

INCESTUOUS RAPE AND THE DEATH PENALTY IN THE PHILIPPINES: PSYCHOLOGICAL AND LEGAL IMPLICATIONS

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INTRODUCTION

The majority of those on death row in the Philippines have been convicted of rape crimes, including rape of a minor, rape of a family member and other aggravated forms of rape. Looking at incestuous rape in particular, this paper examines some of the psychological and legal difficulties of imposing the death penalty for such a crime. It focuses on the effects of the administration of the death penalty on the victim and the victim's family. The paper also looks at some of the legal, evidential and procedural problems that arise in this jurisdiction's imposition of the death penalty for rape.

Despite the continued existence of the death penalty for incestuous rape, the number of reported cases has not diminished. Recognising this, local women's groups in the Philippines have called for the root causes of incest and other forms of violence against women to be addressed rather than imposing the death penalty for rape. This response is also considered by this paper within the broader context of Filipino gender relations.

I. OVERVIEW OF THE DEATH PENALTY

Following the downfall of the Marcos regime in 1986, the Philippines became the first Asian country to abolish the death penalty for all crimes. The 1987 Constitution stated that the death penalty would not be imposed "unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*."¹ While the move was welcomed by many, just six years later, the government reinstated it largely in response to the

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¹ CONST., art III, sec 19, par (1).

apparent rise in crimes such as murder, rape and kidnapping. There was overwhelming public support for its return; the majority believed the death penalty to be a necessary tool to deter violent crimes and restore peace, security and stability in the country. There was also the sentiment that some criminals deserved to be put to death for their crimes.²

The Death Penalty Law³ came into force in 1994, listing a total of forty-six crimes for which a death sentence is possible. Of these, twenty-five are mandatory death offences which give the courts no option but to impose the death penalty regardless of the circumstances of individual cases. Twenty-one of the listed crimes are death penalty eligible offences which allow the courts to choose from a range of penalties including the death penalty. Mandatory death offences include: qualified bribery, two forms of kidnapping, destructive arson, nine types of rape, and twelve drug related offences. Discretionary death offences are: treason, qualified piracy, qualified bribery, parricide, murder, infanticide, two forms of rape, kidnapping, robbery, destructive arson, plunder, eight drug related offences and carnapping.⁴

Since the re-imposition of the death penalty, there have been two official moratoriums on executions in 2000 and 2002. President Gloria Macapagal Arroyo lifted the last moratorium in 2003, but has in recent times implied that she will not sign any death warrants.⁵ The President has recently gone further by categorically stating that she is in favour of scrapping capital punishment, and that she would see to the immediate passage of legislation to abolish the Death Penalty Law.⁶ A week earlier, the President commuted the sentences of two hundred eighty people on death row to life imprisonment.⁷

Reports indicate that there are approximately 1,280 people currently on death row in the Philippines.⁸ The majority of these have been convicted of rape crimes, including rape of a minor, rape of a family member and other aggravated forms of the crime. Of the many possible forms of rape, incestuous rape is the most common. The crime, which refers to incidents of rape where the victim is under the age of 18 and the offender is a relative by blood or affinity, attracts a mandatory sentence of death.⁹

² For details on the role the media played in sensationalising violent crimes, see A. Tagayuna, *Capital Punishment in the Philippines*, in 5:1 EXPLORATIONS IN SOUTHEAST ASIAN STUDIES, A JOURNAL OF THE SOUTHEAST ASIAN STUDIES STUDENT ASSOCIATION (2004).

³ Rep. Act No. 7659 (1993).

⁴ Philippines European Solidarity Centre, *Death Penalty Offenses* (2002), available at <<http://www.philsol.nl/A02b/DPenalty-ListOffenses-sep02.htm>>.

⁵ Gil C. Cabacungan, Jr. *Arroyo Goes Easy on Death Penalty*, available at <http://news.inq7.net/breaking/index.php?index=1&story_id=28619> February 25, 2005.

⁶ *Arroyo: I'll Work to Scrap Death Penalty*, available at <http://news.inq7.net/nation/index.php?index=1&story_id=67009> February 22, 2006.

⁷ *280 Death Convicts Get Commutation*, Manila Bulletin, February 15, 2006.

⁸ Agence France Presse, February 15, 2006.

⁹ See note 3, *supra*: sec. 11, art. 335: "The death penalty shall be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. when the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within third civil degree, or common-law spouse of parent of victim."

