

PEOPLE V. JUMAWAN: EXAMINING THE LAW'S SILENT TREATMENT OF MARITAL RAPE*

NOTE

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I. INTRODUCTION

People v. Jumawan,¹ decided in 2014,² marks the very first time a documented case of marital rape has ever reached the Philippine Supreme Court. In its lengthy decision, the high court pronounced as guilty a man who forced his wife to have sex with him twice without her consent in October 1998. In affirming the ruling of a Cagayan De Oro City Trial Court and the Court of Appeals, the Supreme Court relied on the implicit recognition of marital rape as falling within the scope of Republic Act No. 8353, also known as the *Anti-Rape Law of 1997*. This crucial decision, promulgated within the term of the Supreme Court's first female Chief Justice, categorically states, "Sexual intercourse, albeit within the realm of marriage, if not consensual, is rape."

This note explores this oft-neglected and almost invisible topic in Philippine legal literature and ultimately recommends the need for statutory reform. Amending the current rape laws to explicitly define and criminalize marital rape not only better fulfills the country's commitment to its declared policies on gender equality under the Constitution,³ but also more effectively reflects the need of Filipino women for a more substantial legal recourse against the very real injustices that may have been committed against them, especially by those with whom they share or have shared intimate relationships.

* Cite as Giselle Jose, Note, *People v. Jumawan: Examining the Law's Silent Treatment of Marital Rape*, 89 PHIL. L.J. 328, (page cited) (2015).

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¹ *People v. Jumawan* [hereinafter "Jumawan"], G.R. No. 187495, 722 SCRA 108, Apr. 21, 2014.

² In contrast, the New York Court of Appeals made the same ruling in *People v. Liberta* in 1984, 30 years prior to the decision in *Jumawan*.

³ CONST. art. II, § 14.

II. STRIKING DOWN THE IMPLIED IRREVOCABLE CONSENT THEORY

Antiquated ideologies such as the Chattel Theory, Coverture, and the Marital Unity Theory have evolved into what we know today as the Irrevocable Implied Consent Theory⁴ or Lord Hale’s Contractual Theory.⁵ In *Jumawan*, it is the same irrevocable implied consent theory that served Edgar Jumawan’s, the appellant, mistaken notion that a marital relationship serves as both a permanent “yes” from the wife that becomes a husband’s legal shield against prosecution for rape.

An early US case that declared the unconstitutionality of the marital rape exemption, *Warren v. State*,⁶ aptly observes, “Hale’s implied consent theory was created at a time when marriages were irrevocable and when all wives promised to ‘love, honor, and obey’ and all husbands promised to ‘love, cherish, and protect until death do us part.’ Wives were subservient to their husbands, her identity was merged into his, her property became his property, and she took his name for her own.” The decision, penned by the Supreme Court of Georgia in 1985, asks this: “*When a woman says I do, does she give up her right to say I won’t?*”⁷

These ideologies, however, may not be as obsolete in our society as one may hope. Appellant set forth the following arguments before the Court of Appeals, which both the appellate court and the High Court later refuted:

1. Theoretically, the two incidents complained of were consensual because they took place between a legally married and cohabiting couple.
2. There is a presumption that consent to copulation is present between husband and wife unless the contrary is proved.
3. Marital rape should be viewed and treated differently from ordinary rape, in terms of the standard for determining the

⁴ Prior to the amendments made by Republic Act No. 8353 (1997) to Article 335 of the Revised Penal Code [RPC] seems to have adhered to the irrevocable implied consent theory. Former Chief Justice Ramon C. Aquino has interpreted Article 335 of the RPC to mean that, as a general rule, a husband may not be guilty of raping his wife. As an exemption, a husband may be found guilty if he was legally separated from his wife. See *Jumawan*, 722 SCRA at 139.

⁵ “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” See Matthew Hale, HISTORY OF THE PLEAS OF THE CROWN (1736).

⁶ *Warren v. The State*, 255 Ga. 151, 224 (1985).

⁷ *Id.* at 151. (Emphasis supplied.)

presence of consent and lack thereof. The threshold for consent must be adjusted for a cohabiting married couple because sexual community is a mutual right and obligation.

The *Jumawan* decision takes its cue from the New York Court of Appeals, which, as far back as 1983, declared that there is a lack of rational basis for a distinction between marital and non-marital rape. The case, *People vs. Liberta*, was the first in the United States to strike down the marital rape exemption as unconstitutional: “a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman.”⁸

Given that rape is traditionally defined in our jurisdiction as a man having carnal knowledge of a woman through force,⁹ a gray area becomes apparent as we attempt to define what constitutes force, coercion or non-consent within the marital relationship. This ambiguity, exacerbated by a general reluctance to carefully scrutinize marriage itself, contributes to our society’s treatment of marital rape.¹⁰ The promulgation of *Jumawan*, then, has come better late than never.

III. THE COURT’S RULING

A. Compliance with the CEDAW

Jumawan credits the current state of our laws on rape as part of the country’s compliance with the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹¹ In ratifying the “first international women’s bill of rights” and the “first major instrument that contains a ban on all forms of discrimination against women,”¹² the Philippines committed to promote gender equality and women’s empowerment and condemn discrimination against women. Following the

⁸ *People v. Liberta*, 64 N.Y.2d 152, 164 (1984).

