regalado, Nocon and Puno.

[23] Subingsubing, *supra* note 16, at 174, 208 SCRA at 174, *citing* People v. Godofredo Sagot, G.R. Nos. 102773-77, June 8, 1993.

Court in this case, disregarded the trial court's factual findings on the use of force. It reasoned that there were several inconsistencies on important details which rendered the complainant's story doubtful.

The High Court bolstered its finding of inconsistency by making several observations on the conduct of the complainant. First was her apparent failure to immediately disclose what had transpired. As the records reveal, she informed her mother only after six months had elapsed from the time of the last assault. The Court observed:

> "It is quite *unnatural* for a girl not to reveal such assaults on her virtue (if indeed they occurred) immediately after they happened or when the alleged threat on her life and her grandmother's had ceased, as in this case, when complainant had gone to Baguio."[25] (Emphasis supplied)

Likewise, the Court could not find any valid explanation for the complainant's seemingly unaffected behavior even after the commission of the alleged rapes as testified to by their neighbors, her grandmother and by the complainant herself. For example, she would go out with the accused to watch *betamax*[26] movies or get food for the pigs in the ricefields. The Supreme Court opined:

> "Such behavior directly contradicts the normal or expected behavior of a rape victim. There is no way she could possibly forgive, to say the least; and yet, complainant interacted immediately with her assailant."[27]

But the Court did not totally rule in favor of the accused. It found his defense of consent and his denial of subsequent acts of sexual intercourse "weak". Still, it decided in his favor, adhering to the principle that the prosecution must rely on the strength of its own evidence and not on the weakness of the defense. In effect, what swept the tide in favor of the accused was the basic constitutional *presumption of innocence*. While there was no specific finding that the complainant gave her consent, neither was there a case of rape.

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[24] An exception is when the lower court makes an oversight or misinterprets the facts or circumstances. [People v. Marzan, 128 SCRA 203; People v. Vergara, 136 SCRA 106 (1985); People v. Pelias Jones, 137 SCRA 166 (1985); People v. Egas, 137 SCRA 188 (1985)]

[25] Subingsubing, *supra* note 16, at 180.

[26] A form of videocasette.

[27] Subingsubing, *supra* note 16, at 180.

What was established (and this was based on no less than the accused's admission) was that on November 25, 1989, the accused Napoleon Subingsubing had sexual intercourse with Mary Jane Espilan, who was then only sixteen years old. These facts were sufficient to convict the accused of the crime of *qualified seduction* under Article 337, first paragraph.[28] As defined:

> "[It] is the act of having *carnal knowledge* of a *virgin* over *12 years to 18 years of age* and committed by any of the persons enumerated in Article 337 of the Revised Penal Code, to wit: 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. Abuse of confidence is the qualifying circumstance in the offense."[29] (Emphasis supplied)

The accused was considered a "domestic" in this instance and the term, as defined, is:

> "... applied to persons usually living under the same roof, pertaining to the same house, and constituting, in this sense, a part thereof, distinguishing it from the term 'servant' whereby a person serving another on a salary is designated ... ."[30]

The Court concluded that the accused took advantage of his moral ascendancy, if not dominance over the complainant, who was also, presumably, a virgin.[31]

C. *Issues Raised by the Supreme Court Decision*

While the High Court reversed the convictions for *rape* meted out by the lower court, it did foresee the dissatisfaction that would ensue if the defendant was allowed to go scot-free. Faced with an inconsistent testimony for the prosecution vis-à-vis a weak defense, the Court had to rule for an acquittal. But the Court agonized. The case, after all, was not of the ordinary.

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[28] Art. 337 of the Revised Penal Code defines two kinds of qualified seduction. These are: "qualified seduction of a virgin" and "qualified seduction under the second paragraph." An analysis of the two will be made in Chapter III of this paper.

[29] Subingsubing, *supra* note 16, at 181.

[30] Subingsubing, *supra* note 16, *citing* People v. Alvarez, 55 SCRA 81.

[31] The Supreme Court adhered to the lower court's finding on this matter. Incidentally, virginity is an essential element of this felony.

There were several undisputed facts. First was an obviously pregnant complainant. Second was an unremorseful defendant. Third was the uncontroverted fact that the accused and the complainant were related by blood. He was her uncle and she was his niece. Consent, therefore, was not a readily acceptable defense. The Court rhapsodized:

> "[Defendant's] exculpation from the offense of rape does not mean, however, that his responsibility is merely moral and not penal in character. If that were so, considering the facts of this case, it may be cause for right-thinking men and women to discern a gap or fissure in the legal order, one that cries moreover to be bridged."[32]

The Supreme Court perceived the injustice that would result if the decision was purely for an acquittal. It sensed that there would be something amiss in the moral order that would scream for rectification in the legal sphere if the complainant did not receive even a token of vindication. It nobly tried to answer such call by imposing a lesser penalty on the accused, one which would supposedly fit the crime. But instead of responding to the problem, it raised more questions.

The first issue raised is the adequacy of the present criminal statutes in dealing with incest. *Subingsubing* illustrates the difficulty in getting a conviction for rape on account of incestuous abuse. Oftentimes, reliance has to be made on lesser sex crimes such as, in this instance, qualified seduction. But can this felony fully encompass the scope and gravity of incest? The answer is obviously not if cue can be taken from the choice of incest victims who file charges for rape instead of qualified seduction.

It should also be noted that in the ultimate analysis, the incest angle did not really factor into this case because the crime for which the accused was eventually convicted (*i.e.*, qualified seduction of a virgin) does not even require that the relationship between the parties be incestuous. As a matter of fact, the accused fell under the category of a "domestic" who as earlier defined, need not even be a relative. He only needs to stay under the same roof with the complainant. The question then arises as to the possible consequence, had the accused in this case not stayed with the offended party in the same house and therefore, not have been considered a "domestic".

Moreover, the crime of qualified seduction of a virgin has peculiar requirements of its own. One which was readily apparent from the case

[32] Subingsubing, *supra* note 16, *citing* Alvarez, 55 SCRA 81.

is virginity.[33] What if the offended party had not been reputed to be a virgin?[34] Would it have justified an acquittal? Chapter III of this paper attempts to demonstrate these legal shortcomings.

The third issue the case raises is the propriety of various assumptions and observations on human conduct the Supreme Court indulged in supporting its finding of inconsistency on the part of the complainant. Was consent the only viable reason for the inexplicable behavior of the complainant? Or is it possible that there may yet be a more plausible explanation supplied by, and in consonance with, the nature of incestuous abuse?

Before answering all these questions, a more fundamental one is ripe for consideration.

III. WHAT IS INCEST?

A. Definition of Incest

Incest has been defined as "prohibited heterosexual relations between persons of the same culturally or legally defined kinship group — usually between unmarried members of a nuclear family — *i.e.*, between brothers and sisters or between parents and children."[35] The taboo is universal and many reasons have been ascribed to justify this prohibition.

The most common — the degenerative tendencies of inbreeding — is also the most misleading. While the inter-familial marriages of the European aristocracy did produce some defects in their lineage, the Ptolemies of Egypt,[36] on the other hand, did not result in such. Besides, it was argued that if incest was degenerative, then it could also work in reverse. It could bring out the best traits in a family. In any case, this theory has been largely discarded for lack of scientific basis.[37]

[33] Had the conviction been for qualified seduction under the second paragraph of Art. 337, then there would be no need for this element. However, said crime is limited only to ascendant-descendant and sibling relationships. Since the parties in this case are uncle and niece, it is not covered by this felony. More will be said about this later.

[34] Physical virginity is not required. A reputation for being a virgin would suffice (U.S. v. Casten, 34 Phil. 808).

[35] THE NEW ENCYCLOPEDIA BRITANNICA: MICROPEDIA, s.v. *Incest* 15th ed.

[36] Successors of Alexander the Great.

[37] SAMUEL G. KLING, SEXUAL BEHAVIOR & THE LAW (1985).

The more plausible reason for the incest taboo is the need to promote peace in the family. It is aimed at "protect[ing] the family relations, and its rights, duties, habits and affections from the destructive effect of family intermarriages and domestic licentiousness."[38] If this was not the case, then there would be constant discord arising from sexual jealousy between members of the family. Fathers would be pitted against their sons, mothers with their daughters, and brothers would compete over their sisters.

To reinforce this prohibition, specific statutory enactments have been passed by many countries disallowing marriages and sexual relations between those closely related by blood or affinity.[39] Among these laws, there is a significant variation both in terms of scope and severity. In the United States for example, both incestuous marriages and sexual intercourse between relatives are treated as offenses.[40] In this jurisdiction however, only the latter is considered a felony.[41] An attempt to enter into an incestuous marriage, while null and void, is not considered a crime. Lately however, Philippine laws have tried to expand the concept of incest beyond its universally accepted bounds. However, it is only for the limited purpose of voiding a marriage[42] or in qualifying a crime.[43]

But one dimension of incest is not incorporated in Philippine laws. At best, it is only reflected tangentially. This concept of incest as stated earlier, has emerged only of late and refers to incest as form of assault. Incest has become synonymous with sexual violence. In this context, it has been defined as referring to:

> "... any manual, oral or genital sexual contact or other explicit sexual behavior that an adult family member imposes on a child, who is unable to alter or understand the adult's behavior because of his or her powerlessness in the family and early stage of psychological development. This type of incest is non-consensual because the child has not yet developed an understanding of sexuality that allows him or her to make a free and fully conscious response to the adult's behavior."[44]

[38] State v. Tucker, 174 Ind. 715, 93 NE 3.

[39] Tucker, 174 Ind. 715, 93 NE 3.

[40] Tucker, 174 Ind. 715, 93 NE 3.

[41] REVISED PENAL CODE, Act No. 3815, art. 337 (1932).

[42] THE FAMILY CODE OF THE PHILIPPINES, E.O. 209, art. 38 (1988).

[43] AN ACT TO IMPOSE THE DEATH PENALTY ON CERTAIN HEINOUS CRIMES, R.A. 7659 § 11 (1994).

[44] BUTLER, SANDRA, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978).

> "[I]ncest [is] child sexual abuse by male blood relations *i.e.*, fathers, brothers, uncles, and grandfathers; or male relatives by affinity *i.e.* stepfathers, stepbrothers, foster parents, mother's lover or boyfriend, mostly living in the same household."[45]

This is a broader and more accurate definition of incest. The acts covered are not limited to sexual intercourse alone. As one author puts it, "[a] father who stations himself outside the window of his daughter's bedroom to watch her dress and undress is raping his child's mind as surely as the father who violently and forcibly rapes his child's body."[46]

The gender of the parties are likewise no longer restricted to heterosexual relationships. It has been discovered that some fathers homosexually molest little boys, including their own sons.[47]

Just how prevalent are the cases of incestuous assaults? According to the DSWD,[48] last year, there were 314 cases of incest reported in the country. Fifty-nine (59) of these were prosecuted for Acts of Lasciviousness only because the element of carnal knowledge (required in *rape*) was absent. These incidents are broken down according to the relationship of the victims to their perpetrators:

Father	111	36.9%
Grandfather	33	11.0%
Brother	25	8.3%
Stepfather	81	26.9%
Uncle	51	16.9%
	314	

As to the age brackets[49] of these victims:

1 - 3 years	17	2.0%
4 - 6	102	12.2%
7 - 12	241	28.8%
13 - 18	478	57.0%
	838	

[45] WCC COUNTRY REPORT, *supra* note 44, at 13.

[46] BUTLER, *supra* note 44, at 5.

[47] SCHULTZ, *supra* note 3.

[48] BUTLER, *supra* note 44, at 5.

[49] *Id.* This includes all forms of child sexual abuse.

According to the Women's Crisis Center, a non-governmental organization specializing in cases of domestic violence, the number of incest victims who have sought refuge in their special homes has also risen over the past years:[50]

1989	6
1990	5
1991	12
1992	16

All these figures indicate one thing — the prevalence of incestuous assault. Incest has grown by alarming proportions. It is a problem which cannot simply be ignored and dismissed as rare outbursts of perverse sexual behavior strictly limited within the confines of a family home and which deserves scant government attention. In fact, what is worrisome about these figures is that they are grossly underreported.

But what is it about incestuous assault that demands special attention from the law? How is it different from other sexual transgressions that it should necessitate a change in the existing statutory and jurisprudential rules? The succeeding discussion is an attempt to understand its disturbing nature from the point of view of the various parties in an incest case.

One important reminder should be clearly emphasized before proceeding with the discussion. The analysis that will be undertaken here is totally different from the traditional understanding of incest. It is radically disparate from existing legal theories. Precisely, the purpose of this effort is to infuse these newly acquired insights in order to modify, adapt, or alter the laws (as the case may be) so as not to deprive incest victims of their equal right to justice.

B. The Victim

Because of limited reporting and previous failure to categorize incest as a form of sexual abuse, there is a dearth in Philippine demographic data on incest. From what can be gleaned from the number of cases that have been filed, incest paints a picture of itself as a phenomenon which is confined solely to the economically deprived segments of Philippine society, where abusers tend to be alcoholics, gamblers or drug-users — the type of men who experience no qualms about violating

[50] WCC COUNTRY REPORT, *supra* note 4, at 17.

their own children. This has led some to regard incest as a *poor problem*, one which will eventually sort itself out with the improving economic climate in the country.

The trouble with this perception however, is that the experience of other more developed countries has amply demonstrated that incest is not bound by cultural, social or economic delineations. As one author puts it, "incest is relentlessly democratic."[51] And examples abound. They include a girl, 6, who caught venereal disease from her father; a girl, 7, who masturbates her father after he returns from a round of golf; girls, age 8, who have posed for pornographic pictures for their fathers; another girl, 9, who is skilled at fellatio on her father; girls and boys, 10, sodomized forcibly by their fathers; and a girl who has already undergone abortion of her father's child at age 11.[52]

The plight of these children is aggravated by a common misunderstanding of incest victims. They are made partly to blame for their failure to resist their abusers. Freud's myth of the seductive child did considerable damage. He portrayed children as sexually motivated creatures; hence, instilling the notion that children are capable of fully consenting to sexual overtures like ordinary adults.[53]

But what Freud ignored from his analysis are the more powerful reasons which compel a child not to resist her relative's sexual advances and which force her to suffer in silence. These same reasons explain why incestuous abuse is, by nature, repetitive. None of these, unfortunately, have anything to do with consent.

Incest victims spin the web of their own destruction. They are trapped by their own despair. They are isolated by the weight of their problems preventing them from reaching out to others. The question often at the back of their minds is: Will others be able to understand?

Incest victims suffer from a deep sense of betrayal by the very persons whom they have chosen to trust. If their own relatives can violate them, how much more others? In the end, an incest victim may adopt society's perceptions of her as her own. She begins to believe that she is indeed the person to blame for being the provocative child

[51] BUTLER, *supra* note 44, at 5.

[52] *Id.*

[53] RUSSELL, *supra* note 1.

who seduced her relative. This assumption of guilt inhibits her all the more.

Ultimately, the child loses her sense of worth. This may spill over and translate into other social problems like prostitution, drug addiction and alcoholism. Some exhibit anti-social behavior. In the Philippine context, incest victims mostly turn out to be street children.[54] A majority experience inability to relate with others.

> "These women [feel] powerlessness to find a way to incorporate their own damaged sexuality into loving relationships. The fear of sexuality caused many to feel emotionally raped during intercourse; for others, all touching was weighed with painful memories that they were unable to feel a closeness with and freedom to touch their own children."[55]

The myth of the seductive child has no basis. It is akin to the notion of women secretly wanting to be raped. It only serves the needs of those who would secretly, or not so secretly, desire to rape them.[56]

C. *The Aggressor*

Just as difficult to comprehend is the role of the incest aggressor. How do these men turn into monsters? Many would readily cite the vices of alcoholism and drug addiction. The problem is that, not all those who get drunk or "high"[57] readily turn to their children. Besides, the vice itself may be symptomatic of a deeper problem.

One answer would point to the *aggressor's own experience as a victim of child abuse*, either sexual, physical or verbal. Complications arises when the young victim grows up and starts a family of his own without resolving his childhood difficulties. Usually, incest rears its ugly head anew, because contrary to what its victims may perceive, it is a problem which does not vanish with adulthood. It cannot be easily outgrown. Unless addressed properly and wholistically, it will perpetuate itself in the succeeding generations. Incest becomes a vicious cycle.

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[54] CULLEN, *supra* note 7.

[55] BUTLER, *supra* note 44, at 43-44.

[56] RUSSELL, *supra* note 1, at 5-6.

[57] Colloquial term for being in a psychedelic state of mind due to drug abuse.

The abusive behavior of the incest aggressor can also be traced to the *patriarchal nature of society*.[58] Men are constantly pressured to achieve tangible measures of success. However, what happens if these expectations cannot be met? Unfortunately, most men are not comfortable when dealing with their emotions.