II. IMPLICATIONS OF IMPOSING THE DEATH PENALTY FOR INCESTUOUS RAPE

A. PSYCHOLOGICAL IMPACT ON VICTIMS AND THEIR FAMILIES

Regardless of the penalty for incestuous rape, these cases are in some ways much more complicated to address than other cases of rape. Not only has the victim been abused, but also the abuser is somebody with whom she¹⁰ has a relationship and most likely trusted. This relationship can make it extremely difficult for the victim to seek justice.

Generally speaking, most ongoing sexual abuse remains secret. Feelings of fear, helplessness, shame, self-blame and uncertainties about what happens after the discovery of the crime can ensure that the abuse is never disclosed.¹¹ In cases of incest rape though, where the punishment for the crime is death, the chances of greater secrecy, retractions and long-term psychological complications are much higher.¹² This is particularly true in the Philippines where many people are unaware that the crime of incest rape is punishable by death. Upon learning of the penalty, its existence can traumatize the child further. As Dr. Barbara Snow, a clinical social worker in Utah and co-author of "How Children Tell"¹³ explains, "Often the child is already experiencing excessive self-blame and guilt, and when compounded by the knowledge that disclosure of the abuse could result in the death of the parent or relative, the emotional burden could be too overwhelming for the child to make a full emotional recovery from the abuse episode."¹⁴

In the Philippines there is no alternative punishment for incestuous rape. For the victim, it is a choice between not pressing charges, and running the risk that reporting the rape and taking the case to trial could lead to a death sentence for the abuser. The presence of the death penalty can therefore deter victims from pursuing charges against the offender, as illustrated by the case of "Elena."

¹⁰ Although there are instances of incestuous rape against male members of a family, the majority of victims are females. This paper will therefore focus on female victims, although many of the concerns raised apply to both groups.

¹¹ Child Sex Abuse Accommodation Syndrome is well documented and was first articulated by Dr Ronald Summit who described five common reactions displayed by sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction. See R. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177-193 (1983).

¹² BERNADETTE MADRID, HEATHER SPADER, RACHEL SPIEGEL, AMELIA FERNANDEZ, & VICTORIA HERRERA, EXAMINING THE MANDATORY DEATH PENALTY FOR FAMILIAL CHILD PERPETRATORS: AN ACADEMIC TREATISE FOR PHYSICIANS, (2001).

¹³ T. Sorenson & B. Snow, *How Children Tell: The Process of Disclosure in Child Sexual Abuse*, 70:1 CHILD WELFARE, 3-15 (1991).

¹⁴ Quoted by B. MADRID, ET AL., *op. cit. supra* note 12.

A Child Retracts Due to the Death Penalty¹⁵

"Elena"

Age: 10

Alleged Perpetrator: Father

Abuse Type: Sexual

Case History	Case Status
<ul style="list-style-type: none"> Elena reports to the police that her father sexually abused her and files a case Police perform exam and results are highly suspicious for sexual abuse Elena overhears law enforcement official's discussion of the death penalty as punishment for familial child rape Elena comes to CPU and retracts her story, saying that it was all a lie Elena files a certificate of desistance to end case 	<ul style="list-style-type: none"> Mother removes herself and Elena from home Father can still visit Elena at her new home, thus jeopardizing Elena's safety

Feelings of guilt and fear can occur at any stage: from the initial disclosure and reporting of the crime, to after a verdict has been handed down. Once the victim has decided to pursue the case and present evidence in court, there is little the courts can do other than impose the prescribed penalty if the perpetrator is found guilty. Difficulties can occur when the reality of the death penalty sets in, and the victim begins to regret the outcome. By this stage, however, the only avenue left to the victim, to her family and to the offender is a presidential pardon.

Eduardo Agbayani¹⁶ was convicted in 1998 of raping his 14-year-old daughter Eden. Despite being pressured by her sister and mother to withdraw the charges, Eden decided to pursue the case, which resulted in her father being sentenced to death. As the execution date neared, however, Eden changed her mind and along with her five sisters appealed to the President to stop the execution going ahead. The girls, after visiting their father in the death chamber, told the press, "Our father has committed many serious crimes, but we do not want another sorrow to devastate our life. Our father has already suffered a lot. We want him to return to us so that we can be a family again."¹⁷ The President had previously refused to grant clemency, but changed his mind following the emotional pleas of the daughters and an important Catholic official. The decision, however, came too late for Agbayani as the lethal drugs had been administered a few minutes earlier.