⁹ REV. PEN. CODE, art. 266-A.

¹⁰ Patricia Mahoney & Linda Williams, *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*, in PARTNER VIOLENCE: A 20-YEAR LITERATURE REVIEW AND SYNTHESIS (Jana Jasinski & Linda Williams eds., 1998), at 10, available at http://www.ncdsv.org/images/nnfr_partnerviolence_a20yearliteraturereviewandsynthesis.pdf.

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹² *Jumawan*, 722 SCRA at 140.

CEDAW, the UN General Assembly also promulgated the UN Declaration on the Elimination of Violence against Women (DEVAW).¹³

This commitment comes with the recognition that social and cultural patterns must be modified in order to eliminate prejudice and somehow achieve full equality. Such patterns include practices “based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”¹⁴

Consequently, the country incorporated in the law of the land several provisions that are unequivocally supportive of gender equality and the role of women in nation-building¹⁵ and has since followed this up with more legislation designed to safeguard and promote women’s rights. The *Magna Carta of Women*¹⁶ is the most noteworthy result of the country’s participation in the CEDAW.

The *Anti-Rape Law of 1997* is another such measure designed to protect women from violence and discrimination. The passage of this law, according to *Jumawan*, not only reclassified rape as a crime against persons, but also has supposedly eradicated the archaic notion that marital rape cannot exist. The Court calls this implied recognition of marital rape the law’s “most progressive proviso.”¹⁷

In concluding that the *Anti-Rape Law of 1997* indeed penalizes the crime of rape without regard to the legal relationship between the rapist and his victim, the Court draws attention to Article 266-C of the Revised Penal Code in relation to the use of the word “man” in Article 266-A (1) without qualification. The strength of the *Anti-Rape Law of 1997* is further bolstered

¹³ Declaration on the Elimination of Violence Against Women, A/Res/48/104 (Dec. 20, 1993).

¹⁴ *Jumawan*, 722 SCRA at 150.

¹⁵ CONST. art. II, § 14.

¹⁶ Rep. Act. No. 9710 (2009). The Magna Carta of Women.

¹⁷ Rep. Act No. 8353 (1997), § 2 amended the RPC to read as:

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

In case it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty: Provided, That the crime shall not be extinguished or the penalty shall not be abated if the marriage is void ab initio. (Emphasis supplied.)

by the enactment of Republic Act No. 9262¹⁸ which regards rape within marriage as a form of sexual violence.

B. The Intent of the Framers

The legislative intent to include marital rape within the scope of our laws is clearly supported by the deliberations of the 10th Congress on House Bill No. 6265 and Senate Bill No. 650, which eventually evolved into the *Anti-Rape Law of 1997*. Although there was undoubtedly a consensus that marital rape is penalized under the general definition of rape, the implied recognition came about as a result of the conservative legislature's qualms in labeling the crime as "marital rape."

Below are the pertinent portions of the deliberations:

MR DAMASING: Madam Speaker, Your Honor, I am in favor of this. I am in favor of punishing the husband who forces the wife even to 30 years imprisonment. *But please do not call it marital rape, call it marital sexual assault because of the sanctity of marriage.*

HON. APOSTOL: In our version, we did not mention marital rape but marital rape is not excluded.

HON. ROCO: Yeah. No. But I think there is also no specific mention.

HON. APOSTOL: No. No. No. *Silent lang 'yung marital rape.*

* * *

PRESIDING OFFICER ANGARA-CASTILLO: Mr. Chairman, [t]his provision on marital rape, it does not actually change the meaning of rape. It merely erases the doubt in anybody's mind, whether or not rape can indeed be committed by the husband against the wife. *So the bill really says, you having married to another is not a legal impediment. So I don't really think there is any need to change the concept of rape as defined presently under the [R]evised [P]enal [C]ode. This do[es] not actually add anything to the definition of rape. It merely says, it is merely clarificatory.* That if indeed the wife has evidence to show that she was really brow beaten, or whatever or forced or intimidated into having sexual intercourse against her will, then the crime of

¹⁸ Rep. Act No. 9262 (2004), § 3. Anti-Violence Against Women and Their Children Act of 2004 [hereinafter "Anti-VAWC Act"].

rape has been committed against her by the husband, notwithstanding the fact that they have been legally married.¹⁹

C. The Court's Human Rights-Based Approach

Distinguished American feminist author Andrea Dworkin has said, "Marriage as an institution developed from rape as a practice. Rape, originally defined as abduction, became marriage by capture. Marriage meant the taking was to extend in time, to be not only use of but possession of, or ownership."²⁰ Historically, rape, as a crime, developed to protect the interests of men, not women.²¹

Keeping this in mind, the undeniable significance of *Jumawan's* progressive human-rights based approach to rape cannot be understated. The Court said, "A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself."²²

The Court then, by characterizing sexual intimacy as one absent of coercion, places emphasis on the fact that rape is a violation of human dignity and that sex, even within the marital relationship, is only lawful when done with consent. *Jumawan* stresses that it is the Court's duty to pull back the curtain of marital privacy when the relationship is used by a husband to take advantage of his wife.

Jumawan strongly affirms a woman's right to exclusive autonomy over her own body, which includes the right to decide matters related to her sexuality, including sexual and reproductive health. Marriage cannot serve as a bar to the exercise of these rights because, as the Court points out, human rights are inalienable and the Philippines can no longer accommodate conservative notions of marriage if it is to comply with its international commitments.

