An Analysis of Supreme Court decisions on Rape and Sexual Assault: Assessing their compliance with the Convention on the Elimination of Discrimination against Women (CEDAW) mandate to eliminate Gender Discrimination and promote Gender Equality

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I. INTRODUCTION

This research paper builds on the previous study made by the Writer[1] on Philippine Supreme Court decisions on rape and other crimes involving violence against women. As with the prior study, this Paper looks into fairly recent decisions of the Court (2010-2017) with a specific focus on rape and sexual assault. This Paper assesses whether or not the doctrines and pronouncements made by the Court in these cases are compliant with the Philippine's mandate under the Convention on the Elimination of Discrimination against Women (CEDAW) to eliminate gender discrimination and promote gender equality.

Two of the more substantive provisions of the CEDAW and which are most relevant to this study are found in Articles 2 (c) & (f) and 5 (a), which require the following of State Parties:

> Article 2
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> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
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> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> ...
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
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> ...
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> Article 5
>
> States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.][2]

[1] ATENEO HUMAN RIGHTS CENTER, CEDAW BENCHBOOK (2008) [hereinafter CEDAW Benchbook].
[2] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, arts. 2 (c), (f), & 5 (a) [hereinafter CEDAW].

In concrete terms, the above obligations need to be reflected, not only in a *de facto* environment but also in laws and jurisprudence, for their full realization and implementation. A legal framework that facilitates the removal of barriers which cause discrimination of women by addressing the different forms of violence perpetrated against them is crucial to the achievement of gender equality.

The sources of law under the Philippine legal system are statutes and jurisprudence. As far as the law is concerned, the most reflective of the country's CEDAW obligations is Republic Act (R.A.) No. 9710, otherwise known as the "Magna Carta of Women," which took effect in 2009. Pertaining to violence and access to justice, it provides:

> SEC. 9. Protection from Violence. – The State shall ensure that all women shall be protected from all forms of violence as provided for in existing laws. Agencies of government shall give priority to the defense and protection of women against gender-based offenses and help women attain justice and healing.[3]

This Research focuses on the role of jurisprudence in promoting gender equality through case law. Hence, in reviewing Supreme Court cases for compliance with CEDAW, this Paper examines the language used by the Court to describe or characterize overt acts of crimes such as rape and sexual assault, the Court's general treatment of the perpetrators, and most importantly, the factors considered by the Court in assessing the credibility of the rape or sexual assault victims. The Paper also examines the presence of gender bias and stereotypes, and to what extent these have affected the resolution of cases.

The Paper likewise analyzes the Court's views on the prosecution of these offenses and the ordeal the involved parties go through. In the past, the Supreme Court has expressly acknowledged that in participating in trials, rape victims suffer a generally harrowing ordeal. Our previous study has found that this adds to the stigmatization of victims and to their double victimization.

> Courts have taken judicial notice that it is not easy for women and girls to report the commission of rape and other acts of violence against their persons. One of the factors to which such reluctance is attributed is the way women have been treated in investigations and trials. The lack of sensitivity, as well as gender bias, often result in the blaming of the victims or, at the very least, in their feeling exposed and humiliated. This experience of double victimization affects their ability to access the justice system. If, in the process of seeking remedies for the violation of their rights, the environment remains hostile to the victims/survivors, then the justice systems become less accessible and available for and to them, a situation that could ultimately result in the perpetuation of more gender-based violence since the system of making the perpetrators accountable is not effective.[4]

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[3] An Act Providing for the Magna Carta of Women, [Magna Carta of Women], Republic Act No. 9710, § 9 (2008).
[4] CEDAW BENCHBOOK, at 85-86.

II. THE LEGAL FRAMEWORK: DEFINITION OF RAPE AND SEXUAL ASSAULT

R.A. No. 8353 (1997) amended the Revised Penal Code's provision on Rape and reclassified the same from a crime against chastity to a crime against persons. The law states in part:

> **Section 2. *Rape as a Crime Against Persons.*** - The crime of rape shall hereafter be classified as a Crime Against Persons under Title Eight of Act No. 3815, as amended, otherwise known as the Revised Penal Code. Accordingly, there shall be incorporated into Title Eight of the same Code a new chapter to be known as Chapter Three on Rape, to read as follows:
>
> 'Chapter Three'
> 'Rape'
>
> 'Article 266-A. Rape: *When and How Committed.* - Rape is committed:
>
> 1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:
>
> a) Through force, threat, or intimidation;
> b) When the offended party is deprived of reason or otherwise unconscious;
> c) By means of fraudulent machination or grave abuse of authority; and
> d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.
>
> 2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.[5]

The reclassification of rape as a crime against *persons* and the addition of the second paragraph on sexual assault, which can be committed against both women and men are welcome developments. At the same time, these amendments and additions challenge the courts to make the appropriate and corresponding paradigm shift when deciding rape cases

After the amendment, it was expected that case law on rape would now concentrate more on "the offense's nature as a violation of a person rather than as a violation of a woman's honor;"[6] and that the Supreme Court's pronouncements would have "less emphasis on the 'shame,' 'humiliation,' 'dishonor,' 'embarrassment' and 'stigma' befalling the [victim of rape]."[7]

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[5] 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, [Anti-Rape Law of 1997], R.A. No. 8353, § 2 (1997).
[6] AMPARITA STA. MARIA, IMAGES OF WOMEN IN IMPUNITY IN HUMAN RIGHTS TREATISE ON THE LEGAL AND JUDICIAL ASPECTS OF IMPUNITY (2001).
[7] *Id*.