¹⁵ *Ibid.*

¹⁶ *People v. Agbayani*, 348 Phil. 368(1998).

¹⁷ *Grace Came Too Late for Filipino Condemned to Death. Executed Minutes Just Before Presidential Clemency Order*, ZENIT, June 28, 1999, available at <<http://www.zenit.org/english/archive/9906/ZE990628.html>>.

The Agbayani case also demonstrates the impact the rape has not only on the victim, but on the victim's family as well. Difficulties can arise when the child and her family members display conflicting reactions, not only to the crime, but also to the imposition of the death penalty. By speaking out, the child might be perceived by some to be attacking the credibility of a trusted adult. Therefore, the other family members choose to respond with abandonment, disbelief. Sometimes they even go as far as to ignore the abuse. In the case of Rogelio Mirante,¹⁸ the father was accused of raping his 14-year-old daughter. On about five different occasions, the daughter reported the sexual molestations to her mother, but her mother not only doubted her, she also refused to take any steps to help her and gave credence to the accused's denials.

The kind of pressure put upon the victim not to pursue with the allegation by other family members can vary. In one case reported to the Child Protection Unit,¹⁹ the victim was persuaded to drop the charges because of her mother's ill health. In the case of "Evelyn" (below), the mother supports her child's claims of sexual abuse by her father, but refuses to file a case because if her husband is executed she will be unable to support the family financially. Instead, she is forced to find an alternative solution.

A Family Seeks its Own Alternative²⁰

"Evelyn"

Age: 11

Alleged Perpetrator: Father

Abuse Type: Sexual

Case History	Case Status
<ul style="list-style-type: none"> • Evelyn, one of three daughters, is sexually abused by her father • Father is a seaman and the sole provider for the family • Mother refuses to file a case because she does not want her husband executed and cannot support family without him • Mother is fully supportive of the child and confronts the father • Father is contrite but mother worries that contrition alone will not prevent further incidents 	<ul style="list-style-type: none"> • Mother does not file a case but decides to find alternative housing for children when father returns home • Mother places Evelyn in a shelter but Evelyn is unhappy there • Mother finally decides to place all of the children in another apartment and not disclose the location of the apartment to the father; another family member cares for the children. • Mother resolves to leave father when she has enough money (mother is currently working odd jobs to save money).

These cases demonstrate that the existence of the mandatory death penalty for incestuous rape can put an additional strain on the family as a whole and that in some

¹⁸ People v. Mirante, Sr., 443 Phil 290-291 (2003).

¹⁹ B. MADRID, ET AL., *op. cit. supra* note 12.

²⁰ *Ibid.*

situations the attachment to the family, something that is fundamental to Filipino society, can prove stronger than the desire for justice.

Even in instances where the victim wants the perpetrator to be put to death, the cases are rarely straightforward. Death penalty cases in general attract a huge amount of attention from politicians, the media, and human rights and religious groups. The entire process puts an enormous strain on the victim regardless of whether he or she wants the death penalty. The first execution after the death penalty was restored was that of Leo Echegaray²¹ who was convicted of raping his 10-year-old stepdaughter. In the lead up to the execution, the stepdaughter campaigned relentlessly for the death penalty. When a temporary stay of execution was granted she became depressed and angry with those that were encouraging a stay.

A Child Seeks the Death Penalty²²

“Baby”

Age: 10

Alleged Perpetrator: Stepfather

Abuse Type: Sexual

Case History	Case Status
<ul style="list-style-type: none"> • Stepfather, Leo Echegaray, is convicted and sentenced to death • Echegaray is the first person to be sent to death under Article 335 • Baby campaigns for the execution of her step-father • When the execution is temporarily stayed by the government, Baby suffers bouts of depression • Baby announces that she wants to see the death penalty applied • Baby expresses her frustration with public opinion and the Catholic Church for encouraging the stay in Echegaray's execution 	<ul style="list-style-type: none"> • Leo Echegaray is executed • Baby expresses that she believes justice was achieved

A common factor in the cases highlighted is that despite the disparate reactions to the mandatory death penalty, the existence of the punishment can add to the trauma and suffering of the victim and her family members, rather than aid in the recovery process.

²¹ People v. Echegaray, 327 Phil 364 (1996).