The Irrevocable Implied Consent Theory also infringes on equal protection. The decision points out that the Court only contemplates one

¹⁹ *Jumawan*, 722 SCRA at 142, citing the deliberations of the 10th Congress on H. No. 6265 and S. No. 650. (Emphasis supplied.)

²⁰ ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 19-20 (1981), available at <http://www.feminish.com/wp-content/uploads/2012/08/Pornography-Men-Possessing-Women-Andrea-Dworkin-pdf.pdf>.

²¹ Sandra Ryder & Sheryl Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. MARSHALL L. REV. 393, 394 (1991).

²² *Jumawan*, 722 SCRA at 111.

definition of rape although it may be committed in three forms.²³ In fact, if the Court treated marital rape differently from ordinary rape, it would have amounted to judicial legislation. The law, therefore, does not make a distinction—rape committed within marriage has the same legal consequences as rape committed without marriage, and the law protects all women equally, regardless of their legal relationship with their rapist. Stricter evidentiary rules burdens victims unreasonably because there is no reason, legal or rational, to justify the application of different evidentiary rules for those raped by their husbands. “The elements and quantum of proof that support a moral certainty of guilt in rape cases should apply uniformly regardless of the legal relationship between the accused and his accuser.”²⁴

In convicting Edgar Jumawan of raping his own wife, the Court took what has traditionally been the liberal approach in ordinary rape cases—the guilt of the offending party was established almost purely on the basis of the victim’s credibility.

All in all, the decision itself is laudable as it reflects an enlightened judiciary. That the Court took pains to approach *Jumawan* as it would an ordinary rape case is certainly a subtle but very powerful step in rape jurisprudence in the Philippines. This approach is relevant because it erases all doubts as to whether marital rape is punishable in our jurisdiction. Free from caveats, disclaimers, or beating around the bush, *Jumawan* is a strong statement from our own High Tribunal that the judiciary will not back down from defending women’s rights.

IV. ELIMINATING BARRIERS TO PROSECUTION

Unfortunately, it must be pointed out that the belated addition of *Jumawan* to Philippine rape jurisprudence is just one example of the formal justice system being reflective of dominant culture. Though the Court, without hesitation, convicted a husband who raped his wife, there must be

²³ “[T]he definition of rape in Section 1 of R.A. No 8353 pertains to: (a) rape, as traditionally known; (b) sexual assault; and (c) marital rape or that where the victim is the perpetrator’s own spouse. The single definition for all three forms of the crime shows that the law does not distinguish between rape committed in wedlock and those committed without a marriage. Hence, the law affords protection to women raped by their husband and those raped by any other man alike.” *Jumawan*, 722 SCRA at 153.

²⁴ *Jumawan*, 722 SCRA at 155.

an underlying reason why this case has been its *first and only* opportunity to do so, considering that wife rape is not rare.²⁵

That the Court found the need to painstakingly traverse our laws on gender equality, from the CEDAW to the *Anti-Rape Act of 1997*, as well as supplement the *Anti-Rape Act* with the *Anti-VAWC Act* in order to justify Edgar Jumawan's conviction is very telling of the current state of our rape legislation. The Court ensured that there is no room for doubt as to the criminality of marital rape, but it may be argued that they did so because they were left with no choice. As it is, there is no single, definitive statute that may stand on its own to justify a conviction for marital rape. It would appear that the resulting jurisprudence is undeniably progressive, but the judiciary was constrained to make do with antiquated and fragmented legislation.

A. Making Consent the Crux of the Anti-Rape Law

Jumawan tackles the consent issue by clarifying that the significant point when consent must be given is at that time "when it is clear to the victim that her aggressor is soliciting sexual congress."²⁶ In the case, the Court identified the point of consent as when the offender tapped his fingers on his wife's lap, a gesture she comprehended to be an invitation for a sexual intercourse, which she refused.

Neither did the Court appreciate the argument that the wife should have hit her husband to convey resistance. Following the letter of the law, resistance is not one of the elements of rape. It follows that it is not necessary for the victim to prove resistance. On the other hand, force or intimidation, while an element of rape, the same does not have to be irresistible. Said the Court, "What is necessary is that the force or intimidation be sufficient to consummate the purpose that the accused had in mind or is of such a degree as to impel the defenseless and hapless victim to bow into submission."²⁷

A pending relevant legislation, House Bill No. 812,²⁸ seeks to provide a clearer picture of the concept of consent as the essence of rape,

²⁵ Women who are or have been married are more likely to be raped by their husband than by a stranger. See DIANA E.H. RUSSELL, RAPE IN MARRIAGE (1982).

²⁶ *Jumawan*, 722 SCRA at 162.

²⁷ *Id.* at 163.

²⁸ As of June 14, 2015, the Bill's status is listed as pending with the Committee on Revision of Laws. It was filed in 2013.

and outlines six instances wherein there is a presumption that consent has not been given by the victim, shifting the burden of proof to the defendant. The Bill seeks to address the failure of the law in defining consent from the perspective of the victim, as it is the lack of or inability to give consent that is the very essence of the crime of rape.²⁹

The same bill also does away with the need to prove the legal relationship between the victim and the accused. Unfortunately, this does not help victims of marital rape, as the proposed amendment only relieves the child victim in parent-child or similar relationships wherein the “father-figure” uses moral ascendancy as a means of perpetrating the rape.³⁰

As the bill aims to “zero in” on consent as the central element of rape, it is also a strong acknowledgement that consent remains a live issue in rape jurisprudence in our country.