Unable to express his frustrations with his work or friends, the incest aggressor vents his anger and fear of failure on his family, where he is king. The result is, in some cases, domestic violence.

But incest aggressors are different from other men, because even if others experience similar sexual urges, they do not allow these impulses to overtake them. They are aware of the limits of intimacy allowed between members of the family. That intimacy is not synonymous with sexual activity.

In the end, whether these men should be treated as victims themselves of past abuses or of society's definition of masculine behavior, the incest aggressor remains ultimately liable. This is because the person he has chosen to vent his frustrations on is a mere child incapable of defending herself. She is incapable of distinguishing his actions as a form of sexual onslaught.

> "Sexual assault is a much more subtle form of abuse. It is the abuse of trust – the trust the aggressor has assumed in having taken responsibility for the birth and care of a child, the responsibility that he has taken for himself .... He, and only he, abused that trust. For no matter what the other family problems might be, the aggressor alone must assume the full responsibility *for having chosen to eroticize his relationship* with his child."[59] (Emphasis supplied)

D. *The Mother*

The role of the mother of an incest victim has been the subject of an ongoing debate which has yet to be resolved. Not everyone agrees that the mother is totally innocent. Incest victims, notably, are not too keen in absolving their mothers from some form of complicity.[60]

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[58] BUTLER, *supra* note 44, at 66-73.

[59] *Id.* at 66.

[60] CAROL POSTON AND KAREN LISON, RECLAIMING OUR LIVES: HOPE FOR ADULT SURVIVORS OF INCEST, 7 (1st ed., 1989).

On the other hand, others argue that mothers are victims in their own right. Their plight is compared to a wife with an unfaithful husband. Most are aware, but not many act upon it. This is because there are just as many reasons not to upset the status quo.

The most obvious reason for a mother's silence arises from her instinctive *desire to preserve what remains of her family intact.* She may want to shield them from the shame and humiliation that an incest scandal could bring.

Another reason is a mother's perceived *inability to be economically independent.* A mother may doubt her own capability to provide for the needs of her family.

Then again, a woman's *fear of her husband* cannot be discounted. In incest, the threat is usually not limited to the victim alone but extends to the other family members. Cases vary on whether this threat is communicated to the victim alone or to other family members as well.

Some women are likewise caught in a *genuine disbelief* that incest could occur right in their very homes. They are reluctant to believe such assertions even if made by their own daughters. After all, it is not easy for a woman to accept the fact that the man she has chosen to marry has turned out to be an ogre.

It would also not be amiss to point out that a mother's inability to face the reality of incestuous abuse may be brought about by her *own trauma as an incest victim.*

Finally, the same *patriarchal structure of society* which creates incest aggressors, also accounts for a mother's silence. On the one hand, women are forced into a crippling dependency as they are relegated to roles of mere housewives. While it may be argued that many wives now work; still, their reasons may have little to do with a genuine desire for personal fulfillment. On the contrary, many women choose to work out of sheer necessity – to augment the family income, and not to pursue a career. The result is a double burden, because despite her own exhaustion, she must still be constantly available to attend to the needs of her family both as a wife and a mother.

Faced then with the shocking discovery of her daughter's abuse by her very own husband, does the mother still have the stamina and courage to confront the latter? Can she face the consequences if indeed the allegations of her daughter turn out to be true?

The supreme irony of all these is that some aggressors even have the gall to blame their own wives' absence and constant pre-occupation for turning on to their daughters.

And this dire situation of the mother complements the victim's own silence. Witnessing their mother's tireless efforts, many victims do not have the heart to tell their mothers of their troubles. In the child's mind, this may very well be the proverbial last straw. And so, she keeps the abuses to herself and simply learns to cope with her predicament.

From this point of view then, it is not too difficult to appreciate the mother's own victimization. She is nagged by doubts of her own significance after so many years of playing second fiddle to both her husband and children.

In the Philippine context, the absence of the mother in most households as a result of the recent phenomenon of migration arising from domestic unemployment, has brought about increased opportunities for incestuous abuse. This is exacerbated by the fact that since these women earn foreign currencies, they may actually be replacing their husbands as breadwinners of their respective families. This adds on to the latter's insecurities which must be compensated in one way he surely knows how – by asserting his dominance over his children.

E. The Society

Society likewise plays a role in the proliferation of incest and other forms of domestic violence in terms of gender expectations. Boys are taught not to display emotional behavior. They are required to succeed and to this end, opportunities not generally given to girls, are offered. The perception is perpetuated that caring is weakness, force is strength, and wives and children are mere possessions.[61]

On the other hand, girls are bombarded with confusing double messages. A woman must be "sexy but virgin, appreciative yet challenging, dependent but not clinging, vulnerable but able to protect herself, smart enough for a man but not to threaten him (or to conceal it from him) – in short, always having to adapt themselves for the man."[62]

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[61] BUTLER, *supra* note 44.

[62] *Id.*

Moreover, children are rarely taught by their parents on matters of sex. Instead, they get their lessons from fellow youngsters, or worse, from the media where sex is skewed and used purely as a tool for advertising. Sex becomes impersonal.

The problem for the incest aggressor who grows up in this kind of environment, lies in his inability to grasp the difference between sexuality (which is mostly taught by the media) and intimacy (which he was taught to shun as a young man). When this is directed towards a child though incest, this inability to differentiate between intimacy and sexuality becomes glaringly manifest. Children are treated as mere objects, as sources of emotional, physical and sexual comfort for the adult male who is unable to come to grips with his own failures and frustrations.[63]

And even in instances where no force is used, the child may mistake the older relative's attention for much-needed parental love. From the point of view of the abuser, on the other hand, he finds in the child's willingness and innocence the total and unreserved assurance that he can not get from his wife, his job or society. In fact, he turns to his child for his own emotional survival. And in a supreme act of loyalty, the child will oblige.

> "[C]hildren sense, at a surprisingly early age, what is required of them to keep the family together, and they will do so, even at the price of their own victimization."[64]

And this total and unreserved willingness can be readily seen in the tableaus of daily life – children in the streets, peddling cigarettes or newspapers; in public markets as child laborers; or near garbage cans, searching for scraps. These children, despite their tender age, already act as breadwinners for their families. They realize early that they have to fill in the big shoes which their parents have abandoned.

But does this mean that since these children go through the motions of daily life, they *consent* to the dire situation they find themselves in? The answer is that they do not. And similar to child labor, no child incest victim wants to be the object of her relative's sexual attention. Only, she is helpless in preventing it. She is a true victim of her own circumstance. Her acquiescence, if it can be called such, is actually an *adaptive response*

[63] *Id.*

[64] *Id.* at 139.

to cope in an environment where both her parents have proven incapable of protecting her. To take it against her is a serious mistake.

IV. THE LAW FROM THE POINT OF VIEW OF INCEST

The concept of incest is not new in our legal system. It is present in our civil, criminal and other statutes. The purpose of this chapter is to study these laws, identify their respective strengths and weaknesses, and determine whether these legal remedies are adequate to suit the special needs of incest victims.

A. Incest in Civil Law

Incest, for purposes of civil law, has two legal meanings. The first will be referred to as *incestuous assault* and connotes the sexual violation of a child by a male relative. This was thoroughly discussed in the immediately preceding chapter.

The other legal connotation of incest in civil law refers to the proximity in the relationship between parties which voids a marriage. For purposes of this chapter, it will be called *incestuous marriage* to differentiate it from *incestuous assault.*

The Family Code of the Philippines is the main law on persons and family relations and it embodies both concepts of *incestuous assault* and *incestuous marriage.*

1. VOID MARRIAGES

Articles 37 and 38 of the Family Code provide the grounds for the nullification of a marriage. They embody the concept of *incestuous marriage.* In this context, the concern is limited solely to a determination of the degree or proximity in the relationship between the contracting parties. Within these specified limits, the marriage is proscribed and considered void. Article 37 provides:

> Article 37. Marriages between the following are incestuous and void from the beginning, whether the relationship between the parties be legitimate or illegitimate:
>
> (1) Between ascendants and descendants of any degree; and
> (2) Between brothers and sisters, whether of the full or half blood.

Article 37 adopts the universally recognized bounds of incestuous relationships and confines the blood ties prohibited from marrying tho those enumerated therein. Technically therefore, marriage between cousins cannot be categorized as "incestuous" because it does not fall within the relationships proscribed by Article 37.

The marriages enumerated in Article 37 are invalid as a matter of public policy. So long as the relationship between the contracting spouses fall within the parameters of said provision, the marriage is considered void *ab initio*.

On the other hand, Article 38 provides:

> Article 38. The following marriages shall be void from the beginning for reasons of public policy:
>
> (1) Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;
> (2) Between step-parents and step-children;
> (3) Between parents-in-law and children-in-law;
> (4) Between the adopting parent and the adopted child;
> (5) Between the surviving spouse of the adopting parent and the adopted child;
> (6) Between the surviving spouse of the adopted child and the adopter;
> (7) Between an adopted child and a legitimate child of the adopter;
> (8) Between adopted children of the same adopter;
>
> x x x x

Unlike Article 37, the relationships enumerated in Article 38 are not referred to as "incestuous". Nonetheless, the law renders these marriages void by reason of public policy. But is there any substantial difference between the two provisions?

A close examination reveals that Article 38, in reality, is a mere extension of Article 37, either in terms of the civil degrees covered (#1), as a consequence of marriage (#'s 2 and 3) or of adoption[65] (#'s 4 to 8). It would seem then that the public policy which motivates Article 38 and

[65] One indication of the law's intention to prohibit marriages between parties who are related by adoption is art. 183, 3rd par. of the Family Code which requires that in general, there must be at least a sixteen-year age gap between the adopter and the adopted. The purpose is to discourage amorous relationship between the adopter and the adopted from developing. The rationale is the same as in incest.

Article 38 is practically identical with. As one Civil Law professor[66] noted, the relationships covered in Article 38 are analogous to a biological parent-child relationship.[67] Hence, the conflicts which the law seeks to avoid in Article 37 are essentially the same as those in Article 38. Thus, the marriage between cousins cited earlier as an example, while not void under Article 37, is still a nullity by virtue of Article 38.

This particular definition of incest as contained in Articles 37 and 38 differs significantly from the concept of *incestuous assault* in the sense that its concern is limited solely to the degree of relationship between the parties. Once it has identified the relationship as incestuous, it stops there. It does not probe into the nature of the relationship sought to be formalized through marriage, as to whether it was consensual or not. As far as these two articles are concerned, their effect is merely to nullify any attempt at such union. The underpinnings of a non-consensual incestuous relationship are immaterial for its purpose.

Incidentally, *incestuous marriages* under Article 37 (or by extension, Article 38) are not criminal offenses in this jurisdiction.[68] Because of this, confusion often arises when reference is made to the *criminalization* of incest. Which form of incest: the attempt at marriage between relatives or the non-consensual sexual assault by a relative? This paper, we reiterate, deals only with the latter.

This does not mean though that Articles 37 and 38 are devoid of any relevance in this discussion. An important implication arises from the two.

As earlier noted, Article 37 was intentionally segregated from Article 38. The former adheres strictly to the limits of what is universally regarded as "incestuous". Yet, the framers of the Family Code have deemed it proper to expand these relationships through Article 38 as an explicit expression of public policy. The inference is significant.

Incestuous assaults as punished in criminal law[69] limits its scope to the universally accepted bounds in Article 37, *i.e.*, between ascendants and

[66] Dean Cynthia Roxas-del Castillo of the Ateneo Law School; Professor of Civil Law Review I.

[67] *Id.* (But marriages between brothers and sisters by affinity are no longer disallowed because they really do not assume a function similar to brothers and sisters by consanguinity.)

[68] *Cf.* with US laws; *Tucker*, 174 Ind. 715, 93 NE 3.

[69] REVISED PENAL CODE, Act No. 3815 art. 337, par. 2 (1932).

descendants or between siblings. If, therefore, the extent of incestuous assaults as a crime is to be redefined, then cue can be taken from Article 38 because it is a recent expression of public policy. The framers of the Family Code have shown the way.

2. LEGAL SEPARATION

Incestuous assault can be a ground for legal separation. The Family Code provides:

> Article 55. A petition for legal separation may be filed on any of the following grounds:
>
> (1) x x x [G]rossly abusive conduct directed against x x x a common child, or a child of the petitioner;
>
> x x x x

"Grossly abusive conduct" includes sexual abuse, and when directed at a common child or a child of the petitioning spouse, it constitutes a ground for legal separation.

Article 55 adopts the concept of *incestuous assault*. Unfortunately, this provision is of little value to incest victims because Article 55 was designed more for the benefit of the innocent spouse than for the child. Its purpose is to relieve the former of her marital duties to the guilty spouse, and not to alleviate the plight of the child. For the abused child, it has little practical import. Its benefit is at best, only indirect. While custody of the child is granted to the innocent spouse,[70] it provides no guarantee that future sexual abuses will be prevented. Instances of incestuous assault, in fact, occur most often when the other spouse is absent. Legal separation between the spouses may even create an opportunity for abuse especially in the exercise of visitation rights.

For the guilty spouse to be totally deprived of contact with the child, another proceeding is in order. It does not come automatically with legal separation. Hence, if legal separation is of any help, it is but a very small step in a long trek towards the desired solution.

[70] FAMILY CODE, E.O. 209 art. 63(3) (1988).

Moreover, legal separation comprehends only relationships between spouses. It does not apply to relatives other than parents.

3. PARENTAL AUTHORITY

Similar to legal separation, parental authority uses the broader concept of *incestuous assault*. Its concern, however, is not in the punishment of the act but in the severance of a right arising from the relationship between the offender and the child.

Since parties in an incestuous assault are often related (usually, father and daughter), there is a constant possibility that the offender exercises parental authority over his victim.[71] But this is not the only type of relationship that can be covered because under certain circumstances, parental authority may extend beyond the parent-child relationship.

Articles 231(4) and 232 of the Family Code furnish the more important provisions:

> Article 231. The court in an action filed for the purpose or in a related case may x x x *suspend* parental authority if the parent or the person exercising the same:
>
> x x x x
>
> (4) Subjects the child or allows him to be subjected to *acts of lasciviousness.*
>
> x x x x
>
> If the degree of seriousness so warrants, or the welfare of the child so demands, the court shall deprive the guilty party of parental authority or adopt such measures as may be proper under the circumstances.
>
> x x x x
>
> Article 232. If the person exercising parental authority has subjected the child or allowed him to be subjected to *sexual abuse,* such person shall be *permanently deprived* by the court of such authority. (Emphasis supplied)

[71] FAMILY CODE, E.O. 209 arts. 211, 212, 213, 214, 216 and 189 (1988).

These civil law provisions, as stated, embrace the concept of *incestuous assault*. The court in a proper proceeding can choose between suspension of parental authority or permanent deprivation.

For the abused child, these provisions have special significance. They allow the court to suspend or deprive the offending parent of his parental authority *without* requiring a prior conviction. There is no need for a cumbersome criminal trial unlike in Articles 229(4)[72] and 230[73] of the Family Code which require a prior conviction before parental authority can be severed.

Moreover, for the purpose of entrusting parental authority over the abused child to heads of children's homes, orphanages, and similar institutions, only a *summary* judicial proceeding is necessary.[74] This affords the incest victim with immediate relief.

The provisions just mentioned address a crucial need of incest victims. They are important because they immediately relieve the child from the dissolute moral influence of the offender. A suspension or deprivation of parental authority often has a threefold effect. First, it immediately puts a stop to the abuse. Second, it allows for a successful prosecution. Lastly, it commences the rehabilitative process of the incest victim.

However, these benefits, while immediate, do not come automatically. Much depends on the initiative of the persons close to the victim and the government agencies concerned for these provisions to work.

B. Incest in Criminal Law

Unlike in civil law, incest in criminal law has a single meaning. It refers solely to the non-consensual, sexual assault of a female victim by a male relative, or *incestuous assault* as earlier stated. This does not mean, however, that this unity in concept translates to an advantage because these provisions remain bound by antiquated notions that have managed to survive in the present times. In their existing form, these relics have not only been causes of consternation, but as will be seen later, are downright sources of oppression.

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[72] Unless subsequently revived by a final judgment, parental authority terminates upon *final judgment* by a competent court divesting the party concerned of parental authority.

[73] Parental authority is suspended upon *conviction* of the person exercising the same of a crime which carries the penalty of *civil interdiction*.

[74] FAMILY CODE, E.O. 209 art. 217 (1988).

The succeeding sections will provide a rundown of the existing felonies under the Revised Penal Code where *incestuous assault* can be prosecuted. The discussion will focus on each felony's strengths and weaknesses from an incest victim's vantage point.