²² B. MADRID, ET AL., *op. cit. supra* note 12.

B. LEGAL, EVIDENTIAL AND PROCEDURAL CONCERNS

The realities of prosecuting incestuous rape cases can further traumatise the child particularly where, as in the Philippines and some other jurisdictions, issues of a sexual nature are considered taboo. During the proceedings, the victim will be required to reveal her ordeal in public — perhaps in front of inexperienced, untrained and male dominated courtroom participants. She will also be subject to gruelling cross-examination by the defence. For these reasons, there is a strong possibility that the victim will not want to testify. However, without the testimony, the chances of the case succeeding are slim because in almost all circumstances the victim is the only witness.²³

Largely because of the stigma of rape, judges in the Philippines have given significant weight to the victim's testimony. A review of Supreme Court cases on child-rape decided between 1901 and 1998 revealed that out of the 89% of cases that resulted in a conviction of the accused, 61% were largely based on the testimony of the child. Additional evidence such as medical certificates or other witnesses was deemed necessary in only 38% of the cases.²⁴

The Supreme Court has held that, "in crimes against chastity, the medical examination of the victim is not an indispensable element for the successful prosecution of the crime as the victim's testimony alone, if credible, is sufficient to convict the accused."²⁵ The rationale behind the Supreme Court's decisions is that the crime of rape is considered so heinous and shameful that no Filipina would make it up. The credibility and character of the victim is of primary concern to the Court. In many of the cases that resulted in an acquittal, the court's decision was frequently based on the questionable character of the victim, that is to say the victim was deemed not naive about sex, or had prior sexual experience, or was unchaste in her behaviour.²⁶

The court's readiness to rely heavily or solely on victim testimony is evidenced further in cases where the victim is a minor and when the accused is a family member. In one case, the court stated that, "a rape victim's testimony against her parent is entitled to great weight since Filipino children have a natural reverence and respect for their elders. These values are so deeply ingrained in Filipino families and it is unthinkable for a daughter to brazenly concoct a story of rape against her father, if such were not true."²⁷

²³ Jocelle Batapa, *The Realities of Prosecuting Incestuous Rape Cases: The Sexually Abused Child and Lawyer-Friend Perspectives*, Women's Studies Association of the Philippines (WSAP) Luzon Convention, University of the Philippines Los Banos, Laguna, October 15-23, 2000.

²⁴ ADHIKAIN PARA SA KARAPATANG PAMBATA-ATENEIO HUMAN RIGHTS CENTER AND UNITED NATIONS CHILDREN'S FUND PHILIPPINES, *AN INTERDISCIPLINARY ANALYSIS OF PHILIPPINE JURISPRUDENCE ON CHILD SEXUAL ABUSE*, CHILD PROTECTION UNIT (2002). It should be noted that the percentages quoted in the review have been rounded down from 61.66% and 38.34% respectively.

²⁵ *People v. San Juan*, 337 Phil 339-340 (1997).

²⁶ E. Porio & C. Crisol, *Child Abuse and the Courts: A Sociological Perspective*, in *AN INTERDISCIPLINARY ANALYSIS OF PHILIPPINE JURISPRUDENCE ON CHILD SEXUAL ABUSE*, *op. cit. supra* note 24.

²⁷ *People v. Panganiban*, G.R. Nos. 138439-41, June 25, 2001.

Whilst recognising that it is often difficult to prove that sexual abuse has occurred, especially if disclosure comes years after the abuse, it is questionable whether cases that do not require corroboration or supporting evidence meet international standards of proof.²⁸ It has been recognised by the UN Economic and Social Council that, "Capital punishment may be imposed only when the guilt of the person charged is based upon *clear and convincing evidence* leaving no room for an alternative explanation of the facts [emphasis added]."²⁹

In the Philippines, the Supreme Court automatically reviews every death penalty case as a safeguard against wrongful convictions. However, as can be seen from the table below, between 1993 and June 2004, out of the 907 cases the Supreme Court reviewed, it affirmed only 230 (25.36%). In 71.77% of the cases, the Court either modified or set aside the sentence, resulting in a total of 651 people being saved from the lethal injection. 65 of these people were in fact acquitted.³⁰ The high rate of error illustrated by these figures is cause for concern. Recognizing this, the Supreme Court was compelled to recently rule that the Court of Appeal should now examine the factual issues of cases to minimize the possibility of error of judgment.³¹