The Philippines is not a unique case. Though almost all countries criminalize rape, penal codes across jurisdictions “often define sexual violence very narrowly, with many still framing the problem in terms of indecency or immorality, or as a crime against the family or society, rather than a violation of an individual’s bodily integrity.”³¹ If rape is accepted and treated as a violation of human rights, then other factors, such as civil status, should not be allowed to change the fact that rape is “a violation of a

²⁹ H. No. 812, 16th Cong., 1st Sess., (2013). An Act Amending Chapter 3 of Republic Act 8353, also known as the Anti-Rape Law of 1997, *available at* http://www.congress.gov.ph/download/basic_16/HB00812.pdf. The six instances are:

1. When the act is attended by force, threat, or intimidation.
2. When there is fraudulent machination, grave abuse of authority or moral ascendancy.
3. When the victim is deprived of reason or is otherwise unconscious.
4. When the victim is incapable of giving consent due to his or her mental or physical state or capacity.
5. When the victim is below 15, or has a mental capacity of that of a 15-year old or below and the offender is of legal age.
6. When the offender is a biological or adoptive parent or a *de facto* parent or a person who has raised the offended parent without the benefit of legal adoption, ascendant, step-parent, *de facto* or legal guardian, relative by consanguinity or affinity within the 3rd civil degree, or the common-law spouse or live-in partner of the parent of the victim.

³⁰ *Id.* at 2-3.

³¹ UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN [hereinafter “U.N. Women”], *PROGRESS OF THE WORLD’S WOMEN: IN PURSUIT OF JUSTICE* 33 (2011).

woman's intrinsic worth and dignity as a human being."³² As stated in an intervention to the European Court of Human Rights in the case of *M.C. v Bulgaria*:³³

The equality approach starts by examining not whether the woman said 'no', but whether she said 'yes'. Women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity.³⁴

B. Overcoming Cultural Obstacles

1. *The Maria Clara and Stand-ins for Consent*

Despite the slow but steady shift in the Philippine cultural landscape, ideas of what Philippine femininity *should be* still negatively affect the judiciary's approach to recognizing a victim of rape. Thus, when a woman does not fit the description of what a rape victim *should be*, the Court (and the public) may become hesitant to even validate her experience as sexual assault by dismissing it as a consequence of her past indiscretions (that she was "asking for it"), or in the case of marital rape, of the fact that she *consented* to marriage, and therefore she must have consented to her husband's sexual demands. The "standard rape victim" or "Maria Clara" ideology is a very real and very dangerous construct of the judiciary that remains an obstinate barrier that prevents married women from benefiting from the widely accepted doctrine that the rape victim's lone testimony may be sufficient for a conviction.³⁵

Maria Clara, although thought of by most to be the "ideal Filipina role model," reinforces patriarchal ideologies—not only that the woman is secondary or subordinate to men, but also that a woman's identity is defined by and inextricably linked to that of a man's. When a woman's value is measured by her purity, a woman is considered as having low in "value" if she is raped, arguably also has less in terms of sympathy and consequently,

³² Women's Legal Bureau, Inc., *Sexual Violence as a Medico-Legal Issue: An Overview of International and Philippine National Laws*, 15 REV. WOMEN'S STUD. 46, 59 (2004).

³³ *M.C. v. Bulgaria*, App. No. 39272/98, 40 Eur. H.R. Rep. 459 (2005).

³⁴ Submission of Interights, *M.C. v. Bulgaria*, App. No. 39272/89, 40 Eur. H.R. Rep. 459 (2005), cited in Amnesty Int'l, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, AI Index IOR 53/001/2011 (2011).

³⁵ *People v. Banela*, G.R. No. 124973, 301 SCRA 84, 93, Jan. 18, 1999.

may be less likely to succeed in convicting her rapist.³⁶ The moment that the woman does not fit into the standard, the Court inadvertently becomes “preoccupied with questions of resistance and non-consent.”³⁷

“It is too often assumed that a woman’s appearance, attire, status, location, prior sexual history, or relationship to the man in question either function as stand-ins for consent or render her consent irrelevant or unnecessary.”³⁸ Following this line of reasoning, the legal marital relationship may be perceived by society as a “stand-in” for consent. Therefore, spousal rape is a topic often swept under the rug and dismissed as a matter between husband and wife.

Additionally, filing a rape case comes with social costs. Professor Dante Gatmaytan, in his article “Character, Credibility, and Contradiction: Rape Law and the Judicial Construction of the Filipina,” names the following examples of stigmatization: public ridicule, shame, and exposure to humiliation. When the complainant’s history is examined by the court, “her morality is put in doubt.”³⁹ Considering that most complainants desist from pursuing a case against their abuser, statistical data is far from accurate. “Moreover, many incidents of abuse are still left unreported simply because many women still opt to remain silent, choosing not to report the abuses committed against them.”⁴⁰

2. *Marriage as a Closed Door*

Another problem is the belief that abolishing the marital rape exemption is seen as an invasion of the privacy of marriage. This belief also deters wife rape victims from reporting the rape. A 1984 study of rape victims concludes that the relationship between the victim and the rapist is the most important factor for a rape victim when making the decision to report the sexual assault. A similar study conducted in 1987 also notes,

³⁶ See Norman Owen, *Maria Clara and the Market: Women and Change in the 19th Century Philippines*, 36 ASIAN STUD. J. CRITICAL PERSP. ASIA 24 (2000).