1. RAPE

> Article 335. *When and how rape is committed.* — Rape 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.
>
> The crime of rape shall be punished by *reclusion perpetua*.[75]
>
> x x x x

Rape is the gravest of all sex crimes. It imposes the severest penalty among all other felonies under "Crimes Against Chastity" of the Revised Penal Code;[76] death can [even] be imposed under certain circumstances.[77] Hence, rape is not mistakenly perceived by both victims and prosecution lawyers as the most appropriate crime to charge incest cases. The havoc that incest wreaks on the lives of its victims warrants the supreme penalty imposable, or so it would seem. But the question is, can incest prosper under a charge of rape?

Despite its grievous nature, the answer is tentative. This is because Article 335 is quite specific as to what acts constitute the crime of *rape*. Unless and until such act falls squarely in any of the three situations defined in Article 335, an incest case prosecuted under the charge of rape will not prosper. In fact, what distinguishes rape from other sex crimes are the three legal instances of its commission.

What these are and their implications on incest will be the subject matter of the following discussion. The first circumstance of the use of force or intimidation, or forcible rape (the first kind of *rape*), as well as

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[75] Imprisonment from 20 years and 1 day to 40 years (as amended by R.A. 7659 § 21).

[76] Book II, Title Eleven.

[77] AN ACT TO IMPOSE THE DEATH PENALTY ON CERTAIN HEINOUS CRIMES, R.A. 7659 (1994).

the other elements of this felony, for special reasons, will be reserved for discussion in the succeeding chapter.

(a) *When the woman is deprived of reason or otherwise unconscious*

This is the second kind of *rape*. Under this circumstance, the act is punished because the woman was not able to exercise her will. She is considered deprived of reason when she is feebleminded or idiotic. The deprivation contemplated by law need not be complete; mental abnormality or deficiency being sufficient.[78]

On the other hand, a woman is considered unconscious when sexual intercourse is committed while she is asleep,[79] before she awoke,[80] or when her lethargy was produced by sickness, or when a narcotic was administered to her.[81] So long as the condition of the woman falls under any of these situations, a rape suit can be filed.

For incest victims, this provision is of little use because many of them were in fact very much conscious when sexually violated. Hence, the provision is often inapplicable.

(b) *When the woman is under twelve years of age or is demented*

The third manner of committing rape is referred to as statutory rape. Unlike in the previous circumstance where the victim was merely unable to exercise her consent; here, the law ignores the element of consent. So long as the offended party is under twelve, any sexual conversation, under any circumstance, by any man, regardless of his relationship with the victim or the latter's reputation, is *rape*. If ever, these attendant circumstances can only serve to aggravate the offense. As far as the law is concerned, any woman under twelve is incapable giving consent to coital relations. It is rape at all times. Under this provision, a number of incest victims have found comfort.

Statutory rape is broad and encompassing. It allows the prosecution of the offender with the least demand on the offended party. It takes into account the exceptional situation of its young victim. It has, however,

[78] People v. Daing, C.A., 49 O.G. 2331, *cited in* LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW, 777 (13th ed. 1993) [hereinafter Reyes].

[79] People v. Caballero, 61 Phil. 900, *cited in* REYES, *supra* note 78.

[80] People v. Corcino, 53 Phil. 234, *cited in* REYES, *supra* note 78..

[81] REYES, *supra* note 78, *citing* Albert.

inherent limitations. Age is foremost among these. The victim has to be less than twelve.

In incest, this requirement is, in a relative sense, not difficult to meet. Many victims are assaulted early on in their lives. The only requirement is for their early detection.

But this is where the problem lies because the nature of incestuous abuse militates against such disclosure. The result is that it remains undiscovered for a long period of time and so, the chances of a successful prosecution dwindle considerably. Real evidence like vaginal lacerations or the presence of spermatozoa disappear over time. More and more, reliance will have to be made on the sole testimony of the child.

For a counsel, allowing a child to take the witness stand is replete with risks. An expert lawyer for the defense can easily perplex a young mind. For a child, on the other hand, taking the witness stand can be another source of trauma. In the end, she may just fold up and hide inside a wall of silence. By then, the only evidence available for the prosecution has become inaccessible.

What compounds the problem of late detection is the fact that precisely by reason of the child's tender age, she may be unable to recognize the sexual molestations. For example, a victim referred to her discomfort as a "tummy ache." Mothers themselves, as discussed in Chapter II, are not entirely blameless in this regard. They are unable to, or worse, may refuse to acknowledge sexual abuse as being committed in their household. The conspiracy of silence, to reiterate, is at work here.

The result is that the advantage afforded by law in statutory rape is foregone. And so long as those in a position to recognize symptoms of sexual abuse fail to do so, proving a case of statutory rape becomes just as difficult as ordinary rape itself.

There is a further problem. Statutory rape, like all kinds of rape, requires carnal knowledge by the accused with the victim as an indispensable ingredient. In incest cases, this may present difficulty because it is not unusual for offenders to sexually molest their young without engaging in actual coitus. He may not immediately force himself on his victim at the onset. He may start with fondling, then gradually progress to stroking of the child's genitals or allowing the latter to do the same with his, fellatio, until finally, he is able to consummate the sexual act with the child. The last is the act required by law. By that time however,

the victim may no longer be under twelve. Statutory rape, by then, will no longer be availing.

It is also possible that the incest aggressor may for some reason simply stop short of having sexual intercourse with the child. Hence, while other criminal provisions of the Revised Penal Code may cover such acts, these are not at all commensurate with the damage already inflicted on the child. Although the abuser's acts did not fully ripen into actual intercourse, there was unquestionably a point breached where the damage caused had become just as irreparable.

2. QUALIFIED SEDUCTION

> Article 337. *Qualified seduction.* — The seduction of a virgin over twelve years and under eighteen years of age, committed by x x x [a] domestic [or a] guardian, x x x shall be punished by *prision correccional* in its minimum and medium periods.[82]

The penalty next higher in degree[83] shall be imposed upon any person who shall seduce his sister or descendant, whether or not she be a virgin or over eighteen years of age.

Under the provisions of this Chapter seduction is committed when the offender has carnal knowledge of any of the persons and under the circumstances described herein.[84]

The article actually defines two crimes: the two kinds of *Qualified Seduction*. The first is referred to as *Qualified Seduction of a Virgin* and is committed by a guardian or a domestic[85] who has carnal knowledge with a woman over twelve but under eighteen.[86]

The other form of *Qualified Seduction* is committed by a brother or an ascendant who engages in sexual intercourse with his sister or female

[82] From 6 months and 1 day to 4 years and 2 months.

[83] *Prision Correccional* in its maximum period to *Prision Mayor* in its minimum period; or, from 4 years, 2 months and 1 day to 8 years.

[84] REVISED PENAL CODE, Act No. 3815 (1932).

[85] *See* Subingsubing, *supra* note 16, for a definition of a "domestic."

[86] The others enumerated in the law (*i.e.* any person in public authority, priest, home-servant, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman) were purposely omitted since they will generally not apply to incest cases.

descendant. This is incest proper and is referred to as *Qualified Seduction Under the Second Paragraph of Article 337*. (As will be seen later, this is still not the same incest as discussed in Chapter II of this paper.)

What differentiates *Qualified Seduction* from other sex crimes is relationship of the offender to his victim. "The acts would not be punished were it not for the character of the person committing the same, on account of the excess of power or abuse of confidence of which the offender availed himself."[87] The fact, therefore, that the woman gave her consent is no defense.[88] The penalty, however, is considerably lower compared to that for rape.

The two kinds of *Qualified Seduction* are two separate felonies although they share common elements. First, both necessitate sexual intercourse between the parties. Without this element, the crime is only *Acts of Lasciviousness with the Consent of the Offended Party*,[89] a much lesser felony. Second, the offended party in both instances must be female. This is similar to rape. Male incest victims cannot avail of these provisions.

The two types of *Qualified Seduction*, on the other hand, differ substantially in some respects. *Qualified Seduction of a Virgin* requires that, as the name suggests, the offended party must be a virgin.[90] Secondly, she must be twelve years or older but under eighteen.[91] Incidentally, this was the provision relied upon by the Supreme Court in convicting the accused in *Subingsubing*.

As can be seen, a problem arises offhand from the very first requisite. As previously discussed, victims of incest have a strong tendency to manifest what others may perceive as "anti-social" behavior. This has been explained as a possible consequence of such abuses, or as an unconscious effort on the part of the incest victim to draw attention to her plight. As a matter of fact, one strong indication of incestuous abuse is the unusually advanced knowledge of a child on sexual matters.

[87] U.S. v. Arlante, 9 Phil. 595.

[88] 2 LUIS B. REYES, THE REVISED PENAL CODE 789 (1993 ed.) [hereinafter 2REYES].

[89] REVISED PENAL CODE, Act No. 3815 art. 339 (1932).

[90] *See supra* note 34.

[91] While the law reads: "...over twelve years and under eighteen," according to (Ret.) Justice Manuel C. Herrera, present chairman of the National Amnesty Commission and professor of Criminal Law Review in the Ateneo Law School, it should also include victims exactly twelve years of age. This is because statutory rape covers only victims who are under twelve. Hence, those exactly twelve years and over are excluded.

One graphic example is the case of a five (5) year old child who had been repeatedly assaulted by her uncle.[92] Her unusual behavior was to constantly raise her skirt and exhibit her underwear to fellow pre-schoolers.

While this case undoubtedly belongs to statutory rape because of the child's age, the point is to illustrate how *natural* an impulse it can be for incest victims to display behavior even at an early age that would seem deviant from the point of view of others. For older girls, this aberrant behavior may be in the form of excessive flirtations or even outright prostitution. How then can an incest victim comply with this element?

On the other hand, *Qualified Seduction Under the Second Paragraph of Article 337* or incest proper, dispenses with both virginity and age requirements. The offended party, however, must be a sister or a female descendant of the defendant.

The effect of this element is to remove a significant number of incest cases from within its ambit. *Subingsubing* is one. It is precisely for this reason that the Supreme Court had to concur with the trial court's finding on the complainant's virginity, otherwise, the accused would not have been convicted of any crime. *Qualified Seduction Under the Second Paragraph of Article 337* was simply unavailing.

But the more serious problem with this provision is its significantly lower penalty compared with that for *Rape*.[93] While it does grant lesser requirements to the prosecution – proof of sexual intercourse with the descendant or sister being sufficient to convict the accused – the question is raised as to why the penalty is lower? Perhaps, the law mitigates the liability because of its lesser requirements for conviction.

But the effect of this reduction is to bargain away the right of the complainant. It compromised the conceptual integrity of incestuous assault in exchange for a quick conviction. And this bargain has proven to be a losing one, because *Qualified Seduction Under the Second Paragraph of Article 337* has rarely been resorted to by incest victims. Instead of the refuge it was designed to be, it has been relegated to a mere stop gap measure for incest offenders who cannot be convicted of *Rape*.

[92] The case is being handled by *Adhikain Para sa Karapatang Pambata* (AKAP), a non-governmental organization handling children's rights cases, under the auspices of the Ateneo Human Rights Center (AHRC).

[93] A difference of at least twelve years and one day.

But will a mere increase in the penalty be sufficient to rectify this crime? Not really. As a felony, it is theoretically infirm. It fails to capture the essence of incestuous assault. It cannot encompass its seriousness and gravity. It does not even attempt to call incest by its name.

3. ACTS OF LASCIVIOUSNESS

The Revised Penal Code likewise defines two kinds of *Acts of Lasciviousness*. The first is:

> Article 336. *Acts of lasciviousness.* – Any person who shall commit any act of lasciviousness upon other persons of *either sex*, under any of the circumstances mentioned in the *preceding article*,[94] shall be punished by *prision correccional*.[95] (Emphasis supplied)

Article 336 makes reference to Article 335 on *Rape*. The elements are identical except for two. First, carnal knowledge with the offended party is not required although there must still be some form of sexual overture on the part of the defendant. Another is that *Acts of Lasciviousness* under Article 336 can be committed against *both* male and female victims. This, as a matter of fact, is the only remedy available to sexually molested male victims.

Considering that, except for the two just mentioned, the rest of the elements of Article 336 are similar with those of *Rape*, it follows that the *Acts of Lasciviousness* must likewise be committed through the use of force or intimidation, or when the victim is unconscious or deprived of reason, or when the victim is less than twelve or is otherwise demented. The implication is that the attendant problems in each circumstance of *Rape* are likewise present in this crime. Moreover, the penalty is once more significantly lower. For a child who has been sexually abused, short of sexual intercourse, this remedy is acutely insufficient.

The other type of *Acts of Lasciviousness* is defined in Article 339 of the Revised Penal Code. It reads:

> Article 339. *Acts of lasciviousness with the consent of the offended party.* – The penalty of *arresto mayor*[96] shall be imposed to punish any

[94] Revised Penal Code, Act 3815 art. 335 (1932).

[95] From 6 months and 1 day to 6 years.

[96] From 1 month and 1 day to 6 months.

other acts of lasciviousness committed by the *same persons* and the *same circumstances* as those provided in Articles 337 and 338. (Emphasis supplied)

Acts of Lasciviousness With the Consent of the Offended Party, or Article 339, is analogous to Article 336 in the sense that both would have constituted graver offenses had the element of sexual intercourse been present. In Article 339, this graver felony is *Qualified Seduction*.[97] But since *Qualified Seduction* is actually comprised of two crimes, then Article 339 also consists of two felonies. Thus, the complainant under this crime must likewise establish all the elements of either of the two kinds of *Qualified Seduction* in Article 337, except for sexual intercourse. This being the case, the limitations associated with Article 337, are likewise attendant in this felony.

Article 339, however, substantially differs from *Acts of Lasciviousness* under Article 336. The former is not applicable to victims of either sex, only to female ones. Why this is so is not explained.

The effect of the gender requirement is to deprive male victims of incestuous assaults of any remedy where none of the circumstances of *Rape* are present. If there was only abuse of confidence, the act can never be prosecuted under the Revised Penal Code.

4. GRAVE SCANDAL

Article 200. *Grave Scandal.* — The penalties of *arresto mayor*[98] and public censure shall be imposed upon any person who shall offend against decency or good customs by any highly scandalous conduct not expressly falling within any other article of this Code.[99]

Article 200 is a catch-all provision. It is usually the last resort for many crimes. It is doubtful however, if it will be of much use to incest victims. *Grave Scandal* contemplates offenses against decency and customs. Incestuous assault is undoubtedly a transgression of the bounds of propriety required by modesty and good taste. But as the name suggests,

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[97] 2REYES, *supra* note 88, at 793. While art. 339 makes reference to both arts. 337 and 338, art. 338 on simple seduction is not applicable to incest cases. Its main distinguishing element is the use of deceit, usually in the context of a promise of marriage in order to obtain sexual favors from the offended party.

[98] From 1 month and 1 day to 6 months.

[99] REVISED PENAL CODE, Act No. 3815 (1932).

the act or acts complained of must be committed in a public place or within the purview of the public to constitute *Grave Scandal*. The nature of incest is directly at odds with this requirement. Incest thrives on secrecy and the silence that accompanies its commission. How then can there be a grave scandal?

C. *Differences Between Civil Law and Criminal Law With Regard to Incest*

The two branches of law differ in their *notion* of incest. Civil law uses two definitions while criminal law has one.

The two differ, as well, in terms of the *scope* covered in the incestuous relationship. Civil law, through an expression of public policy, has expanded its enumeration. The distinction is significant because in criminal law, the extent of an incestuous relationship being an element of the offense, affects its nature and the corresponding penalty. Thus, a marriage between an uncle and a niece is just as void as a marriage between brothers and sisters. But in criminal law, sexual intercourse between siblings is considered a crime, while carnal knowledge between an uncle and his niece is not necessarily so.

Another notable disparity is their *applicability* in relation to the gender of the offended party. While civil law makes no distinction whatsoever, it is very relevant in criminal law. Which crime to charge an offender depends materially on the sex of the victim. In criminal law, a male incest victim's only recourse is *Acts of Lasciviousness* under Article 336.

Finally, the *manner* the sexual abuse was committed is essential in determining what crime to charge the accused with. In civil law, this is totally irrelevant. So long as the commission of sexual abuse is established, regardless of the nature of the act and the manner of its commission, its effect on the civil relations between the parties remains the same (*e.g.*, deprivation of parental authority). There is no need for a determination of what form of sexual abuse was committed. In criminal law, on the other hand, one material question would be whether or not there was sexual intercourse.

What would account for these differences? One answer would immediately point to the distinct effects of the two sets of laws. While civil law results only in a change in the civil relations between the parties, the consequences of a criminal suit are much harsher. Punishment imposed may consist of either incarceration, a fine, disqualification in the exercise certain rights, or a combination of any of the three. These cannot be taken lightly.

But is this the only reason? As can be gleaned from the distinctions just enumerated, some of these are not even necessary and do not logically arise from the purported effects of the two sets of laws. This justification then becomes suspect.