RATE OF ERROR

1993 –June 8, 2004

DISMISSED due to death of the Accused-Appellants	26
AFFIRMED	230
MODIFIED:	
a. FURTHER PROCEEDINGS	31
b. RECLUSION PERPETUA	483
c. INDETERMINATE SENTENCE	72
ACQUITTED	65
TOTAL	907

A further concern with the criminal justice process in the Philippines is the lack of expertise about DNA evidence, particularly its collection and use in the courts. Crime scene investigators are usually the first to arrive at a crime scene, but they lack the necessary training to properly identify, handle and store DNA related evidence. In one case, when asked to analyse a blood soaked weapon found at a crime scene, the investigator simply began to wipe the blood of the weapon in order to collect the

²⁸ For further information on the standard of proof in the Philippines, see F. SAIFEE, INTERNSHIP REPORT CENTRE FOR CAPITAL PUNISHMENT STUDIES, 35-55 (2003).

²⁹ United Nations Economic and Social Council Resolution 1984/50, Safeguards Protecting the Rights of those Facing the Death Penalty, art. 4, May 25, 1984. Also see United Nations Economic and Social Council Resolution 1996/15, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, 45 Plenary Meeting, article 3, July 23, 1996.

³⁰ People v. Mateo, G.R. No. 147678-87, July 7, 2004. Also see SC orders Court of Appeal to Review Death Penalty Cases, The Philippine Daily Inquirer, July 9, 2004.

³¹ *Ibid.*

evidence.³² Furthermore, scientific or laboratory equipment is underdeveloped, with only four DNA testing laboratories in the whole of the Philippines.³³

Added to this is the absence of laws or judicial guidelines to consider DNA evidence in court even when it could confirm the guilt or innocence of the accused. The existence of physical evidence is addressed by the Rules of Court of the Philippines, however, there are no specific laws requiring both the victim and defendant to submit DNA evidence, nor are there any corresponding judicial guidelines on the appreciation of physical, medical and forensic evidence.³⁴ Moreover, there is no room to allow for post conviction DNA testing in the Philippines. In 1995, Reynaldo de Villa,³⁵ a 67-year-old man, was sentenced to death for the rape of his 12-year-old niece, Aileen Mendoza, who became pregnant as a result of the alleged crime. On automatic review, the Supreme Court upheld the conviction, although it reduced the death sentence to *reclusion perpetua* and ordered the accused to support the child. However, a DNA paternity test conducted by the DNA Analysis Laboratory based at the University of the Philippines' National Sciences Research Institute proved that Reynaldo was not the father of the child. Despite the evidence, the Supreme Court refused to grant him a retrial, ruling that the DNA test could not be considered as new evidence, as a test disproving paternity could have been produced at the trial stage. The court stated that, "lack of knowledge of the existence of DNA testing during trial did not make the DNA results new evidence."³⁶ Reynaldo was recently granted a conditional pardon on 14 February 2006, 11 years after his original conviction.

The importance of DNA testing is further demonstrated by the cases of fourteen people in the U.S.A. who have been exonerated after post conviction DNA evidence proved that they did not commit the crime they were sentenced to death for.³⁷

Dr. Maria Corazon De Ungria, Head of the DNA Analysis Laboratory, has assisted in the drafting of judicial guidelines on the admissibility of post conviction DNA evidence. It is hoped that the guidelines will pave the way for admitting post conviction DNA evidence in the Philippines, thereby reducing the number of wrongly convicted individuals on death row.³⁸

³² See note 28, *supra*. A. ACOSTA, CENTER FOR CAPITAL PUNISHMENT STUDIES INTERNSHIP REPORT, 14-15 (2004).

³³ J. A. Carteciano & Rodel G. Offemaria, *Top Science Cracks Tough Domestic and Violent Crimes*, Science and Technology Information Institute, available at <<http://www.dost.gov.ph/media/article.php?sid=488>> February 21, 2005.

³⁴ Position Paper on the Death Penalty Bills, Free Legal Assistance Group (FLAG), available at <<http://www.hmow.org/monitor/PPDPB.rtf>>.

³⁵ *People v. de Villa*, G.R. No. 124639, February 1, 2001.

³⁶ Supreme Court Public Information Service, *SC Denies Convict's Plea for New Trial Despite New DNA Evidence*, Supreme Court News Flash, November 12, 2004.