³⁷ Roman Miguel G. de Jesus, *The Sweetheart Defense in Rape Cases: Comments on People v. Ramos and People v. OGA*, 80 PHIL. L.J. 711, 715 (2006).

³⁸ Rebecca Whisnant, *Feminist Perspectives on Rape*, in STAN. ENCYCLOPEDIA PHILO. (Edward N. Zalta ed., 2013), available at <http://plato.stanford.edu/entries/feminism-rape/#Rel> (last modified August 2013).

³⁹ Dante Gatmaytan, *Character, Credibility, and Contradiction: Rape Law and the Judicial Construction of the Filipina*, 1998 PHIL. PEACE & HUM. RTS. REV. 117.

⁴⁰ SALIGAN Women’s Unit, *Strengthening Responses to Violence Against Women: Overcoming Legal Challenges in the Anti-Violence against Women and Their Children Act*, at http://www.saligan.org/docs/strengthening%20responses_women.pdf.

“women were more reluctant to talk about their partners’ sexual assaults than about any other type of abuse.”⁴¹

Society’s belief that marriage is a closed door whose sanctity and privacy must be prioritized is flawed, however; if rape occurs within the marriage, the marriage has already deteriorated and cannot be safeguarded by any sort of legal immunity. “[I]t is the violent act of rape and not the subsequent attempt of the wife to seek protection through the criminal justice system which ‘disrupts’ a marriage. Moreover, if the marriage has already reached the point where intercourse is accomplished by violent assault, it is doubtful that there is anything left to reconcile.”⁴² Marital privacy is not meant to protect nonconsensual acts. If a husband may not invoke marital privacy to escape liability for wife-beating, neither may he justifiably rape his wife under the guise of a right to privacy.⁴³ “A woman who is raped by a stranger lives with a memory of a horrible attack; a woman who is raped by her husband lives with her rapist.”⁴⁴

3. *The Judicially-Crafted Filipina and the Risk of Revictimization*

Filipina women are made to contend with the reality of living in a country with a legal system that works against them and not for them.⁴⁵ Rape jurisprudence is replete with contradictions, and many decisions create and propagate gender stereotypes. Undoubtedly, gender sensitivity is a critical area for reform in the courts.⁴⁶ However, we cannot wait around for the judiciary to unlearn stereotypes, for it has been observed that:

Judgments in individual cases have an important role in indicating to society the conduct which is criminal and unacceptable, and the reasons for such decisions, and particularly addressing attitudes

⁴¹ Mahoney & Williams, *supra* note 10, at 9.

⁴² *People v. Liberta*, 64 N.Y.2d 152, 165 (1984).

⁴³ *Id.*

⁴⁴ Mahoney & Williams, *supra* note 10, at 3, *citing* David Finkelhor & Kersti Yllo, *Rape in Marriage: A Sociological View*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* (Finkelhor et al. eds., 1983).

⁴⁵ “For example, battered women have no easy recourse because there is no divorce law in the Philippines. Instead, the Family Code provides for “psychological incapacity” as the only ground for nullity of marriage. It provides for legal separation on the grounds of repeated physical abuse, grossly abusive conduct, abandonment for at least one year and attempt on the life of the spouse. A woman has to prove physical abuse committed at least two times before she can be granted legal separation and forfeit the share in the conjugal or community property of the guilty husband in favor of common children.” *See* Rowena Guanzon, *Laws on Violence Against Women in the Philippines*, at 4 (2008), available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGP_LVAW%20Paper%20\(Rowena%20Guanzon\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGP_LVAW%20Paper%20(Rowena%20Guanzon).pdf).

⁴⁶ *See* ROWENA GUANZON, *ENGENDERING THE PHILIPPINE JUDICIARY* (2006).

which seek to excuse or justify criminal conduct, identifying false stereotypes and through detailed reference to the evidence before the court, making clear the reality of how perpetrators commit crimes.⁴⁷

To illustrate: in *Karen Tayag Vertido v. The Philippines*,⁴⁸ the Committee on the Elimination of Discrimination Against Women affirmed Karen Vertido's argument that she had been "revictimized" by the Philippine judiciary. The decision stated that the State party's failure to comply with its obligation to address gender-based stereotypes was tantamount to a failure to exercise due diligence in complying with the CEDAW. When the Philippine Supreme Court assessed the credibility of Vertido's account of her rape and allowed itself to be influenced by gender-based stereotypes that ultimately was declared a violation of the right to non-discrimination.