Truth is, there may yet be another reason which would account for their differences. There are several indications to this. One is the fact that incest is never referred to in the Revised Penal Code by its name. It is awkwardly called *Qualified Seduction Under the Second Paragraph of Article 337*. Another is the respective dates of enactment of these laws. The provisions in civil law pertinent to this study are recent amendments of the Family Code[100] while its counterpart in the Revised Penal Code[101] are mostly original provisions.

What these clues lead to is that criminal law, at least with regard to incest and other sex crimes, has suffered from an unduly prolonged stagnation. It has lagged considerably behind. For how else can one justify the need to distinguish the sex of an offended party in sex crimes especially when committed against children?

This is the relevance then of a comparison between civil and criminal law. First, it provides a suitable basis for identifying which distinctions are truly warranted by the nature of each crime. Immediately, the gender requirement is not one of them. Furthermore, since civil law incorporates much of the present understanding and expressions of public policy with regard to incest, then it can serve as a basis for whatever changes that may be proposed in criminal law later on. Civil law can be a handy guide for the future revisions in criminal law.

D. *Incest in Other Laws*

There are provisions in other laws which tackle the issue of incestuous assault. The following is an enumeration of these laws.

1. P.D. 603 (THE CHILD AND YOUTH WELFARE CODE)[102]

P.D. 603, as amended, declares as a matter of policy that:

[100] Took effect on August 8, 1988.

[101] Took effect on January 1, 1932.

[102] Took effect in June 1975.

> Article 1.[103] The molding of the character of the child starts at the home. Consequently, every member of the family should strive to make the home a wholesome and harmonious place as its atmosphere and conditions will greatly influence the child's development.

The same Code likewise enumerates the rights which children are entitled to enjoy:

> Article 3(3).[104] Every child has the right to a well-rounded development of his personality to the end that he may become a happy, useful and active member of society.
>
> Article 3(5).[105] Every child has the right to be brought up in an atmosphere of morality and rectitude for the enrichment and the strengthening of his character.
>
> Article 3(8).[106] Every child has the right to protection against exploitation, improper influences, hazards, and other conditions or circumstances prejudicial to his physical, mental, emotional, social and moral development.

P.D. 603 considers young incest victims under the special category of "neglected"[107] children. Such determination allows the DSWD or any duly licensed child placement agency to file a verified petition for the "involuntary commitment"[108] of the "neglected" child to their care or that of an individual.[109] There will be a full-blown court proceeding which may

[103] CHILD AND YOUTH WELFARE CODE, P.D. 603 (1974).

[104] CHILD AND YOUTH WELFARE CODE, P.D. 603 (1974).

[105] CHILD AND YOUTH WELFARE CODE, P.D. 603 (1974).

[106] CHILD AND YOUTH WELFARE CODE, P.D. 603 (1974).

[107] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. 141 (3)(b) (1974). A neglected child is one whose basic needs have been deliberately unattended or inadequately attended. Neglect may be emotional, *i.e.*, when children are maltreated, raped or seduced.

[108] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. (4)(a) (1974). Involuntary commitment is the legal act of entrusting a child to the care of the Department of Social Welfare and Development or any duly licensed child placement agency or individual involving the termination of parental or guardianship rights by reason of substantial and continuous or repeated neglect.

[109] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. 142 (1974).

result in the termination of the rights of the child's natural parents,[110] transferring the same to the DSWD, a child placement agency, or another individual.[111]

There is one problem, though P.D. 603 contains a provision penalizing children who leave the institution or the person to whom their custody has been entrusted except in cases of grave physical or moral danger, actual or imminent. Violation of this prohibition can lead to imprisonment, a fine, or both.[112]

The question is raised as to why even think of penalizing the child. The main reason for her transfer in the first place is because of the fact that she is "neglected". The law itself admits that there are justifiable reasons for leaving. However, instead of acknowledging the special status of the child, the law imposes a burden on her to prove that these grounds do exist.

An incest victim suffers a different kind of trauma. The offender molests the child in the guise of love between members of the family. He blurs the distinction between real love and sexual abuse. The effect of this on an incest victim is the inability to distinguish one from the other. When the perversity of the actions of the abusive relative finally dawns upon the incest victim, the tendency is for the child to lump all acts of the abuser, whether innocent expressions of concern or actual abusive conduct, as manifestations of abuse. When a child is transferred to an institution or a new home, and the social worker or foster parent exhibits signs of concern for the child, the latter may exaggerate the same and misinterpret it as a prelude to abuse. Panic sets in and the fear may be strong enough to compel the child to leave, or more accurately in her mind, to escape.

Precisely, "[t]he most devastating result of the imposition of adult sexuality upon a child unable to determine the appropriateness of his or her response is the irretrievable loss of the child's inviolability and trust in the adults in his or her life."[113] For this reason, Art. 160 of P.D. 603 should be repealed, or at the very least, amended.

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[110] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. 151(1974).

[111] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. 152 (1974), *cf.* art. 217 of the FAMILY CODE, E.O. 209 art. 217 (1988).

[112] CHILD AND YOUTH WELFARE CODE, P.D. 603 art. 160 (1974).

[113] BUTLER, *supra* note 44, at 5.

P.D. 603 likewise provides for other penalties to parent offenders, namely: imprisonment and a fine,[114] or an admonition.[115] It also requires medical personnel who encounter cases of child abuse to report the same to city or provincial prosecutors. Non-compliance is fined.

The law likewise assures confidentiality of records. Any unauthorized disclosure is penalized.[116] In turn, medical personnel who report these cases are granted immunity from civil and criminal suits arising from such disclosures when made in good faith.[117]

2 REPUBLIC ACT 7610 (SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT)[118]

Republic Act 7610, a recent enactment, is a special penal law. It was designed to provide adequate protection for the child and to deter abuse, exploitation and discrimination. It defines the term "children" as "persons below eighteen (18) years of age or those who are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition."[119]

What is at once apparent from this definition is the absence of a gender-based distinction. A child victim under Republic Act 7610 can either be male or female.

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[114] Art. 59. *Crimes.* – Criminal liability shall attach to any parent who:

. . . .

(9) Causes or encourages the child to lead an immoral or dissolute life.

Art. 60. *Penalty.* – The act mentioned in the preceding article shall be punishable with imprisonment from two to six months or a fine not exceeding five hundred pesos, or both, at the discretion of the Court, unless a higher penalty is provided for in the Revised Penal Code or special laws, without prejudice to actions for the involuntary commitment of the child under Title VIII of this Code.

[115] Art. 61. *Admonition to Parents.* – Whenever a parent or guardian is found to have been unreasonably neglectful in the performance of his duties toward the child, he shall be admonished by the Department of Social Welfare . . . .

[116] Art. 166; *See also* §§ 4 to 6 of Rules and Regulations of R.A. 7610, which took effect on November 1993.

[117] Art. 167. *See also* Rules and Regulations Implementing R.A. 7610 § 7.

[118] Approved on June 17, 1992.

[119] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610 § 3(a).

Sexual abuse is specifically penalized in Article III (Child Prostitution and Other Sexual Abuse) and Article VI (Other Acts of Abuse) of said law.[120] However, what is troublesome in these provisions is that they make no mention of incest at all. The Rules and Regulations promulgated by the Department of Justice in consultation with the DSWD pursuant to this law, expressly include incest as a form of sexual abuse.[121] Even Senator Jose Lina, in his sponsorship speech, mentioned incestuous abuse as one of the reasons for the passage of this law.[122] The question is raised however: Does Republic Act 7610 cover incest cases?

On the one hand, there is no doubt that incest, at least in theory, is a form of child sexual abuse and the clear intent of the law is precisely to protect the children from *all* forms of sexual abuse regardless of its nature. But on the other hand, the substantive portions of the law where the criminal acts are spelled out in detail (Articles III and VI) do not include incest. To insist upon its inclusion is to strain the words of the law. Incest is clearly out of context. Moreover, as a penal statute, Republic Act 7610 must be strictly construed.[123] The result is an unresolved question on the applicability of this law to incest. Until this is decided in a proper case filed with the Supreme Court, or through an amendatory legislation, the answer will remain debatable.

However, this present impasse does not mean that incest victims are totally deprived of the advantages offered by Republic Act 7610. Among these are the extension of the list of persons who may file a complaint for sexual abuse under this law,[124] protective custody of the child,[125] assurance of confidentiality,[126] and the reinstitution of special court proceedings in child-related lawsuits.[127]

[120] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610 § 3(a).

[121] Rules and Regulations of R.A. 7610, § 2(g).

[122] Senate Journal, 4th Regular Session, Session No. 111, April 28, 1991, 42-46.

[123] U.S. v. Abad Santos, 36 Phil. 243 (1917); *see also* People v. Gatchalian, 58 Phil. 665 (1933).

[124] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610, § 27. This will be discussed in greater detail in Part V.

[125] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610 § 28.

[126] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610 § 29.

[127] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, R.A. 7610 § 30.

In fact, what makes this law particularly distinctive is its highly progressive outlook. This is reflected in the radical strides it has taken in criminal law theory.

3. BARANGAY LAWS

Two laws with the same aim but attuned to the needs of the local community are Republic Act 6972 and Republic Act 7160. The first, the *Barangay-Level Total Development and Protection of Children Act*,[128] declares as a matter of State policy the protection of children's rights. An important feature of this law is the creation of sanctuaries in the barangay for children who are in urgent need of protection from cruelty and abuse. It also gives barangay officials the right to call on law enforcement agencies in situations where the child needs to be immediately rescued from unbearable home situations.[129]

The other law, Republic Act 7160 or the *Local Government Code of 1991*,[130] authorizes the Sangguniang Barangay, the local legislative body, to adopt measures toward the prevention and eradication of child abuse in their respective communities.[131]

These laws recognize a basic truth in many sexual offenses, *i.e.*, it is to the barangay officials to whom aggrieved families first run to, especially those located in remote areas. Barangay officials are the frontliners of the law and the two statutes provide these local bodies with ample authority to initiate measures to prevent child abuse within their respective communities. Their incomparable advantage is that they work at the grassroots level.

V. PROPOSED LEGISLATION

The preceding chapter demonstrated the difficulty in finding a suitable law to charge the aggressor in incest cases. Instead of getting forthright relief, the victim is unnecessarily burdened by having to choose which crime to prosecute her case. In each instance, she is forced to weigh

[128] Approved on November 23, 1990.

[129] BARANGAY-LEVEL TOTAL DEVELOPMENT AND PROTECTION ACT, R.A. 6972, Sec. 3(e).

[130] Took effect on January 1, 1992.

[131] LOCAL GOVERNMENT CODE, R.A. 7160 § 391(20) (1991).

the advantages of each felony against the drawbacks. This, in turn, is brought about by arbitrary distinctions which have become embedded in the present criminal laws. The result is a sordid state of affairs where the dignity in seeking vindication of one's right is reduced to the desperation of having to haggle for justice.

Earlier on, the problem with the crime of *Qualified Seduction Under the Second Paragraph of Article 337* or incest proper, was raised. But as stated, it is not a simple matter of increasing its penalty. There are other considerations. At this point, this writer himself faces a crossroad. On the one hand, considering the unjust requirements of the present criminal laws, there is already more than sufficient justification based on the pressing needs of incest victims to completely overhaul the legal system with regard to incest. To this end, there is the expediency of formulating an entirely new law which will incorporate all the useful facets of the existing ones, paste them together, and dub it as the new "Incest Law."

On the other hand, there may be wisdom in taking cue from what incest victims have instinctively been doing for so many years, *i.e.*, filing their cases as charges for *Rape*. At first blush, it would seem that this is but a natural reaction for victims to ask for the highest imposable penalty. However, upon closer scrutiny, it would appear that rape and incest have a lot more in common than what can be immediately perceived.

For reasons that will be apparent later on, this writer has opted for the second option. Thus, instead of overhauling the existing legal landscape with regard to incest, this writer will propose that incest be considered as the fourth category of *Rape*.

A. *The Crime of Rape Through Force or Intimidation*

Theoretically, incest and *Rape* are two entirely distinct crimes. They are not the same. Incest is embraced, *albeit* in a restricted sense, in the crime of *Qualified Seduction Under the Second Pargraph of Article 337. Rape*, on the other hand, is essentially carnal knowledge without a woman's consent. Thus, when incest is prosecuted under a charge of *Rape*, what the information actually alleges are the elements of *Rape*, not *Qualified Seduction*. The incest angle is merely an aggravating circumstance.[132]

[132] Now a qualifying circumstance by virtue of R.A. 7659.

Although at present, there are three existing categories of *Rape*, for the purpose of this chapter, only the first category, or *forcible rape*, will be used in analyzing incest. The reason is partly because subject to certain exceptions, in all sexual acts, whenever consent is absent, force or intimidation will almost always be present. Statistics further reveal that an overwhelming majority of the cases appealed to the Supreme Court are for forcible rape.[133]

In addition, the second and third categories of *Rape* which have already been discussed, are really special circumstances. These two categories are firmly entrenched in law and jurisprudence. They reflect an advanced state of criminal law theory. The only task left for the prosecution is to prove that the offended party falls within any of these categories and the process is greatly facilitated.

Because of this ease, even if the sexual abuse is actually incestuous, so long as the circumstances in the second or third forms of *Rape* are likewise attendant, then the prosecution should, by all means, pursue their case under the latter. They offer a leeway which cannot be matched by any law at the moment. To insist upon the incestuous nature of the act is to abandon the advantages offered by these provisions. It would be folly. This paper would therefore exclude incest cases which can be rightfully prosecuted under these two categories of *Rape*.

And as a matter of fact, it is precisely this relative ease in prosecution which this writer aims to engender for incest cases because not all victims can always lay claim to having been abused within the limited parameters of these two kinds of rape. The sad truth is, many were very much conscious, of sound mind and above twelve when molested. Yet, they have suffered no less. They remain unwilling victims of incest – an atrocious offense – and they equally deserve the sympathy of the law. For this reason, it is fervently argued that the circumstance of an incestuous relationship between the offender and the offended party should already suffice, alone and by itself, to presume the commission of *Rape*, similar to statutory rape and rape of a demented or unconscious person.

With this as a basic framework, the attempt to link the concepts of incest and rape can now proceed. As a first step, an examination of the elements of forcible rape is in order. This was left hanging in the previous chapter.

[133] At least 85% from the period 1985-90.

1. ELEMENTS OF FORCIBLE RAPE

Forcible rape is committed by a male offender who has carnal knowledge with a woman through the use of force or intimidation. There are three elements.

(a) *The offender must have* ***carnal knowledge*** *with the offended party*

The first element necessitates that sexual intercourse be committed. The law does not require full penetration of the male organ inside the woman's genitalia. Proof of seminal emission is not necessary and the absence of spermatozoa in the vagina does not negate rape.[134] The woman need not get pregnant.[135]

Lack of fresh lacerations does not negate rape especially if medical examination is conducted some two weeks later.[136] The rupture of the hymen is not essential. It suffices that proof of the "entrance of the male organ into the labia of the pudendum" is adduced.[137] Without carnal knowledge, the act is merely *Acts of Lasciviousness* under Article 336.

This coital requirement has long been criticized as being severely restrictive. Earlier, mention was made of the numerous instances of lascivious conduct committed on young children which fall short of actual intercourse and yet, are no less abominable. Even without coitus, these other expressions of sexual perversion can inflict serious damage.

(b) *The offended party must be female*

This is another element which has drawn flak especially in incest cases. While female victims easily outnumber the males, it does not mean that the latter are not entitled to the same statutory relief. Male children are victimized as well and when it comes to incest, there is no substantial difference between the sexes. Both are just as vulnerable and defenseless.

(c) *The offense must be committed through the use of force or intimidation*

[134] People v. Canastre, 82 Phil. 480 (1948).

[135] People v. Gozum, 135 SCRA 295 (1985).

[136] People v. Deus, 136 SCRA 660 (1985).

[137] People v. Aragona, 138 SCRA 569 (1985).

Force or intimidation qualifies sexual assault into rape because the sexual act, by virtue of the intimacy involved, is intended to be consensual in nature. When coupled with an unwilling victim, it becomes an act of violence.

Just what is the degree of force required to constitute rape is a "relative term, depending on the age, size and strength of the parties and their relation to each other."[138] The force used need not be irresistible. It need only be present and so long as it brings the desired result, all consideration of whether it was more or less irresistible is beside the point.[139]

However, there must be some form of physical resistance.[140] If the woman has contributed in some way to the realization of the act, this will possibly constitute an offense very different from the crime of rape.[141] This has been the waterloo of incest cases.