³⁷ INNOCENCE PROJECT, DNA RESULTS IN COLEMAN CASE FINALLY REVEAL THE TRUTH IN ONE CASE -- BUT DON'T ANSWER SERIOUS DOUBTS ABOUT THE FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM, INNOCENCE PROJECT SAYS, JANUARY 12, 2006.

³⁸ For further information on the role of DNA testing in criminal investigations see: M. C. De Ungria, *Forensic DNA Analysis in Criminal Investigations*, 132:1 Philippine Journal of Science (2003).

III. A SOCIAL PERSPECTIVE

A. MEETING THE NEEDS OF DETERRENCE AND RETRIBUTION

As illustrated above, there are numerous difficulties with imposing the mandatory death penalty for incestuous rape. Advocates of the death penalty would argue, however, that it is a necessary punishment to deter future criminals. The majority of research on deterrence conducted worldwide has predominately focussed on the crime of murder. While it is commonly asserted that there is no deterrent effect to the death penalty, particularly when compared with other forms of punishment such as life imprisonment, a consensus on whether executions actually reduce the rate of murder has not been reached. Although it is beyond the scope of this paper to go through the various methodological considerations when discussing deterrence, it should be noted that in rape cases, the effectiveness of the death penalty as a crime deterrent is much harder to determine because the crime must be disclosed in the first place.

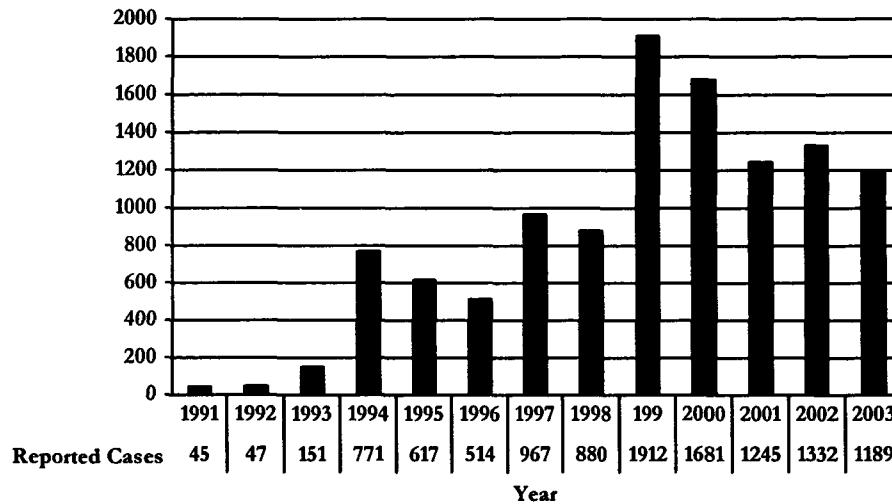
Statistics on incestuous rape (below) show that the number of reported cases has risen dramatically from 1991 to 2003, with notable increases from prior years in 1994 (the year the Death Penalty Law came into effect) and 1999 (the year that Leo Echegaray, the convicted child rapist, was executed). Following the reinstatement of the death penalty, it can be seen that the rate of reported cases decreased slightly, but began to increase again in 1997 and shot up considerably in 1999. It can, on the one hand, be assumed that during this period the existence of the death penalty had little deterrent effect overall on the rate of the crime. Equally, it can be asserted that as no executions had taken place between 1994 and 1999, the effect of the death penalty could not be seen or felt.

In total, seven executions took place before the moratorium on executions in March 2000. Three of the seven had been convicted of raping their daughters or stepdaughter. Although the number of reported cases did fall slightly after the executions, it is worth noting that the rate continued to decline while a moratorium on executions was in place. Given the lack of a consistent relationship between the death penalty and the rate of incestuous rape, it is suggested that the death penalty has little, if any, impact on the reduction of the crime.

Although there remains a significant difference between the 45 cases reported in 1991 and the 1189 cases in 2003, this could partly be due to a number of factors such as the increased recognition of the crime, better recording practices, the broadening of the definition of rape in 1997, and the advancement of children's services such as the Child Protection Unit and the Centre for the Prevention and Treatment of Child Sexual Abuse in the mid-90s.