Under our own *Magna Carta of Women*, "discrimination against women" also includes "any act or omission, including by law, policy, administrative measure or practice, that directly or indirectly excludes or restricts women in the recognition and promotion of their rights and their access to and enjoyment of opportunities, benefits, or privileges." The same section further provides:

A measure or practice of general application is *discrimination against women if it fails to provides for mechanisms to offset or address sex or gender-based disadvantages or limitations of women, as a result of which women are denied or restricted in the recognition and protection of their rights and in their access to and enjoyment of opportunities, benefits, or privileges; or women, more than men, are shown to have suffered the greater adverse effects of those measures or practices. Provided, finally, that discrimination compounded by or intersecting with other grounds, status, or condition, such as ethnicity, age, poverty, or religion shall be considered discrimination against women under this Act.*⁴⁹

Professor Gatmaytan criticizes the judiciary's practice of imposing a double standard on rape victims, which he calls the "judicially-crafted model of the Filipina," despite the fact that rape is a crime wherein there is arguably a presumption of guilt against the defendant. Says Professor Gatmaytan, "While the Court has ruled that the character of the complainant is immaterial in rape cases, it often entertains allegations by the defendant that

⁴⁷ Amnesty Int'l, *supra* note 34, at 34.

⁴⁸ *Karen Tayag Vertido v. the Philippines*, Communication No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (July 2010).

⁴⁹ Rep. Act No. 9710 (2009), § 2. (Emphasis supplied.)

the complainant is a woman of ‘loose morals.’” Therefore, the credibility of the Filipina rape victim is measured by the standards imposed by society, or rather, how the Court believes a woman should behave.

The marital relationship presents an analogous situation. For example, the 1990 case of *People v. Murallon*,⁵⁰ in striking down the Sweetheart Defense Theory, states, “Love is not a license for lust, *at least upon a sweetheart only who, unlike the wife, has a right to resist the passionate advances of her partner.*” Though the same pronouncement would most likely not hold today, this is just one example of how the court may make a subconscious distinction when a legal marital relationship is involved.

The relationship may also affect how victim credibility is perceived by the court, placing an undue evidentiary burden upon a married woman seeking to prosecute her husband for sexual assault. According to Lord Hale, “Rape is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent.” Society, then, still nurses a concern for protecting men from false accusations from “vindictive wives.”⁵¹ While the pertinent laws do indeed outlaw marital rape, the public perception of marital rape arguably continues to act as a virtual shield from prosecution.

C. The Paper Tigers: Present Rape Legislation

1. *Anti-VAWC Act and the Magna Carta of Women*

It is established that marriage should not serve as a legal impediment to prosecution. However, in practice, there arguably exists an impediment in the law itself.

The *Anti-VAWC Act* includes rape under the definition of “sexual violence.”⁵² Similarly, the *Magna Carta of Women*, through an ambitious stride in equality legislation, is lacking in this aspect. Like the *Anti-VAWC Act*, marital rape is enumerated under the *Magna Carta of Women*’s definition of Violence Against Women,⁵³ but the same not explicitly defined.

⁵⁰ G.R. No. 85734, 189 SCRA 488, 493, Sept. 13, 1990. (Emphasis supplied.)

⁵¹ Cassandra DeLaMothe, *Liberta Revisited: A Call to Repeal the Marital Exemption for All Sex Offenses in New York’s Penal Law*, 23 FORDHAM URB. L.J. 857, 878 (1996).

⁵² Anti-VAWC Act, § 3.

⁵³ Rep. Act. No. 9710 (2009), § 2.

On the other hand, the *Magna Carta of Women's* definition of “discrimination against women” mentions the phrase “irrespective of marital status.” Therefore, under the *Magna Carta of Women*, the fact that a woman is married should not impair her exercise of human rights and other fundamental freedoms.⁵⁴

However, the difficulty in using either the *Anti-VAWC Act* (relied on by the Court in *Jumawan*) or the *Magna Carta of Women* to justify the prosecution of marital rape, becomes apparent when one considers that neither of them provides a definition of this species of rape or even a specific penalty for it. Unfortunately, this means that victims wishing to prosecute marital rape under the *Anti-VAWC Act* are constrained to circle back to the Revised Penal Code for guidance.⁵⁵

Republic Act No. 8505, or *Rape Victim Assistance and Protection Act of 1998*, notably provides for a rape shield: “In prosecutions for rape, evidence of complainant’s past sexual conduct, opinion thereof or of his/her reputation shall not be admitted unless, and only to the extent that the court finds, that such evidence is material and relevant to this case.”

In the context of rape legislation and jurisprudence, the rape shield should presumably also apply notwithstanding the fact that a woman and her rapist are legally married. As already mentioned, *Jumawan*, theoretically, is already ample authority to prosecute marital rape in the same way as ordinary rape. We know, however, that in practice, this is not as simple.

2. *The Effect of Pardon*

The “special” treatment of marital rape, though for the most part motivated by harmful cultural issues and ideologies, is also propagated by legislative design. Statutory obstacles differ across jurisdictions around the world, which include the imposition of less severe sentences, a higher burden of proof for the rape victim, and the requirement of a greater showing of force.⁵⁶

⁵⁴ Rep. Act. No. 9710 (2009), § 4.

⁵⁵ An offense is punished by RPC if both its definition and the penalty therefor are found in the said Code, and it is deemed punished by a special law if its definition and the penalty therefor are found in the special law. *People v. Simon*, G.R. No. 93028, 234 SCRA 555, July 29, 1994.

⁵⁶ Linda Jackson, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 213-15 (1994).