Intimidation, on the other hand, while not physical in nature, remains a form of coercion because it subverts the will of the victim. It can be in the form of threats or overpowering moral influence. A victim can be intimidated because of fear for her life and personal safety.[142] It includes the moral kind such as the fear caused by threatening the victim with a pistol or knife.[143]

Like the use of force, the degree of intimidation required to constitute *Rape* is relative. Intimidation is addressed to the mind of the victim and is subjective.[144] There are no hard and fast rules. It must be viewed in the light of the victim's perception and judgment at the time of the commission of the crime.[145]

Only these three elements constitute the crime of forcible rape and no other. Virginity is not a requisite.[146] Neither is the reputation or the

[138] People v. Savellano, 57 SCRA 320 (1974).

[139] 2REYES, *supra* note 95 at 776; *see also,* People v. Momo, 56 Phil. 86 (1974) and People v. Jimenez, 93 Phil. 137 (1953).

[140] *See also* People v. Lago, C.A., 45 O.G. 1356, *cited in* 2REYES, *supra* note 95.

[141] *See also* U.S. v. De Dios, 8 Phil. 279 *cited in* REYES, *supra* note 95.

[142] People v. Arengo, 181 SCRA 344 (1990); *see also* People v. Olivar, 215 SCRA 759 (1992).

[143] People v. Mabunga, 215 SCRA 694 (1992).

[144] People v. Matrimonio, 215 SCRA 613 (1992).

[145] People v. Grefiel, 215 SCRA 596 (1992).

[146] People v. Banayo, 195 SCRA 543 (1991).

character of the woman.[147] The fact that the offended party may have been of an unchaste character constitutes no defense in a charge of rape.[148] Lewd designs of the offender need not even be alleged. The site of the commission of the offense does not negate rape for it can be committed even in a public place.[149] A medical examination, while useful, is not a prerequisite.[150]

B. *Relationship in Incest is a Qualifying Circumstance*

The main feature which sets incest and parricide[151] apart from other felonious acts is the circumstance of relationship between the offender and the offended party. This analogy, however, is short-lived because the law treats the two acts in an entirely different manner.

When a person kills another, the crime committed is homicide.[152] Should the accused turn out to be a relative of the deceased, the crime is automatically qualified into parricide, a graver felony. No other circumstance is necessary. Any other (*e.g.*, the means used) can only serve to aggravate the offense but not to qualify it any further. With regard to the penalty, parricide and murder[153] stand on equal footing. They both impose the highest penalty in "Crimes Against Persons."[154]

On the other hand, when it comes to sex crimes, not even the fact that the sexual offender is the victim's own father could, by that circumstance alone, persuade the law to impose the highest penalty possible. Incest *per se* will always be qualified seduction under the second paragraph of Article 337. In fact, it is precisely this incestuous element which defines this crime. More puzzling is why it should lead to a sizeable decrease in the attendant penalty.

[147] People v. Bacalzo, 195 SCRA 557 (1991).

[148] People v. Blance, 46 Phil. 113 (1924).

[149] People v. Hermosada, 143 SCRA 484 (1986); *see also* People v. Bautista, 142 SCRA 649 (1986 150 People v. Abonada, 169 SCRA 530 (1989).

[151] REVISED PENAL CODE, Act No. 3815 art. 246 (1932). However, the relationships covered in th crime are limited only to relatives by consanguinity in the direct line and the spouse of th accused.

[152] REVISED PENAL CODE, Act No. 3815 art. 249 (1932).

[153] *Reclusion perpetua* to death.

[154] REVISED PENAL CODE, Act No. 3815 Title 8 (1932).

How and why this set-up came to be is a genuine source of amazement. When one kills a person who turns out to be a relative, the relationship factor immediately asserts itself to qualify the crime. The underlying premise is that a person who kills his own kin exhibits a higher degree of criminality. Applied to incest cases, this argument should be even more persuasive.

After all, unlike homicide, sexual intercourse can never be committed by accident. Carnal knowledge is always intentional. It is precisely for this reason why it was earlier stated that force or intimidation will always be present whenever consent is absent in any sexual entanglement. As such, whenever an offender has sex with his kin, there is no doubt that what he is displaying is not just a higher sense of criminal depravity, it is perversity in its darkest and most degenerate form. The fact that the sexual act is incestuous should therefore suffice to qualify the act into a grave offense, akin to parricide.

The law does not deem so however. Could it be because the analogy made here between incest and parricide is misplaced? Or is it possible that it is actually the crime of parricide which suffers from poor conceptualization, not incest?

Answering the latter question first, parricide is not a poorly conceived crime. A charge for parricide does not automatically translate into a conviction. Like all other crimes, all the justifying[155] and exempting[156] circumstances and absolutory causes[157] are just as availing to the defendant charged with parricide. He is presumed innocent. It is only when he is found guilty that the criminality of his act attaches with finality. Thus, when he is convicted for parricide, it is only then that the underlying presumption of a higher degree of criminal perversity is justified. Relationship, then, is properly qualifying.

If this is the case with parricide, then why cannot the same be true with sex crimes? Why cannot mere relationship alone suffice to constitute incest as a grave felony? Why does it have to be associated with other

[155] REVISED PENAL CODE, Act No. 3815 art. 11 (1932).

[156] REVISED PENAL CODE, Act No. 3815 art. 12 (1932).

[157] REYES, *supra* note 78. Absolutory causes are those where the act committed is a crime but for reasons of public policy and sentiment, there is no penalty imposed. These are art. 6, art. 20 in rel. to art. 19 par. 1, art. 124 last par., art. 247, pars. 1 and 2, art. 280 par. 3, art. 332 and art. 344, par. 4 of the REVISED PENAL CODE, Act No. 3815 (1932).

factual circumstances, notably force and intimidation, before it can be qualified? This brings the discussion back to the first question: Is the analogy between incest and parricide justified?

The answer is expectedly not categorical for one simple reason: the acts of killing and sex are, by nature, worlds apart. Death may be caused by negligence, accident or design. The resulting penalty may vary in each instance but one thing will always be certain: the victim will be dead no matter what.

On the other hand, sexual intercourse does not always have to produce a situation deleterious to a person's well-being. On the contrary, because sex is an essential function of the human reproductive system, it is, in a sense, meant to be exercised. Corollarily, the intent to have sex will not always be criminal. In fact, it may even be the most intimate expression of mutual affection. For this reason, the presence of consent negates criminal intent.

Before incest and parricide can be compared then, a crucial step must first be taken, *i.e.*, the act of sexual intercourse in incest must first be *criminalized*. It must be understood as one committed with criminal intent. Only after this crucial step is made will the analogy between incest and parricide begin to work. And when the intent is criminal and the offender happens to be a relative of the victim, it now becomes extremely difficult to justify how the relationship factor can result in the highest penalty in intentional killing, while in criminal carnal knowledge, it does not. Relationship ought to produce the same effect. The fact that it does not is a legal idiosyncracy.

What accounts then for this theoretical inconsistency? Again, the answer is not new. It is the unduly prolonged stagnation of sex crimes in this country.

One extremely important point should be stressed though. The argument that incest should be a grave felony because of the circumstance of relationship finds support not just in the analogy with parricide alone but in the very nature of incest. It is, in fact, the very wellspring of this contention. Chapter II tried to illustrate how incest operates. In every phase of its execution, the use of coercion is an undeniable constant. As indicated beforehand, it would be well and good if every time incest is pursued in courts, all the circumstances of rape are attendant. But this is not always the case in a substantial number of incestuous assaults. Many in fact, have nothing but their incoherent testimonies to offer.

C. *Why Incest is Rape*

The preceding section made a very crucial assumption to justify the analogy between incest and parricide, *i.e.*, in incest, the intent is criminal; not consensual. But is it really the case?

It is the writer's position that it is. Furthermore, it is strongly contended *that mere proof of an incestuous relationship should automatically result in a presumptive refutation of the existence of consent.* This is because while an incestuous relationship arising from pure consent will always remain a distinct possibility, its likelihood in incest is tremendously reduced. The reason hinges primarily on the very circumstance of *relationship.*

Relationship creates a forbidden zone — an area where a form of physical contact is not allowed to be expressed between members of the family, except the spouses. This prohibition is firmly entrenched in almost all norms of society, be it cultural, legal, religious or moral.

When this barrier is breached, the accused does not simply break the law; he runs against an entire spectrum of prohibitions which make up this taboo. He defies everything held sacred by his family, society, religion and culture. He is not just a misfit. He is an outcast in the eyes of the law and a pariah in his community.

The violator cannot feign ignorance. The incest taboo is prevalent. It is pervasive. He cannot pretend not knowing its full implications. When he decides to push through with this offense, he knows that he is not merely giving way to his lust. He is breaking every bound of morality and propriety.

And the intentional nature of the sexual act compounds his liability. His transgressions are never accidental. As earlier pointed out, every sexual act is deliberate. Therefore, when carnal knowledge is incestuous, it is one committed by the perpetrator with full consciousness of his actions. When he breaks the norms, he breaks them willfully.

The criminal intent of the incest aggressor is therefore evident. From this alone, it should already merit the severest penalty. Unlike in ordinary rape cases where the law still has to ferret out from the facts the criminal resolve of the accused, in incest, it is inherent and at once apparent.

But there is more, for the profanity of incest lurks not just in the intention of the perpetrator but in the actual means he uses in committing the same. In incest, the offender is not alone in the consummation

of his actions. The victim, who happens to be his own kin, anguishes in his transgressions.

When the abuser initiates his sexual overtures, alarm bells ring not in the offender's mind alone. Similar warnings flash as urgently in the mind of his intended victim compelling the latter to resist. The offender is met not just by his own mental resistance, there is in fact, external resistance as well.

In the victim's mind, it is not simply because she is being sexually molested that she offers resistance. The more powerful reason for thwarting such attack is precisely her relationship with the offender. If he succeeds, he will not be alone in bearing the stigma of incest. She will be blemished just as well. She may even bear him a child as a painful reminder of his travesties.

With every reason then for the offender to desist, and every reason as well for the victim to resist, when incest succeeds, it can only be because there was coercion. Incest, at this point, is no longer the innocuous act of two relatives opting to engage in sexual play that many are wont to believe. Neither is relationship a useless happenstance bereft of any implication. Nor is it limited to the abuse of confidence which the crime of qualified seduction would like to theorize incest, although admittedly, it starts off on the right footing.

More than this, inherent in almost every act of incest is the interplay of power and domination of the abuser over the weakness and dependence of his victim. The very idea itself of relationship militates against any tendency to have sexual involvement between kin. Incest as being consensual and arising from the initiative of both parties runs counter to human nature. Hence, when it does succeed, the likelihood is that it was made with compulsion or insistence of one party alone. Its success was assured by the offender's abuse of his dominance over his victim, compounded by the vulnerability of the latter. To overcome the victim's natural resistance (and not just reluctance), there had to be force or intimidation somewhere in between. And no less than the Supreme Court itself, through very recent pronouncements, has expressed the use of force or intimidation as being inherent in an incestuous assault:

> "It is hard to believe that any daughter would simply give in to her father's lascivious designs had not her resistance been overpowered."[158]

[158] People v. Lucas, 181 SCRA 316 (1990).

> "In a rape committed by a father against her daughter, the father's moral ascendancy and influence over the latter substitutes for violence or intimidation."[159]

> "The overpowering and overbearing moral influence of a father over his daughter takes the place of violence and other resistance required in rape cases committed by an accused having no blood relationship with the victim."[160]

> "Force or intimidation need not even be employed for rape to be committed where the overpowering moral influence of a father over his daughter suffices."[161]

And these principles have been extended by the Supreme Court beyond the confines of a father-daughter relationship to other incestuous relationships as well:

> "The foregoing principle[s] appl[y] in the case of a sexual assault of a stepdaughter by her stepfather and of a goddaughter by a godfather in the sacrament of confirmation."[162]

Incest then becomes as contemptible for the *means* employed in its commission as its *nature*. When consummated, it is an act of coercion. It is a form of assault which has to be abated and penalized. Incest then is a form of *Rape*.

D. Proposed Legislation

Before proceeding with the proposed legislation, there is a need at this point to hurdle a major legal obstacle. Hitherto, this has hindered the successful prosecution of incest cases *albeit* it was by no means intentional. This obstacle happens to be another cornerstone of our criminal legal system. It is so deeply embedded that it is etched as one of the basic rights in the fundamental law of the land: the presumption of innocence of the accused.

[159] People v. Matrimonio, 215 SCRA 613 (1992).

[160] People v. Caballes, 199 SCRA 152 (1990); People v. Mabunga, 215 SCRA 694 (1992); People v. Bruca, 179 SCRA 64 (1989).

[161] People v. Robles, 170 SCRA 557 (1989).

[162] Matrimonio, 215 SCRA at 694.

1. GENERAL RULE ON THE PRESUMPTION OF INNOCENCE OF THE ACCUSED

No less than the Bill of Rights embodies this fundamental precept. It states:

> Section 14.[163] (1) No person shall be held to answer for a criminal offense without due process of law.
>
> (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved ...

This means that no person can be convicted unless the prosecution has proved beyond reasonable doubt that he committed the crime for which he is charged.[164] The presumption imposes the burden on the State "to prove every fact and circumstance constituting the crime charged, for the purpose of showing the guilt of the accused."[165] This presumption cannot be overcome by ordinary evidence. The degree required is *proof beyond reasonable doubt.*[166]

> "[T]he State is required, in the discharge of the burden imposed upon it of establishing by proof all the essential elements of the crime with which the defendant is charged in the indictment,...and in the absence of such a degree of proof of the defendant's guilt, he is entitled to an acquittal, regardless of whether his character is good or bad."[167]

2. EXCEPTION

The rule, however, admits of an exception. It does not preclude the State from shifting the burden of proof on the accused. This is founded on the nature of crimes in this jurisdiction as mere statutory creations. As such, a necessary consequence of this power is the right of the sovereign "to specify what act or acts ... shall constitute *prima facie* evidence of guilt ... ."[168] The result is a shift in the burden of proof to the accused. As the Court has stated:

> ...[N]o constitutional provision is violated by a statute providing that proof by the state of some material fact or facts shall constitute *prima facie* evidence of guilt, and that... *the burden is shifted to the defendant for the purpose of showing that such act or acts are innocent and are committed without unlawful intention.*[169] (Emphasis supplied)

Aside from being an incident of the sovereign power to create crimes, a more cogent reason for allowing contrary presumptions is no less than human experience itself.[170] This is because the substantive aspect of the Due Process clause[171] demands reasonability in every act or statute passed by the Legislature.[172] The only requirement for it to withstand constitutional infirmity is that "there be a rational connection between the facts proved and the ultimate fact presumed so that the inference of the one from proof of the other is not unreasonable and arbitrary because of lack of connection between the two in common experience."[173]

The Revised Penal Code and other special penal laws already contain several examples of these contrary presumptions. These include illegal assembly,[174] graft and corruption,[175] malversation,[176] brigandage,[177] aiding and abetting a band of brigands,[178] cattle rustling,[179] fencing,[180] estafa

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[163] PHILIPPINE CONST. art. III; *see also* NEW RULES ON CRIM. PROC., rule 115 § 1(a).

[164] JOAQUIN BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER, 119 (1993).

[165] U.S. v. Luling, 34 Phil. 725 (1916).

[166] "Proof beyond reasonable doubt does not mean such a degree of proof as, excluding the possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." NEW RULES ON EVIDENCE, rule 133, § 2 (1989).

[167] RICARDO J. FRANCISCO, EVIDENCE: RULES OF COURT IN THE PHILIPPINES 576 (1993).

[168] Luling, 34 Phil at 176.

[169] Luling, 34 Phil 725 (1916).

[170] Albores v. Court of Appeals, 132 SCRA 604 (1984).

[171] CONST., art. III, § 1.

[172] BERNAS, *supra* note 164 at 3.

[173] People v. Mingoa, 92 Phil. 856 (1953), *citing* 1 COOLEY, 638-641 (8th ed.).

[174] REVISED PENAL CODE, Act No. 3815 art. 146 2nd par. 2 (1932).

[175] ANTI-GRAFT AND CORRUPTION LAW, R.A. 3019, § 3(i) 2nd par. and § 8 (1960).

[176] REVISED PENAL CODE, Act No. 3815 art. 217, last par (1932).

[177] REVISED PENAL CODE, Act No. 3815 art. 306, 3rd par. (1932).

[178] REVISED PENAL CODE, Act No. 3815 art. 307, 2nd par. (1932).

[179] ANTI-CATTLE RUSTLING LAW OF 1974, P.D. 533, § 7 (1974).

[180] ANTI-FENCING LAW, P.D. 1612, § 5 (1979).

committed by means of issuing or postdating a check without or with insufficient funds,[181] issuance of bouncing checks,[182] arson,[183] exemptions from criminal liability for theft, swindling or malicious mischief by relatives on the basis of "presumed co-ownership of the property between the offender and the offended party,"[184] rape[185] and defamation.[186]

It should be stressed though that these presumptions are merely *prima facie*. They are not conclusive so as to afford the accused an opportunity to contradict the same.