Incestuous Rape Cases 1991 - 2003³⁹

Department of Social Welfare and Development



Whilst the obvious rationale for reinstating the death penalty in the Philippines was deterrence, its return was also widely supported by the public as a form of cultural retribution.⁴⁰ In almost all incestuous rape cases, the contemptible nature of the crime is acknowledged. As summed up by one judge, "Rape is a nauseating crime that deserves the condemnation of all decent persons...Whoever violates [a women's chastity] descends to the level of the odious beast. The act becomes doubly repulsive where the outrage is perpetrated on one's own flesh and blood for the culprit is reduced to lower than the lowly animal...the man who rapes his own daughter violates not only her purity and her trust but also the mores of his society which he has scornfully defied. By inflicting his animal greed on her in a disgusting coercion of incestuous lust, he forfeits all respect as a human being and is justly spurned by all."⁴¹

An issue to consider is whether the death penalty is ever a proportionate response to the crime of rape. In 1977, the United States Supreme Court ruled that the death penalty for the rape of an adult women was unconstitutional as such a punishment would be "grossly disproportionate" because the rapist does not take the life of his victim. Justice Byron White stated that while, "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over

³⁹ The charts in this paper combine a number of statistics obtained from the Department of Social Welfare and Development to give an overall picture of the number of incestuous rape cases reported in the Philippines. 3,350 cases of sexual abuse were recorded in 2004, but as the statistics have not been divided into different types of sexual abuse, it is not possible to identify which relate to incestuous rape.

⁴⁰ A. Tagayuna, *op. cit. supra* note 2.

⁴¹ Quoted in *People v. Agbayani*, 348 Phil. 368(1998).

and normally is not beyond repair.”⁴² The ruling, however, left open the question of whether the rape of a minor could be punishable by death. Louisiana, the only state in the United States which permits the death penalty for aggravated rape (rape of a child under 12), recently sentenced to death a man convicted of raping his 8-year-old stepdaughter.⁴³ It is likely that the case will be heard by the Supreme Court in due course.

Despite the position taken by the Philippine judiciary, as a reflection of society’s condemnation of incestuous rape, a high number of cases still occur. Rather than focussing on the retributive nature of the death penalty, which has not eliminated incidents of incestuous rape, perhaps consideration should be given to the conditions that allow for such abuse to commonly take place.

B. ADDRESSING THE ROOT CAUSES

The majority of groups representing women and children in the Philippines have taken a stance against the death penalty for rape and incest, because they believe that it will not solve the problem. Nor do they believe that it is beneficial to the victim. Part of the problem is that in Filipino society, many people are conditioned to believe that raped women are damaged and that their lives have been destroyed forever.⁴⁴ In the above-mentioned case of Eduardo Agbayani, the judge stated, “By testifying in court, she made public a painful and humiliating secret, which others may have simply kept to themselves for the rest of their lives. She thereby jeopardized her chances of marriage, as even a compassionate man may be reluctant to marry her because her traumatic experience may be [a] psychological and emotional impediment to a blissful union.”⁴⁵ The death penalty is therefore justified by some as a life taken for destroying the life of the victim.

In many of its judgments, the Court has emphasised its duty to protect victims, particularly children.⁴⁶ However, in attempting to do the right thing, the Court’s reflection on the perception of society regarding rape victims is not particularly helpful. In its bleak prediction on the chances of a blissful marriage, the Court is not only deterring victims from reporting the crime in the first place, it is also reinforcing the societal stigma sexual abuse carries.

Women’s groups in the Philippines stress that healing cannot possibly begin unless society changes its perspective that a women’s life is over if she is raped.

⁴² *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴³ A. Liptak, *Louisiana Sentence Renews Debate on the Death Penalty*, New York Times, August 31, 2003.

⁴⁴ Women’s groups in India have voiced similar concerns after calls to impose the death penalty for rape in that jurisdiction. See R. Sen, *Why feminists oppose the death penalty for rapists*, PUCL Bulletin, January 2003. India has recently ruled out the death penalty for rape believing that the number of rape cases will not decrease and that victims may be killed as a way of removing the evidence. See *No proposal to introduce death sentence for rapists*, Press Trust of India, March 9, 2005.

⁴⁵ *People v. Agbayani*, *supra*.

⁴⁶ For example, *People v. Lao*, 319 Phil. 234 (1995) & *People v. Digno* 320 Phil 288 (1995).