In our jurisdiction, the *Anti-Rape Act of 1997* still includes one very critical clause:

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

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

It is from the above Article 266-C that *Jumawan* draws the conclusion that marital rape is impliedly recognized as falling within our jurisdiction's definition of rape. The same proviso arguably militates against the so-called "rape is rape" sentiment the framers of the law originally had in mind. At the very least, the "rape is rape" sentiment has been watered down by the addition of Article 266-C. At its most harmful interpretation, it would appear that "marital rape" *is* "rape," but only until the husband is pardoned by the wife. An article entitled *Sexual Violence as a Medico-Legal Issue: An Overview of International and Philippine National Laws* by the Women's Legal Bureau Inc., also points out:

[B]ecause the law recognizes pardon for the crime, it negates the public character of the rape and the state interest in prosecuting the same. In effect, the provision on pardon indicates that the state will prosecute vigorously rape cases when the victims are unmarried, but will leave the matter up to the married victim.⁵⁷

V. MEETING WOMEN'S LEGAL NEEDS THROUGH EXPLICIT CRIMINALIZATION

A. Exercising Due Diligence: The State Party's Responsibility Under CEDAW

Given the Constitutional provisions on gender equality and women empowerment, as well as other laws protecting women and children have been enacted in compliance with the CEDAW, it becomes imperative to examine whether or not the Philippines as a State Party has truly exercised due diligence in fulfilling its responsibility under CEDAW.

⁵⁷ Women's Legal Bureau, Inc., *supra* note 32, at 59.

The UN Handbook for Legislation on Violence Against Women recommends a comprehensive legislative approach in order to protect all women without discrimination, including discrimination as to marital status. This includes the specific criminalization of sexual assault within a relationship.⁵⁸ Specifically, the Handbook recommends that legislation should recognize violence against women perpetrated by specific actors, and in specific contexts, which includes violence against women in the family. Besides the definition of sexual assault as a violation of bodily integrity and sexual autonomy, the Handbook also calls for a definition that is broad enough to incorporate marital rape:

Specifically criminalize sexual assault within a relationship (*i.e.*, “marital rape”), either by:

1. providing that sexual assault provisions apply “irrespective of the nature of the relationship” between the perpetrator and complainant; or
2. stating that “no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation.”⁵⁹

Under the Implementing Rules and Regulations (IRR) of the *Magna Carta of Women*, the State, as the Primary Duty-Bearer in the promotion of Women’s rights, is tasked to take measures and establish mechanisms to promote the coherent and integrated implementation of the act.⁶⁰ Pursuant to this, the IRR provides that the State shall take steps to review, amend and/or repeal laws that are discriminatory to women. Included in the listing of laws to be reviewed is Republic Act No. 8353, or more specifically, its proviso that removes criminal liability of the rapist when the victim marries him.⁶¹ Given that no reforms have been made to reflect the suggested definitions, it may be said that the Philippines has not exercised due diligence in complying with the commitment that it undertook under the CEDAW.

⁵⁸ United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, Handbook for Legislation on Violence Against Women, at 2, 26-28, U.N. Doc. ST/ESA/329 (2010).

⁵⁹ *Id.* at 26.

⁶⁰ Implementing Rules and Regulations of Republic Act No. 9710 (2010), § 8.

⁶¹ § 15.

B. Sending a Clear Message through Statutory Abolition

The U.N. Women's Progress Report states that (as of 2011), only 52 countries explicitly make marital rape a criminal offense. This means that 73% of all countries do not explicitly make marital rape a crime. This widespread reluctance to recognize marital rape through its statutory abolition contributes to the perception that violence within the sphere of a legal marriage is acceptable.⁶² The fact remains that marital rape is both a "product and a contributing factor to women's inequality [...] internationally."⁶³

While *Jumawan* will inevitably serve as a basis for subsequent convictions for wife rape, explicit criminalization still matters because "a woman cannot derive the full benefit from a law when she is unsure what the law is."⁶⁴ The law operates as both a deterrent and an educator.⁶⁵ When legislatures unambiguously and straightforwardly acknowledge marital rape, they send out a message that societies hold married women to be human beings, with the right of consent equal to all other women.

An article on Canadian sexual assault laws states that the legal reforms⁶⁶ made have not only served to show the influence of the women's movement but also paved the way for further changes to the criminal law. More importantly, the introduction of these reforms was symbolic of the change in how sexual assault and sexual violence are perceived in the community. The article also posits that the legislative approach, as opposed to "progressive judicial interpretation," may help achieve legitimacy in the eyes of the public, "making it more difficult for police and prosecutors to resist than judicial change."⁶⁷

Explicit criminalization may also affect the victim's decision to report the rape incident. In a survey comparing the reporting rates of several European countries, it has been concluded that the main underlying factor

⁶² U.N. WOMEN, *supra* note 32.

⁶³ Jennifer Koshan, *The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience*, at 3 (2010), EQUALITY EFFECT WEBSITE, at <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.

⁶⁴ Sonya A. Adamo, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. INT'L L. REV. 555, 587 (1989).

⁶⁵ Ryder & Kuzmenka, *supra* note 21, at 406.

⁶⁶ In 1982, Canadian Parliament passed Bill C-127, featuring a three-tiered structure for the offence of sexual assault designed to emphasize sexual assault as a crime of violence. This included the abolition of spousal immunity previously present in the Criminal Code.