Another important limitation of contrary presumptions in criminal statutes is that they may only be created by law. This is because contrary presumptions arise as an incident of the sovereign power to create crimes and must be based on a determination of human experience. Only the Legislature with its plenary powers has this prerogative.

3. APPLICATION IN INCEST CASES

To recapitulate what has been said in the preceding discussion, incest is proscribed by all norms of human conduct. It is a taboo. When this is breached (and this is always willful), the only possible explanation is the use of coercion since resistance to incest is a natural, human tendency. The coercion is embodied in the interplay of domination over dependency, abuse over trust, and authority over obedience. No less than the Supreme Court has recognized these coercive forces at work in incest.

Consent, therefore, hardly enters the picture. The lack of it, on the contrary, is buttressed by both human nature and experience. Hence, when incest is committed, it is almost as surely without consent. There are no noble intentions. It is a criminal sexual perversion. In plain terms, it is an act of a sick, perverted mind.

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[181] REVISED PENAL CODE, Act. No. 3815 art. 315, 2(d) (1932).

[182] BOUNCING CHECKS LAW, B.P. 22, §§ 2 and 3 (1978).

[183] LAW ON ARSON, P.D. 1613, § 6.

[184] REYES, *supra* note 78 at 761.

[185] REVISED PENAL CODE, Act No. 3815 art. 335 (1932).

[186] REVISED PENAL CODE, Act No. 3815 art. 354 (1932).

While the Constitution guarantees the presumption of innocence of the accused, this rule is subject to exceptions, more so, when one compelling reason is the concomitant duty of the State to protect its young.

What is now being sought is for the law to take the next crucial step. The Supreme Court has led the way by acknowledging the inherent existence of force, or at the very least, intimidation, in incest. This has totally sufficed to destroy the presumption of innocence of the accused in incest cases. The only thing left to do now is to shift the burden on the accused to prove that there was actual consent, for clearly, this is the exception more than the rule. The proposed legislation is designed to overcome the powerfully inhibitive nature of incestuous abuse and to avoid future situations similar to *Subingsubing*.

To this end, it is proposed that incest be considered as the fourth category of rape. As amended, Article 335 will appear as follows:

> Article 335. *When and how rape is committed.* Rape 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;
> 3. When the woman is under twelve years of age or is demented; and
> 4. When the victim is under eighteen years of age and the offender is a parent, ascendant, stepparent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim. When these elements are present, such will constitute *prima facie* evidence of the guilt of the accused.
>
> The crime of rape shall be punished by *reclusion perpetua*.
>
> x x x x
>
> The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances:
>
> 1. When the victim is under eighteen years of age and the offender is a parent, ascendant, stepparent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.
>
> x x x x

E. *Effects of the Proposed Legislation*

1. PROBATIVE VALUE

The most significant effect of the proposed legislation is the resulting shift in the burden of proof. It is no longer incumbent upon the incest victim to disprove the possibility of consent while at the same time proving any of the existing circumstances of *Rape* in order to prosecute under such offense. Rather, it is now for the accused to prove the presence of consent in the incestuous relationship.

In this connection, this proposed fourth category of *Rape* is less strict than statutory rape because consent is not totally precluded. It is only presumed *prima facie* to be absent. But the two share a common ease, relatively speaking, in establishing the constitutive elements of *Rape*. Age and relationship between the parties are two easily determinable circumstances.

Applied to future incest cases similar to *Subingsubing*, where prosecution is inconsistent and the defense weak, the law will now have to lean in favor of the complainant. The defense must now establish that there was consent, if indeed there was any, in order to be acquitted.

A question may arise, however, whether this presumption would not be susceptible to abuse considering that a mere accusation of incestuous involvement can result in a scandal and cause damage to a person's reputation. The answer to this can be found in both the nature of the offense and the present legal set-up.

Under the latter, there are several procedural and substantive safeguards to prevent such form of abuse. Foremost is the need for a preliminary investigation for crimes cognizable by the Regional Trial Court, such as rape.[187] The public prosecutor can decide, without a need for a full-blown trial, whether there is well-founded belief to file a case. Secondly, the Revised Penal Code likewise protects individuals from disrepute maliciously caused by others through the crimes of slander,[188] incriminating innocent persons,[189] and intriguing against honor.[190] Then, there are also

[187] NEW RULES ON CRIM. PROC., rule 112 § 1 (1985).

[188] REVISED PENAL CODE, Act No. 3815 art. 358 (1932).

[189] REVISED PENAL CODE, Act No. 3815 art. 363 (1932).

[190] REVISED PENAL CODE, Act No. 3815 art. 364 (1932).

the reliefs granted by the Civil Code for damages.[191]

But more effectively, the very nature of the crime itself inhibits any person from instigating the complaint, whether as the father of the victim or the supposed victim herself. In fact, this is true even for families who were actually wronged. As the Supreme Court has opined:

> It is unnatural for a parent to use his offspring as an engine of malice, especially if it will subject a daughter to embarrassment and even stigma, as in this case.[192]

As for any woman to use this provision just to get back at her relative, the Court has this to say:

> [I]t is... hard to believe that a young and naive lass could be so motivated by feelings of revenge as to fabricate a story of rape, to have her private parts examined and to subject herself to the indignity of a public trial, against her very own father, if there be no truth to the same.[193]

Besides, the proposed legislation was designed to be merely *prima facie* and not conclusive so as to afford the accused an opportunity at all times to present evidence to the contrary. This is in recognition of the fact that this writer does not close the possibility of an incestuous relationship arising wholly from consent.

2. QUALIFIED SEDUCTION

Another welcome effect of the proposed legislation is that incest victims will no longer have to content themselves with qualified seduction under the second paragraph of Article 337 which, as it stands, is limited to the male ascendant-female descendant or brother-sister relationships. It also corrects the error of said article which actually *penalizes* the offended party by imposing a lesser penalty against the offender.

Furthermore, incest victims will no longer have to gamble on the first half of Article 337, or *Qualified Seduction of a Virgin*, where they

[191] NEW CIVIL CODE, Title XVIII on Damages and Preliminary Title, Chapter 2 on Human Relations.

[192] People v. Salomon, 229 SCRA 403 (1994).

[193] People v. Lucas, 181 SCRA 316 (1990).

have to contend with even more absurd legal requirements such as reputation for virginity and the like.

It is even suggested at this point that *Qualified Seduction* under the second paragraph of Article 337, which pertains exclusively to incest, be repealed. Compared with the real gravity of the problem of incest, *abuse of confidence* which this crime theorizes is puny. It starts off well but expectedly falls short of breath.

And this is what this paper has consistently driven at. Incest has never been simply a matter of *abuse of confidence*. More than this, in all its phases and in all its forms, it is an act of coercion. Incest has always been rape.

3. EFFECT ON REPUBLIC ACT 7659 (HEINOUS CRIMES LAW)

At this point, the effect of the proposed legislation vis-à-vis the amendments introduced by Republic Act 7659 to Article 335 on rape, which similarly delve on incest, is put into question. Will these not conflict, or perhaps, result in a redundancy? It will be noted that the first sentence of the proposed new category of rape is a verbatim reproduction of one of the amendments introduced by Republic Act 7659 on Article 335 or *Rape*.

There is no conflict. Republic Act 7659 has already remedied a problem earlier raised by redefining the extent of relationships which are considered incestuous. Prior to this, only ascendants and descendants and siblings were covered. Republic Act 7659, it would now seem, is an even more radical expression of public policy than Article 38 of the Family Code because it takes into consideration not just the actual blood ties in families, but the informal ties as well which exist in many Filipino households. These include the common law husband of a separated wife, a stepfather, a live-in[194] boyfriend, and the like. This writer, by quoting verbatim a section of Republic Act 7659 and merely placing it in a different section, pays homage to this important stride made by said law.

Moreover, there is no redundance. While it would seem that Article 335 has already incorporated the proposed legislation because Republic Act 7659 qualifies rape by imposing the death penalty in incestuous rape cases, a closer scrutiny however, would reveal that before said amendment can begin to apply, the three elements of *Rape* must still be proved.

[194] Colloqiual term for co-habiting couples.

Hence, the difficulties attendant in prosecuting *Rape* cases remain intact despite Republic Act 7659. *Rape* must still be proven as a matter of fact before Republic Act 7659 can even begin to apply.

On the other hand, the proposed legislation does away with these difficulties. As mentioned, its primary significance rests in the shift of the burden of proof on the accused, thereby relieving the victim of the oppressive silence which is inherent from the very nature of the incestuous act.

But there is another equally serious contention. Under the proposed legislation, mere proof of an incestuous relationship would essentially suffice to constitute the crime of *Rape*. The penalty imposable is *reclusion perpetua*. But under the amendment introduced by Republic Act 7659 on Article 335, if the relationship is incestuous, the death penalty should be imposed. A problem thus arises, namely: Would not the proposed legislation result in an expressway to the death chambers for an accused charged with incestuous rape through a series of legislative presumptions? Or stating it differently, should the amendment on incest introduced by Republic Act 7659 still apply notwithstanding the proposed legislation?

Offhand, this writer admits of having no qualms with this situation, had this been his actual intention. The effects of incest are lingering and if only to vindicate such devastation, the death penalty should be imposed.

However, this is not the intention behind the proposed legislation. The aim is to facilitate prosecution, not execution. To recall, one of the justifications for making the incestuous relation the *sole* criterion for constituting rape is to provide incest victims who do not fall within the other categories of rape, a similar facility towards a successful prosecution because they suffer no less. The necessary inference is that those who can validly avail of the existing provisions should continue to do so. If, for example, they are able to establish force or intimidation or statutory rape *independent* of the proposed legislation, then Republic Act 7659 should apply in full force.

However, for those who will have to rely on the proposed legislation, Republic Act 7659 should no longer apply. Since the element of incest has already been used to presume the existence of rape, it would be unjust to the accused to use the same presumption, but this time, to set the penalty to death.

This, unfortunately, is the gamble, the give and take. However, this is a far better solution than what the law can presently offer. For this writer, incest will always be a far graver offense than *Rape*. But this is

only an ideal. It must perforce give way to reality and pragmatism. The conspiracy of silence inherent in incest weighs down heavily against its successful prosecution. A concession will have to be made one way or the other. This is the compromise.

4. OTHER SEX CRIMES

Another welcome effect of the proposed legislation is on other sex crimes. Because lesser sex crimes make reference to Article 335 on *Rape*, whatever changes are introduced in the latter will automatically redound to the benefit of said crimes. This augurs well with the needs of some incest victims who, while not as sexually violated as others, are victimized just as well. An example of this would be the daughter who is constantly viewed secretly by her stepfather as she undresses or takes a bath. The beauty of the proposed legislation is that it is able to take advantage of the existing gradations in sexual offenses inherent under the Revised Penal Code. The accused can be prosecuted for *Acts of Lasciviousness* under Article 336 while benefitting at the same time from the contrary presumption created by the proposed legislation.

VI. STATE INTERVENTION IN PROSECUTION OF INCEST CASES

There is another change that needs to be done in the legislative sphere. The proposed change affects a significant aspect of the legal system — the prosecution of sex crimes. Specifically, the aim of this chapter is to make the filing of criminal suits involving reported cases of incest a mandatory obligation of the State. There are persuasive reasons for this. Before proceeding though, there is a need at this point to understand the existing set-up.

A. General Rules in the Filing of Rape Cases

As a sex crime, incest falls under Part Eleven of the Revised Penal Code under "Crimes Against Chastity." These are referred to as *private crimes*. Their prosecution is governed by the following provisions:

> Article 344.[195] *Prosecution of the crimes of x x x seduction, x x x rape and acts of lasciviousness.*

[195] REVISED PENAL CODE, Act No. 3815 art. 344 (1932).

> x x x x
>
> The offenses of seduction, x x x rape or acts of lasciviousness, shall not be prosecuted except upon a complaint filed by the offended party or her parents, grandparents, or guardian, nor, in any case, if the offender has been expressly pardoned by the above named persons, as the case may be.
>
> x x x x
>
> Section 5.[196] *Who must prosecute criminal actions.*
>
> x x x x
>
> The offended party, even if she were a minor, has the right to initiate the prosecution for [rape, seduction or acts of lasciviousness], independently of her parents, grandparents or guardian, unless she is incompetent or incapable of doing so upon grounds other than her minority. Where the offended party who is a minor fails to file the complaint, her parents, grandparents, or guardian may file the same. The right to file the action granted to the parents, grandparents or guardian shall be exclusive of all other persons and shall be exercised successively in the order herein provided, except as stated in the immediately preceding paragraph.
>
> x x x x

These provisions inhibit the filing of a criminal suit at the instance of the State. The initiative rests primarily on the offended party, and successively, on her family. This rule applies only to private crimes and has been justified as a:

> ...consideration for the offended woman and her family who might prefer to suffer the outrage in silence rather than go through with the scandal of a public trial *(Samilin v. CFI of Pangasinan, 57 Phil. 298, 304)*. The law deems it the wiser policy to let the aggrieved woman and her family decide whether to expose to public view or to heated controversies in the court the vices, faults and disgraceful acts occurring in the family *(US v. Bautista, 40 Phil. 735, 743)*.
>
> Article 344 was not enacted for the specific purpose of benefiting the accused.[197]

[196] NEW RULES ON CRIM. PROC., rule 110 (1985).

[197] People v. Babasa, 97 SCRA 672, *cited in* AMBROSIO PADILLA, CRIMINAL LAW: REVISED PENAL CODE ANNOTATED, 662 (12th ed., 1990).

The filing of a complaint by the aggrieved party is a *condition precedent* before the proper authorities can exercise the power to prosecute the guilty parties.[198] To her belongs the primary right to institute a complaint. If the offended party is already of age and in full possession of her mental and physical faculties, no one can dispute her paramount right to prosecute or not, whichever she chooses.[199] Only when she does not have full legal capacity can her relatives act on her behalf, and only according to the order provided in the Rules.

The only time when the State can initiate the action is contained in the same Section 5 of Rule 110:

x x x x

> In case the offended party dies or becomes incapacitated before she could file the complaint and has no known parents, grandparents or guardian, the State shall initiate the criminal action in her behalf.

x x x x

As can be seen, this exception does not contemplate a case where one of the preferred relatives who can file a complaint is also the defendant, such as in incest.

Republic Act 7610 expanded this list of persons who can file a complaint involving children subjected to sexual abuse:

> Section 27.[200] *Who may file a complaint.* — Complaints on cases of unlawful acts committed against children as enumerated herein may be filed by the following:
>
> (a) offended party;
> (b) parents or guardians;
> (c) ascendant or collateral relative within the third degree of consanguinity;
> (d) officer, social worker or representative of a licensed child-caring institution;

[198] Valdepeñas v. People, 16 SCRA 871, cited in PADILLA, *supra* note 197, at 676.

[199] PADILLA, *supra* note 197, at 662.

[200] THE SPECIAL PROTECTION OF CHILDREN AGAINST ABUSE, EXPLOITATION AND DISCRIMINATION ACT, Republic Act No. 7610 (1993).

> (e) officer or social worker of the Department of Social Welfare and Development;
> (f) barangay chairman; or
> (g) at least three (3) concerned, responsible citizens where the violations occurred.
>
> Section 17.[201] *Filing of Criminal Case.* The investigation report of the Department and/or of the police or other law enforcement agency on the abuse of a child, together with the results of the physical/ mental examination and/or medical treatment and other relevant evidence, shall be immediately forwarded to the provincial or city prosecutor concerned for the preparation and filing of the appropriate criminal charge against the person who allegedly committed the abuse.

Republic Act 7610 contains a longer list than Article 340 of the Revised Penal Code. However, there are two important limitations to this law. First, the list is still successive, *i.e.*, those who are mentioned earlier are still preferred over those listed later.[202] Another is that Section 27 of Republic Act 7610 applies only to those crimes enumerated in said law and at this juncture, it remains unresolved whether incest is covered by said law or not.[203]

While the intention in limiting the right of the State to initiate the prosecution of private crimes is quite noble, problems have arisen precisely because of this inhibition. True enough, many victims of private crimes have opted to suffer in silence rather than face the attendant humiliation in a trial where traumatic experiences would once more be recounted and old wounds pried open. But the question is posed: Did the offended party really have any choice to begin with? Unfortunately, the answer is in the negative for in fact, she is *blackmailed* into silence. The price of keeping her reputation intact is foregoing the vindication of her rights. Not that the law intended this to be so; rather, it is another consequence of the law failing once more to adapt to the changing times.

[201] Department of Social Welfare and Development Rules and Regulations Implementing R.A. 7610 (1993).

[202] Interview with Oscar Pimentel, Judge of the Regional Trial Court of Makati; Professor, Ateneo Law School.

[203] This was discussed earlier in Chapter III of this paper.