Furthermore, rather than reducing the high rates of rape and incest, women's advocates believe that the death penalty only serves to distract society from the real problem, which is the government's failure to respond adequately to violence against women and children. Instead of imposing the death penalty, they argue that justice should begin with examining the culture that systematically breeds such violence and by tackling its root causes.⁴⁷

Theodore O. Te, a leading death row lawyer, also points out that culture plays a key role. He states that, "In the case of rape for example, I think our chauvinistic attitude towards women is responsible for many such cases... the chauvinistic view that women are property, that we are free to do with them as we please. It's really an issue of power."⁴⁸

The Philippines is a predominately Catholic country, and as such personal beliefs and community values are based on the teachings of the Roman Catholic Church. Many women are brought up to believe that the male is the head of the household with absolute authority over his wife and children. Abuse and violence in the family home is not uncommon, but the husband or father's behaviour is rarely questioned. This in part explains the reluctance to report sexual abuse and domestic violence. Women generally accept that part of their role in marriage is to satisfy the sexual needs of their husbands, which explains why many fail to understand the concept of rape in marriage or to consider it criminal behaviour.⁴⁹ In fact, the issue of marital rape in the Philippines only came into the limelight in the mid-1990s, during the anti-rape bill deliberations. Women's groups were outraged by the failure of some congressmen to understand how a woman could be raped by her husband. The reasoning behind the lack of awareness was based on the doctrine of presumed consent whereby a woman is perceived to have consented to everything her husband wishes her to do in their married life.⁵⁰ The same can be said for children, particularly females, who are brought up to please the head of the household or the male members of the family. If social norms continue to tolerate violence against women, many experts believe that, regardless of whether the death penalty exists or not, the number of rape and incest incidents will not diminish.⁵¹

⁴⁷ SIBOL Statement, Philippines European Solidarity Centre, *Women Say No to the Death Penalty*, February 1999, available at <<http://www.philsol.nl/A99a/SIBOL-feb99.htm>>.

⁴⁸ C. Aro & Institute of International Legal Studies (IILS), *IILS Forum on the Death Penalty*, in The Diliman UP Date Online, April 2001, available at <<http://www.upd.edu.ph/~upinfo/archives/aprmay2001/deathp.htm>>.

⁴⁹ D.D. Hunt & C. Sta. Ana-Gatbobton, *Filipino Women and Sexual Violence: Speaking out and Providing Services*, Paper presented to the Immigrant Women's Support Service Forum: Sexual Violence in a Gender, Cultural and Human Rights Framework, November 24, 2000.

⁵⁰ O.H. Tripon, *Yes, there is such a thing as marital rape*, 1:1 WOMEN'S FEATURE SERVICE (2000), on-line newsletter, of the Womenlead Foundation Inc, available at <http://www.geocities.com/women_lead/newsletter2.html>. Marital rape is now penalised under the 1997 Anti-Rape Law: An act expanding the definition of the crime of rape, reclassifying the same as a crime against persons, amending for the purpose Act No. 3815, as amended, otherwise known as the revised penal code, and for other purposes, Republic Act No. 8353 (1997).

⁵¹ M. Tan, *Breaking the Silence*, Health Alert, November 28 1998, Health Action Information Network, Manila, Philippines. Quoted in *Filipino Women and Sexual Violence: Speaking out and Providing Services*, *op. cit. supra* note 49.

IV. CONCLUSION

With this in mind, the appropriateness of the death penalty as a punishment for incestuous rape is questionable. In many of the case studies, the presence of the death penalty has left the victim without any avenues for justice; in some cases, the victim continues to live in an unsafe environment, where her needs remain unaddressed. It is vital that the immense emotional trauma a child faces when confronted with the fact that the offender will be put to death, and also the psychological and financial impact executions can have on the wider family unit, are addressed within and outside the criminal justice system.

Moreover, a criminal justice system based on retribution does not aid the victims of incestuous rape.⁵² By applying the death penalty without disputing the gravity of any crimes of rape, any opportunity for restorative justice, where appropriate, is denied.⁵³ As can be seen from the statistics, the death penalty is not an answer to eradicating or reducing incidents of incestuous rape. Hence, efforts should focus on early detection, certainty of arrest and punishment and social reforms.

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⁵² See D. Demetillo, *Death penalty for rape retributive and outmoded*, Women's Feature Service, Cyberdyaryo, May 27, 2005.

⁵³ For further information on restorative justice see Centre for Restorative Justice, Simon Fraser University, Burnaby, Canada, *Restorative Justice: A Summary*, available at <<http://www.sfu.ca/cfrj/fulltext/summary.pdf>>.