⁶⁷ Koshan, *supra* note 63, at 16.

in the decision to report the rape is the “general concept of rape as the public understands it.”⁶⁸ There exists the concept of “real rape,” which is usually perceived as an act of violence performed by a stranger wherein the victim shows signs of resistance. When the victim feels that securing a conviction is unlikely, there is obviously a reluctance to report. Consequently, “only cases with a strong evidential position would be reported in a legal culture that presents many obstacles for a rape victim.” Explicit criminalization may solve this problem because it provides an environment that will allow the victim to perceive marital rape as “real rape” with a higher possibility of conviction, and therefore increase her willingness to report the rape.

C. Recommended Amendments

An article advocating substantial legislative reform to rape statutes in order to establish marital rape as a serious crime in the eyes of the public and the judiciary provides a “model for comprehensive reform.” The legislature could take one of three approaches: naming marital rape as a crime and treating it as a separate felony, including it in the statutory definition of rape (*i.e.* rape is committed against any person, *including* the spouse of the perpetrator), or abolishing marriage as an affirmative defense in a separate statute.⁶⁹

The State of California punishes marital rape as a distinct and separate statute under its Penal Code.⁷⁰ It provides for a different penalty, as well as requires different reportorial requirements. However, the inclusion of a separate statute, though not completely ideal, is still an affirmative statement condemning wife rape and identifying it as a felony.⁷¹

The Philippines may follow the example of other jurisdictions that have opted for total statutory abolition,⁷² such as New Zealand, Canada, Australia-Victoria, and Australia-New South Wales, Namibia, and Costa Rica.

⁶⁸ Christian Diesen, *The Importance of Reporting Rape*, 6 PHOENIX L. REV. 933, 941 (2013).

⁶⁹ Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 704 (1995-1996).

⁷⁰ Compare CAL. PEN. CODE, § 261 which provides that “[r]ape is an act of sexual intercourse accomplished with a *person not the spouse* of the perpetrator[.]” with § 262 which provides “[r]ape of a person who is the spouse of the perpetrator[.]” (Emphasis supplied.)

⁷¹ Eskow, *supra* note 69, at 698.

⁷² Adamo, *supra* note 64, at 585.

1. New Zealand: “A person may be convicted of sexual violation in respect of sexual connection with another person notwithstanding that those persons were married to each other at the time of that sexual connection.”⁷³
2. Canada: “A husband or wife may be charged with an offence under section 246.1 [sexual assault], 246.2 [sexual assault with a weapon, threats to a third party or causing bodily harm], or 246.3 [aggravated sexual assault] in respect of his or her spouse.”⁷⁴
3. Australia-Victoria: “[W]here a married person is living separately and apart from his spouse the existence of the marriage shall not constitute, or raise any presumption of, consent by one to an act of sexual penetration with the other or to an indecent assault (with or without aggravating circumstances) by the other.”⁷⁵
4. Australia-New South Wales: “[T]he existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person.”⁷⁶
5. Namibia: “No marriage or other relationship shall constitute a defence to a charge of rape under this Act.”⁷⁷
6. Costa Rica: “This Act is designed to protect the rights of victims of violence and to punish forms of physical, psychological, sexual and patrimonial violence against adult women, as discriminatory practices based on gender, and specifically in a relationship of marriage, *de facto* union declared or not[.]”⁷⁸

V. CONCLUSION

Visible legal changes influence public attitudes toward criminal acts.⁷⁹ *Jumawan* proves that the Philippine legislation on violence against women has been experiencing a gradual and progressive evolution, and

⁷³ Adamo, *supra* note 64, at 568 & n.78.

⁷⁴ *Id.* at 570 & n.93.

⁷⁵ *Id.* at 571 & n.98.

⁷⁶ *Id.* at 572 & n.103.

⁷⁷ COMBATING OF RAPE ACT NO. 8 OF 2000 (NAMIBIA), § 3.

⁷⁸ CRIMINALIZATION OF VIOLENCE AGAINST WOMEN LAW (COSTA RICA), art. 1 (2007).

⁷⁹ DeLaMothe, *supra* note 51.

indeed the decision itself may serve as an impetus for enlightenment and open the door for further discussion on gender equality legislation. In promulgating this decision, the judiciary has taken a very modern approach by putting human rights at the forefront of the dialogue on rape. It is best for our legislature to follow suit. Our rape laws are antiquated at best and can no longer suffice to fulfill Philippine society's needs, especially the needs of its women.

“The lack or inadequacy of national mechanisms, programs and services to address this violation also discriminates against women by impairing the exercise of her right to legal remedies and health, for instance.”⁸⁰ This inadequacy must be addressed because it has been acknowledged that, in cases of sexual abuse, “the biggest stumbling block is cultural,” and this must somehow be counteracted. *Jumawan* may have been the first step, but explicit criminalization is the next one.

A law that does not give married and unmarried women equal protection creates conditions that lead to marital rape. It allows men and women to believe that wife rape is acceptable. The belief that marital rape is an oxymoron cannot be allowed to exist in any society trying to promote not only gender equality but also women's rights. Otherwise, marital rape will remain “one of the most misunderstood crimes of the modern era.”⁸¹

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⁸⁰ Women's Legal Bureau, Inc., *supra* note 32.

⁸¹ Melisa J. Anderson, Note, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GA. J. INT'L & COMP. L. 139, 139 (1998).