In incest, this problem is more acutely pronounced. Not only are the victims blackmailed into silence, but the whole dynamics of incest completely shrouds the affair in a heavy mantle of silence. There is actually no choice to speak of, unlike in ordinary rape. Once the terrible secret is divulged, it will not just lead to the prosecution of the case; it will rock the family to its very core. Very few children can see the long-term wisdom in such a course of action especially when faced with the short term economic and social crises that will inevitably plague the family. After all, it is not just any stranger who will be incarcerated, it is a member of the family, almost always, the father who is the main provider.

Moreover, in cases of father-daughter incest cases, it is not just the child who is silenced, even the mother as well. Both mother and child are paralyzed into inaction by the very forces at play in incest. This closes other avenues for prosecution of the offense especially since the mother is preferred over other relatives.

B. Why the State Must Intervene

There are compelling reasons for the State to intervene. Even the 1987 Constitution justifies this course of action:

> Section 13. The State x x x shall promote and protect their physical, moral, spiritual, intellectual and social well-being x x x[204]

> Section 3(2). The State shall defend x x x x the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to development.[205]

P.D. 603 which enumerates some of the rights of the child, likewise states that:

> Article 3(10). Every child has the right to the care, assistance, and protection of the State, particularly when his parents or guardians fail or are unable to provide him with his fundamental needs for growth, development and improvement.[206]

[204] CONST., art. II.

[205] CONST., art. XV.

[206] CHILD AND YOUTH WELFARE CODE, P.D. 603 (1974).

The same is true with R.A. 7610:

> "The State shall intervene on behalf of the child when the parent, x x x or person having care or custody of the child fails or is unable to protect the child against abuse, x x x or when such acts against the child are committed by the said parent, x x x or person having care and custody of the same.

This inherent power of the State with regard to the care of children has often been referred to as *parens patriae*. It has a wide range for limiting parental freedom and authority on matters affecting the child's welfare.[207] While originating in common law, it has been adopted in this jurisdiction:

> "... [W]here minors are involved, the State acts as *parens patriae*. To it is cast the duty of protecting the rights of persons or individuals who because of age or incapacity are in an unfavorable position, *vis-à-vis* other parties. Unable as they are to take due care of what concerns them, they have the political community to look after their welfare. This obligation the State must live up to.[208]

What justifies the exercise of *parens patriae* is *necessity*. In incest, the necessity arises from the fact that it is precisely the parents themselves who have failed to live up to their primary duty of rearing and caring for their young. Worse still, they are the ones who perpetrate the wrongdoings on their children. While the role of the mother is still in question, the fact remains that the child is suddenly left alone to fend for herself, both parents having failed to exercise their roles as natural guardians of the child's person. The State therefore has every right to step in.

In this regard, the intervention should not be limited to pure rehabilitation. The State has an interest in seeing to it that justice is served and the rights of the child are vindicated. This concern translates into the right of the State to initiate, on its own and without waiting for the instance of the child, the prosecution of the offender.

The State has as much interest because it cannot expect the child or the parents to do it themselves. The underpinnings of an incestuous form

[207] Prime v. Massachusetts, 321 US 158, 88 L.Ed. 645.

[208] Nery v. Lorenzo, 44 SCRA 431 (1972); *see also* People v. Dolores, 188 SCRA 660 (1990) where the principle was applied specifically to a rape case.

of abuse – that it paralyzes the victim from upsetting the *status quo* – serves as the compelling reason for the exercise by the State of this power. The State must take advantage of the *rare* instances when by chance or sheer unbearability, the dark secrets of incest spill into the outside world. It cannot stand idly by and pretend that when a child's genital is swollen and bleeding, there is a rational explanation or that a complaint is forthcoming. It cannot content itself with a law mandating the mere reporting of the incident to the authorities and then lie in wait for the proper parties to file the complaint. The situation necessitates tangible State action. There is, therefore, in every case of incest, the necessity for the exercise of *parens patriae.*

Corollarily, the interest of the State in the preservation of the basic unit of society -- the family – justifies its new role in the prosecution of incest cases. Republic Act 7659 which reimposes the death penalty, in its preamble states that:

> "[T]he crimes punishable by death x x x are heinous for being grievous, odious and hateful offenses and which, by reasons of their inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards, and norms of decency and morality in a just, civilized and ordered society."

If it is in the interest of the State to deter the commission of heinous crimes, then more so in cases of incest because it attacks the very integrity of a family. Its effects, unless halted, reverberate in the succeeding generations. There is an urgent need to abate it.

D. *Recommendation*

What all these lead to is that the State should be allowed to initiate the prosecution of incest cases without the need for a complaint to be filed by the proper parties as enumerated in Article 344 of the Revised Penal Code and elaborated in Section 5 of Rule 110 of the 1985 New Rules on Criminal Procedure, as amended, or Section 27 of Republic Act 7610. The idea that like other sex crimes, incest is a private crime and is an offense against the virtue of a woman is *passé*. Incest and all sex crimes violate the very worth of a person. It is not limited to her virtue alone.

Moreover, in incest, the interest of the State in the welfare of sexually abused children compels it to exercise its prerogative as *parens patriae.* Considering that the violations on the child transpire in the very home which ought to be the child's source of comfort and protection, the State must step in, not just to protect the child but to punish the offending relative who has failed to live up to his primary duty of taking care of his child.

Finally, the State's concern for the family necessitates intervention as a matter of self-preservation. Since the family forms the basic framework of society, when it is threatened, the State is likewise threatened. When the family is corrupted, it is not too farfetched for the society to be corrupted as well. The social affliction has to be weeded out at its very root. In almost all respects then, there is a justification for the State to initiate prosecution of incest cases.

VII. ANALYSIS OF THE JUDICIAL DISPOSITION OF INCEST CASES

Up to this point, the proposed changes have been limited to legislative remedies. However, the problem in prosecuting incest cases under a charge of *Rape* is not limited to the statutes alone. *Subingsubing* illustrates how a victim can be denied justice by a mere faithful application of the existing rules in the prosecution of *Rape* cases. These rules which were fashioned by the Supreme Court over time as factual guides for courts to use in determining the guilt of an accused, have unintentionally daunted the cause of incest victims. There is a need, therefore, to deal with this matter.

On a more pragmatic level, the need to address this problem has also been made imperative by the nature of the changes proposed in the two preceding chapters as *future* legislative enactments. If the present bills in Congress on *Rape* are any indication, then the legislative actions proposed in this paper are just as likely to be caught or watered down in the same political quagmire in Congress. Thus, while intending this section to be a mere complement of the first two, it may yet turn out to be the one most realizable despite its limited impact.

A. *General Rules in the Prosecution of Rape Cases*

Three principles govern the prosecution of *Rape* cases. These are:

(a) an accusation for rape can be made with facility; it is difficult to prove but more difficult for the person accused, though innocent, to disprove;

(b) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; an [illegible]

(c) 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.[209]

These principles guide the courts in sifting through the facts to determine the guilt or the innocence of the accused in rape cases. And nowhere else is the painstaking scrutiny of facts more crucial than in sex crimes. The act complained of is a common occurrence and unless the circumstances surrounding it are carefully appreciated, it can spell the difference between life and death for the accused.

To this end, the most important element is the presence or absence of consent. But since it can be a self-serving declaration on either side, the courts are forced to look at surrounding circumstances to reinforce such claim.

It should be emphasized at this point though that, as earlier stated, a testimony which rings true throughout is, by itself, sufficient to establish the commission of rape even without these circumstances. Only when there is doubt does reliance on these indicators become necessary.

B. *Factors Generally Considered*

In general, the courts look at the circumstances surrounding the very act itself and the woman. *Subingsubing* specified some of these.

1. ROMANTIC LINKS BETWEEN THE PARTIES

To determine if there is consent, the emotional involvements or romantic links between the offender and the offended party is a material consideration. That the accused and the complainant are sweethearts would diminish the possibility of rape. Rape between lovers is less likely than if the parties are strangers to one another.

[209] People v. Tismo, 204 SCRA 535 (1991); People v. Lim, 206 SCRA 176 (1992); People v. Dela Cruz, 207 SCRA 449 (1992); People v. Pizarro, 211 SCRA 325 (1992); People v. Casinillo, 213 SCRA 777 (1992); People v. Matrimonio, 215 SCRA 613 (1992); People v. Batis, 216 SCRA 673 (1992).

2. DELAY IN REPORTING

This is one important factor which is considered heavily by the courts. The underlying premise is that a person who has been violated, sexually at that, will not hesitate to call the attention of the authorities or complain to her relatives in order to vindicate her soiled honor.

On the other hand, a woman who takes a long period of time before complaining may not be a real "victim". In *Subingsubing*, the complainant's choice to keep mum for months was taken against her. The rule is thus:

> "...[T]he unreasonable delay by the complainant in reporting the rape to her own mother and the authorities, casts serious doubt as to her charge of rape."[210]

An unjustified delay in reporting also erodes the credibility of the victim. It may suggest consent or the possibility that the suit was filed merely to spite or harass the defendant. It may also be construed as a sign of clemency.

On the other hand, the seasonable reporting of the crime of rape is given a premium by the courts. The fact that the victim lost no time and immediately reported the crime enhances her credibility.[211] It is indicative of truthfulness and spontaneity.[212] It may even assist in the successful prosecution of the case as the immediacy in the reporting can be considered as part of the *res gestae*.[213]

3. BEHAVIOR OF THE VICTIM

Another circumstance carefully scrutinized by the courts is the behavior of the victim especially in relation to the accused, both before and after the occasion of the alleged rape. As to the rape victim's sexual conduct prior to the alleged assault, its probative value is severely restricted.[214]

[210] People v. Geneveza, 169 SCRA 153 (1989).

[211] People v. Tablizo, 182 SCRA 739 (1990).

[212] People v. Abonada, 169 SCRA 530 (1989).

[213] David v. CA, 182 SCRA 675 (1990); People v. Goles, 192 SCRA 663 (1990).

[214] See NEW RULES OF EVIDENCE § 34 of Rule 130 (1989) which states: "Evidence that one did or did not do a certain thing at one time is not admissible to prove that he did or did not do the same or a similar thing at another time; but it may be received to prove a specific intent or knowledge, identity, plan, system, scheme, habit, custom or usage, and the like."

> "...[A]bsent circumstances which enhance its probative value, evidence of the victim's unchastity, whether in the form of testimony concerning her general reputation or... concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its prejudicial effect."[215]

Testimony on prior acts of the victim is only relevant when coupled with circumstances like "real evidence explanative of a physical fact such as the presence of semen, pregnancy, or the victim's condition indicating intercourse... or where the evidence tends to establish bias, prejudice, or an ulterior motive surrounding the charge of rape.... Sexual history might also be relevant where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue."[216]

On the other hand, subsequent acts of the victim has an unassailable probative value. It is of utmost importance in the resolution of rape cases.[217] As illustrated in *Subingsubing*, a semblance of normalcy in the victim's behavior immediately after the incident may negate the commission of rape because sexual violation is ordinarily expected to produce shock in the victim, or at the very least, elicit some signs of discomfort. If the victim engages in activities with the accused with the same regularity prior to the alleged sexual violation, then chances are, there was no assault. In one case, the accused was acquitted because of an appreciable lack of anger, panic, strong emotions or confrontation on the part of the complainant.[218]

4. MOTIVE OF THE COMPLAINANT

Another important consideration, the general rule is that where there is no motive to testify against the accused, the credibility of the complainant is enhanced. This is premised on the fact that a rape suit already tolls heavily on the complainant even before the trial stage has began. The Court has observed:

[215] US v. Kasto, 584 F.2d 268 (1978).

[216] Kasto, 584 F.2d 268, 272 (1978).

[217] People v. Herrick, 187 SCRA 364 (1990).

[218] People v. Malbago, 185 SCRA 311 (1990).

> "The Court is not unmindful of the oft-repeated observation that, unless she was telling the truth, the rape victim would not deliberately identify herself as such and expose herself to public disgrace and the embarrassment of having to testify on the sordid details of her violation."[219]

> "[Moreover,] no young, decent Filipina woman would publicly admit that she had been criminally ravished unless that is the truth for her natural instinct is to protect her honor."[220]

On the other hand, the presence of a motive dilutes the complainant's case. As the Court has put: "[C]ould it have been out of pique, on [the complainant's] part or on her family, that impelled her to cry 'rape'?"[221]

5. OTHER FACTORS

The present list is not meant to be exclusive; only, those enumerated are the ones frequently cited. There are other factors such as the *age difference* between the complainant and the accused. As the Court in one case stated, where the accused is already nearing his seventies, he not only enjoys a presumption of innocence, he also enjoys a *presumption of impotence*.[222] The age difference, especially if substantial, would also reject the notion of an instant relationship between the accused and the offended party because of our culture and the inherent modesty attributed to Filipino women, in general.[223]

Moreover, *attempts to flee* by the accused or by the complainant are indicative of the guilt of the former and credibility of the latter, respectively.[224]

The factual indicators just enumerated are based on logical inferences on patterns of human behavior commonly observed in rape victims. These

[219] People v. Ignacio, 211 SCRA 796 (1992).

[220] People v. Pasco, 181 SCRA 233 (1990); People v. Santiago, 197 SCRA 557 (1991); People v. De Guzman, 216 SCRA 754 (1992).

[221] People v. Herrick, 187 SCRA 679 (1990).

[222] People v. Pailano, 169 SCRA 649 (1990).

[223] People v. Manalo, 145 SCRA 9 (1986).

[224] People v. Salomon, 229 SCRA 403 (1994).

are not meant to be taken singly. Neither were they designed to be hard and fast rules. However, a combination of any of these may imbue a specific finding of guilt or consent with great weight.

C. *Nature of Incest Explains the Difference*

For some, it is easy to presume the would-be reaction of incest victims by simply comparing it with ordinary rape cases. After all, except for the fact that the aggressor happened to be the offended party's relative, the acts are basically the same.

There is one factual circumstance though which may give a clue that this deduction is not altogether correct, *i.e.*, in almost all instances of incestuous rape, it is very rare to find a victim who has stepped forward on the very first occasion of her rape. Almost always, there has been a history of prior and repetitive abuse, so much *unlike* ordinary rape cases.

What this observation indicates, if it says anything at all, is that it may be improper for the courts to simply apply the same rules on rape with incest without a careful consideration of the nature of the incestuous act because when applied indiscriminately, the incest victim inevitably appears in a bad light.

In *Subingsubing*, the offended party did not tell anyone about her condition until she was far away from the defendant. During such time, she stayed in the same house with him and acted as if nothing out of the ordinary was happening. In sum, her behavior did not fit at all within the spectrum of reactions expected from an ordinary rape victim.

But the nature of incest does and can spell the difference. It can provide the missing explanations over and beyond what has already been established in jurisprudence. There is a need therefore to restudy the very same indicators of consent enumerated earlier but this time, in the light of the insights gained on the nature of incestuous abuse.

1. ROMANTIC LINKS BETWEEN THE PARTIES

If the circumstance of lack of any romantic involvment between the accused and the offended party can negate consent because no one would normally have sexual relations with a stranger, then with more reason should this argument apply in cases where the parties are related by blood or by affinity because romantic liaisons are proscribed. Family ties create a *normative barrier* which prohibits relatives from even thinking of engaging in sexual play. Instances of incest arising purely from consent are rare.

In *Subingsubing*, this factor was wholly ignored. It was taken for granted that a young barrio lass would even think of entering into a sexual relationship with her uncle when she did not even have a boyfriend to begin with. Yet, it was readily accepted that a young schooler would casually return home one afternoon, prepare lunch, and then have sex with her uncle. Then, uncharacteristic of her newly acquired sexual sophistication, she dons her uniform and returns to school like the young school girl she truly was. This version actually makes the offended party look like an experienced seductress. The irony of it all is that the accused was found guilty of *Qualified Seduction of a Virgin*.

2. DELAY IN REPORTING

The Court has already recognized one justification for delay in reporting — the continuing threat on the life of the victim.[225] But it should be noted that this threat attains an even higher degree of imminence in incest cases because the abuser is oftentimes someone who *also* stays in the same house as the child and has therefore, every opportunity to observe her actuations.

> "It is not uncommon for young girls to conceal for some time the assault on their virtue because of threats made by the rapist, especially when the latter is the victim's own stepfather[226] and *living with her.*[227]" (Emphasis supplied)

Moreover, the threat is not just on the victim alone. In a number of reported cases, the threat is extended to the other parent and children. For a child who has firsthand experience of what the abusive relative is capable of, the probability of his making good his threats is not a matter which she can easily ignore. It is a reality which she cannot gamble on. In this situation, the child literally makes herself the *sacrificial virgin* who would rather suffer in silence than risk the safety of her family.

Another possible reason for the prolonged silence of incest victims is the shock of the realization that one has been abused sexually by a relative. The trauma of incest is not easily discarded. She may want to

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[225] People v. Aquino, 186 SCRA 208 (1990).

[226] People v. Munda, Sr., 189 SCRA 425 (1990).

[227] People v. Oydoc, 125 SCRA 250 (1983).

hide the sexual assault from her husband or boyfriend because of the uncertainty in the latter's reaction when he learns of the incident.[228]

Finally, it cannot be discounted that there can still be a "natural reluctance, born of an underlying filial loyalty, to denounce her own kin."[229] Family members may dissuade the incest victim from instituting further action.

3. BEHAVIOR OF THE VICTIM

The incest victim holds the key to the future of her family. In her hands lies its continued preservation (albeit in a tarnished form) or its eventual destruction. Unfortunately, the victim may be reluctant to upset the fragile semblance of *a status quo* because it can irreversibly trigger off a series of effects that can shatter the very existence of her family.

The continuing threat on the lives of the victim and her other relatives may also account for the seemingly normal post-abuse behavior of an incest victim. Any unusual behavior can arouse suspicion. And in the mind of the victim, this can lead to the accused making good his threats.

In this sense, the circumstance of delay in reporting and the post-rape attitude of the victim are related. Both can be induced by the threatening attitude of the abuser. In both instances, the victim is silenced.

What aggravates the situation is the insight that the victim is no longer protecting herself, for there is no longer a need to – she is already a victim. More often than not, the threats are directed at her other relatives, like younger siblings or the mother. And she buys their safety at the price of her silence.

4. MOTIVE OF THE VICTIM

As earlier stated, lack of a motive other than the vindication of her right, adds weight to the credibility of a complainant. That the complainant and the accused are strangers is particularly indicative of this. Applied to incest cases, there should be more reason not to testify against the accused because of the existing filial bond.

[228] People v. Cariño, Sr., 167 SCRA 285 (1988).

[229] People v. Ignacio, 211 SCRA 796 (1992).

That the rape complaint was filed because of pique or resentment is too much to ask in incest cases because:

> "Even assuming that there existed some resentment..., it is nevertheless hard to believe that a young and naive lass could be so motivated by feelings of revenge as to fabricate a story of rape, to have her private parts examined and to subject herself to the indignity of a public trial, against her very own father, if there be no truth to the same."[230]

In fact, the victim is even more credible "when the accusing words are said against a close relative, as in the case of a father by a daughter,[231] son-in-law by a mother-in-law,[232] or an uncle by a niece.[233]

D. Recommendation

The nature of incest requires a different set of rules to be applied in evaluating the facts in incestuous rape cases. The task is not insurmountable because these rules are, by nature, not enacted. Rather, they evolve out of Supreme Court decisions. Because of this, the very same Court can reformulate them without being accused of engaging in judicial legislation as they remain within the sphere of mere factual appreciation.

These rules are not fixed or rigid. It is precisely their flexibility which gives them their inherent advantage because they can admit of new exceptions when called for by the situation. Incest is one such instance.

The realization that incest is not just a simple matter of a relative choosing to have sexual intercourse with his own kin should be dawning by this time. There is plenty in between. Most of the indicators relied upon by the courts, though useful in ordinary rape cases, are largely inapplicable to incestuous rapes because of one underlying factor: *the persistent silencing effect of incest on its victims.* There are more than enough reasons to pretend that nothing is going on out of the ordinary than to speak out.

[230] People v. Lucas, 181 SCRA 316 (1990).

[231] People v. Cariño, Sr., 167 SCRA 285 (1988).

[232] People v. Alvis, 117 SCRA 362 (1982).

[233] People v. Soterol, 140 SCRA 400 (1985).

[234] *See* People v. Herico, 192 SCRA 655 (1990).

And these reasons are not for the victims to invoke. It is for the courts to read into the facts of the case in the same way that courts have fashioned out exceptions to the general assumptions on behavior of offended parties in ordinary rape cases.

Incest victims cannot be expected to invoke their incestuous circumstance to explain their behavior because they are too enmeshed in their own personal turmoil to afford them the luxury of taking an objective look at the forces at play in their lives. It is for the courts to consider it for them.

And this is nothing new. There was once a time when the courts have, on their own, chipped at the basic presumption of innocence of the accused in a rape case by stating boldly that no Filipina would ordinarily allow herself to be involved in a rape suit. This has, for all intents and purposes, become the general rule more than the exception. And this writer seriously doubts that this rule arose because one complainant chose to hinge her credibility on being a mere "Filipina lass."

It is likewise urged that with or without the proposed legislations in Chapter IV and V on incestuous rape, a conscious effort should be made to distinguish incestuous rape from ordinary rape cases. The ordinary rules should not be applied indiscriminately. The courts should take it upon themselves to dip into the nature and dynamics of incest for an explanation because they will surely find an answer.

A legislative enactment while preferred because of its relative permanence, may take a longer period before it can be effected. In the meantime, the Supreme Court is not precluded in making these jurisprudential changes.

While it may be difficult to spell out what exact patterns of behavior can be expected from incest victims because they react differently,[234] what is merely asked is that the fact that the complainants are incest victims be taken into account. This conscious effort can translate into leniency in the application of the rules, a more pervasive search for explanations, or perhaps, even an outright change. Like in statutory rape cases, incest demands special treatment from the courts.

Two important caveats need to be mentioned at this stage. First, whatever changes are suggested here should apply only to rape cases involving incest. As to ordinary rape cases, the existing presumptions should remain valid.

Secondly, this section was not meant to criticize the attitude of the judiciary. On the contrary, it aims to take advantage of the judicious liberality and foresight which characterized the High Court over the years. It only aims to point out an opportunity for jurisprudential development. The Supreme Court has already initiated the first bold moves toward a more compassionate understanding of incest cases. Still, there are wide avenues for change that would do well if adopted.

VIII. RECOMMENDATIONS

A. *Summary*

It has been argued that the nature of incest justifies an overhaul of the entire legal system as regards this crime. The proposed changes should cover not just the legislative, but the prosecutory and judicial aspects as well. This broad expanse is what this paper has tried to encompass in the preceding chapters.

Initially, there was a justified convenience for a radical legal overhaul. However, this writer opted instead to suggest a few changes which, despite their minimalism, were intended to produce far-reaching effects. Up to this point, the reasons for said choice have mostly been implied in each discussion. The time is now ripe to explicate these reasons.

It has been proposed that incest be considered as the fourth category of *Rape*, operating as a *prima facie* presumption of the commission of the offense, negating consent and shifting the burden of proof on the accused. Why *Rape*? it is asked.

From a purely theoretical vantage point, the answer is quite simple. *Rape* is the only crime which can fully capture the essence of incest as a form of sexual violence in its most concrete terms. Enacting a special law or provision called *Incest* will not help because it is just as vague as the crime it tries to describe. On the other hand, *Rape* directly brings home the message of incest as a form of sexual assault. The sexual coercion has been referred to by the Court in many occasions as the "overbearing and overpowering moral influence." Translated into more familiar terms, it is force or intimidation which hopefully at this stage, is understood and already accepted to be subsumed in incest.

Moreover, *Rape* rectifies the misconception regarding incest. Heretofore, when incest is mentioned, what immediately comes to mind

are romanticized notions of doomed relationships or forbidden love affairs. Very rarely is it perceived as a form of sexual coercion. This is tragic because by this time, the former has been clearly outnumbered by the latter. Consensual incest is now the exception, more than the rule.

A prosecution for *Rape* is also intended to exorcise from the mind of the incest victim her sense of guilt which the crime of *Qualified Seduction* may have unintentionally suggested. After all, there is hardly any seduction at all in incest. Seduction, in its ordinary sense, connotes inducement or temptation. None of these elements are present in incest. The myth of the seductive child is precisely that, a myth. On the part of the abuser, on the other hand, the closest it can get to a seduction is through deception. However, it is a form of deception which is so damaging and so exploitative in nature that it is tantamount to virtual use of force or intimidation.

Furthermore, by classifying incest as a form of *Rape*, attention is focused on incest as one of the more serious social problems. *Rape* as a crime is never ignored unlike *Qualified Seduction* where hardly a case is filed at all. The conceptualization of *Rape* is also well accepted and understood. In this context, incest is easier for both ordinary people and legal experts to comprehend. Hopefully, this access created for discussion will lead to a greater understanding of the crime and more positively, towards its prevention.

Finally, this course of action is aimed at taking advantage of the existing efforts already underway in Congress. *Rape*, as a crime, is presently undergoing major revisions, essentially involving the removal of unnecessary distinctions which impede its jurisprudential development like which acts should constitute *Rape*. Should it be limited to sexual intercourse alone or others as well (*e.g.*, fellatio, sodomy, etc.)? In incest, the perversion is immediately apparent and since its victims are only children whose bodies are unable to accommodate traditional sex play, there is a strong propensity for the offender to resort to unorthodox sexual methods. In this regard, the pending bills in Congress expanding the acts constituting *Rape* can only serve to benefit the prosecution of incest cases because as a category of *Rape*, whatever changes are proposed therein would immediately affect incest. This avoids the unnecessary duplication of efforts. It also subjects the matter of incest to minimum political interference.

There are also other issues which are affected by the proposed amendments on the crime of *Rape*. These include the recognition of both

genders as likely victims of *Rape*. As the idea of male rape victims gains wider acceptance, it will benefit incest victims. This is conceptually in accord with the move to broaden the acts included in the crime of *Rape* where in this respect, boys are just as *effective* to their abusers, as girls.

Likewise, *Rape* is being considered as belonging to "Crime Against Persons." Even if this would render Chapter V of this paper superfluous, so long as the necessary changes are made, then there is no problem. What should be clearly emphasized though is that the State as *parens patriae* is obliged to do more than wait for a victim to file a complaint before it takes the first step. The goal of the said chapter was to provide an urgency and a deeper dimension to this legislative action.

Incidentally, the present pending bills on *Rape* which can benefit incest are listed as follows:

PROPOSED BILLS	PURPOSE	STATUS
S.B. 1042	• redefining rape as a "Crime Against Persons" • instituting recovery measures for rape victims • redefining rape	2nd reading
S.B. 1413	• providing for effective prosecution of offenders	2nd reading
S.B. 1518	• rendering admissible in civil and criminal cases out-of-court statements of minor sex abuse victims under certain circumstances insofar as sex abuse under inquiry; exception to hearsay rule • redefining rape as Crime Against Persons • institutionalizing measures for the recovery of rape victims and effective prosecution of offenders	2nd reading

PROPOSED BILLS	PURPOSE	STATUS
H.B. 12525	• establishing rape victims' assistance center per congressional district • prescribing certain conditions in the investigation and trial of cases involving the crime of rape	substituted by HB 12786 for 2nd reading
H.B. 10592		1st reading
H.B. 699		1st reading

All told, whatever changes introduced in the crime of *Rape* would immediately redound to the benefit of incest cases. This is the unexpected result of the proposed legislation. It dispenses with time-consuming debates and duplication of efforts. Moreover, it imbues the present bills on *Rape* with a more profound significance and greater urgency while maintaining the conceptual integrity of incestuous assault. The effect is synergistic.

On the judicial front, it was suggested that a conscious effort be made to distinguish ordinary rape cases from those involving incest. As explained, the latter is clearly governed by a different set of rules and the use of the traditional benchmarks of behavior, while apropos in ordinary rape cases, can amount to a denial of justice in incest cases. While each accusation will still have to be tried on a case-to-case basis, more effort should be poured towards attaining a better understanding of incest cases in order to find the missing explanations where traditional understandings of rape falls short.

B. Other Measures

There are other measures suggested here, although already beyond the scope of this paper. They are mentioned in passing in the hope that they can be used in future policy guidelines. Some of these can be implemented at once without need of future legislation. Some are also limited to particular specializations. These include:

1. RESEARCH AND DATA COLLECTION

This is necessary to gain more information on incest in order to design a proper rehabilitation program that would be suited specifically to the needs of victims in a Philippine context. The country's unique historical background and social structures need to be taken into account – *e.g.*, effects of martial law, migrant workers, etc.

2. NATIONAL CAMPAIGN ON INCEST

The objective of this course of action is to heighten public awareness on the problem of incest so that those who may be aware of existing cases of incestuous abuse will not be helpless. This is also aimed at making victims realize that they are not alone in their plight and that there are existing government and non-governmental agencies and support groups which can offer some form of assistance and protection.

3. INCREASED BUDGETARY ALLOCATION TO DSWD FOR INCEST-RELATED PROJECTS

One consequence of incest revelation is the economic dislocation of the family. In this regard, the DSWD is tasked with providing livelihood options for victim families who have decided to move on with their lives but are limited by budgetary constraints. This undertaking can tax the limited resources of the DSWD considerably, and this does not yet include the rehabilitative needs of the victims themselves. The DSWD is expected to provide protective custody, counselling, medical and psychiatric services and generate livelihood for its victims. This is hardly possible with its meager budget.

4. ROLE OF MEDIA

While reckless media reporting is already punished by Section 29 of Republic Act 7610, media must take it upon itself to protect the victim from unnecessary exposure and sensationalism. If media should focus on incest victims, then it should be out of concern and the need to provide genuine awareness on the issue.

The role of media cannot be disregarded because it plays a crucial role in educating the public. "[T]he disclosure of abuse by victims is the most compelling antidote to the sexual abuse of children."[235]

CONCLUSION

Making the laws adapt to the reality of incest has been a long, drawn-out process. It was made even more difficult by the need to overcome built-in prejudices and misconceptions surrounding this offense.

To those who are fortunate enough not to have experienced incest as part of their childhood, incest is a subject matter shrouded in intrigue and mystery. It is discussed in whispered voices and hushed tones, rarely for the purpose of rousing indignation. The only instance when it is openly discussed is in literature which unfortunately, rarely depicts accurately the true nature of incestuous abuse. On a more mundane level, stories of cousins ending up married are a familiar fare especially since there are countries where these types of marriages are allowed. This is the common understanding of incest.

On the other hand, there are families who are actual victims of incest. In the Philippines, many of these have come from depressed areas. This aggravates the problem because it creates the impression that incest is a *problem of the poor*. But this has no basis whatsoever because as proven by the experience of more progressive countries, incest occurs in all levels of the economic strata. Neither is it a cultural problem where Filipino families are immune.

In any case, the actual ramifications of incest rarely escape the confines of the homes of incest families. It is a deep, dark, family secret which is meant to be buried. Those who do understand it can hardly be expected to share their experiences.

Hence, with one side reluctant to share their knowledge, and the other side flushed with false notions, it is not surprising if the proposed changes made in this paper meet with stiff opposition (which this paper actually wants to stir because it will inevitably lead to a better understanding of the problem). Thus, one may ask if the proposed changes are not too harsh, considering it creates a contrary presumption to that of the innocence of the accused by mere proof of an incestuous relationship between the victim

[235] CULLEN, *supra* note 7.

and the accused. Specifically, what about cases of cousin-lovers? Would it not be susceptible to abuse by a vindictive child or a spurned lover?

For this writer, this is where the problem lies. Whenever one thinks of incest, the idea of it being a mere unusual but still harmless relationship crops up. The proposed change is tested in situations where it was not clearly meant to apply in the first place. These situations constitute the exception more than the rule and this is what this paper has consistently pounded at. Incest should be understood in the context of sexual coercion by a relative. It is urged that when one thinks of incest, one should think of the child ravished by her older relative.

Besides, the contrary presumption was precisely intended not to be conclusive. It is only *prima facie*. The purpose is to allow the defendant to adduce evidence that would contradict this presumption. Cousin-lovers are also not covered by the proposed legislation because it is limited only up to the third degree of civil relations.

In addition, a prosecution for incest acts as a natural deterrent for any woman to claim. She puts not only her credibility, but her reputation on the line. And even with or without this presumption, nothing will really stop a vindictive child or a spurned lover from instituting any criminal action. In this connection, one can only rely on the saying that truth has a way of coming out.

Finally, even if these protestations should prove to be valid, this writer still roots for the proposed changes because no one can dispute the *other* unassailable reality of incest as a form of abuse. Hence, at the risk of occasional injustice, this writer has chosen to tip the scales in favor of the incest victims because they are undoubtedly the ones who need sympathy and compassion from the law more than the intermittent few who might be inconvenienced thereby. There is a justifiable need, in this instance, to shift the balance in favor of the incest victims. After all, if justice is to be argued for justice' sake, isn't there something amiss in a legal system which can staunchly defend the rights of its accused but is impotent in vindicating the rights of its abused children? At this point, if a value-judgment has to be made, there is no hesitation at all in to opting for the latter.

But over and above these legal arguments, this paper aims to arouse genuine understanding for the plight of incest victims because they are *victims* in the real sense of the word. The innocence of their childhood has been plucked out by the very persons whom they have chosen to trust.

It is hoped that this insight is one that will reach out, not avoid or recoil, because in the end, more than what the law can offer, what they need is human compassion and understanding.