Further, in a previous paper, the Writer posited:

> The change in the law should result in the promotion of the rights of women and girls. The woman and girl-child must be believed on the basis of an appreciation of their own testimony and other evidence, if available, but not on how chaste or innocent they have remained or how well they have taken care of their reputation. Courts have the responsibility of reflecting this change, not only because they have the duty to interpret the law but also because those in charge of enforcing and implementing it, every so often rely on jurisprudence for guidance.[8]

The amendments to the law notwithstanding, the definition of rape is still problematic because it does not categorically state that the offense is committed when there is sexual intercourse with a woman without her consent. Although the law implies that non-consensual sex is punishable, the manner by which non-consent is manifested has been defined and to an extent limited, by the circumstances specifically enumerated in the law. Thus, this has required that the prosecution prove at least one of these circumstances for the commission of rape, and even sexual assault.

In fact, the CEDAW Committee has already made a recommendation for this problem in its *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the Philippines*:[9]

> 26. The Committee recommends that the State [P]arty:
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> (a) Adopt comprehensive legislation on gender-based violence against women covering all forms of violence;
>
> (b) Expedite the amendment of the Anti-Rape Law of 1997, **putting lack of consent as the primary element of the definition of rape** and raising the minimum age of sexual consent, currently set too low at 12 years, to at least 16 years[.][10]

This flaw in the law becomes especially problematic for mature women who are in possession of their full cognitive faculties when manifesting their non-consent to sexual intercourse. This is despite the fact that, as early as 2002, the Supreme Court already ruled in *People v. Dulay y Corona*,[11] that

> [a]ny physical overt act manifesting resistance against the rape in any degree from the victim is admissible as evidence of lack of consent. Tenacious resistance, however, is not required. Neither is a determined and persistent physical struggle on the part of the victim necessary.
>
> At the Bicameral Conference Committee Meeting on the disagreeing provisions of S.B. No. 950 and H.B. No. 6265, the forerunners of R.A. No. 8353, the legislators agreed that **Article 266-D is intended to soften the jurisprudence of the 1970s when resistance to rape was required to be tenacious.** The lawmakers took note of the fact that rape victims cannot mount a physical struggle

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[8] *Id.*

[9] Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of the Philippines [A Report Adopted by the Committee at its 64th Session] July 4-22, 2016, *available at* http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhss1YTn0qfX85YJz37paIgUDDEORoO%2bFufiE0lAaW15o4x6ODFDtYEeObySRVS0ldVlU7Z6bIw1k3Ud%2b0FV7g7u6lASdaSqEEFngDtWdzJ39z (last accessed Mar. 2, 2018).

[10] *Id*. B (26). (emphasis supplied).

[11] G.R. No. 144344-68, July 23, 2002.

> in cases where they were gripped by overpowering fear or subjugated by moral authority. Article 266-D tempered the case law requirement of physical struggle by the victim **with the victim's fear of the rapist or incapacity to give valid consent**. Thus, the law now provides that **resistance may be proved by any physical overt act in any degree from the offended party.**[12]

The issue of resistance in rape shall be discussed further in this Paper.

III. THE SUPREME COURT RULINGS

A. *Language* –

In several cases, the Court has referred to the act of rape as "defloration." In the case of *People v. Gaduyon y Tapispisan*,[13] the Supreme Court noted that inconsistencies in a victim's testimony are expected because "she was a minor child during her **defloration.**"[14] They further described the perpetrator's carnal lust as that "which **deflowered** and got [the victim] pregnant."[15] Likewise, in *People v. Agustin and Hardman*,[16] the Supreme Court described what the victim underwent as a deflowering and continuous ravaging.

Regarding the credibility of the offended party, the court has also repeatedly referred to the latter's testimony as a "story [or tale] of defloration." Thus,

1. "A young girl would not usually concoct a **tale of defloration**[.]"[17]
2. "No woman would concoct a **story of defloration**[.]"[18]
3. "No young woman, especially of tender age, would concoct a **story of defloration**."[19]

If the Court's intention is to somehow sanitize the language of its decisions, it should not do so by diminishing the gravity of the violation involved in rape and sexual assault cases. It should not try to use language that de-emphasizes the seriousness of the violence inflicted on the offended party. Survivors of rape and sexual assault deserve better treatment which includes an accurate depiction of the wrong committed against them. Calling rape "deflowering" or the victims' testimonies as "tales of defloration" not only trivializes their ordeal but also diminishes the viciousness and perversity of the perpetrators.[20]

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[12] *Id*. (emphases supplied) (citations omitted).
[13] G.R. No. 181473, Nov. 11, 2013.
[14] *Id*. (emphasis supplied).
[15] *Id*.
[16] G.R. No. 194581, July 02, 2012.
[17] People v. Antonio Baraoil, G.R. No. 194608, July 9, 2012.
[18] People v. Estrada, G.R. No. 178318, Jan 15, 2010; People v. Bacatan, G.R. No. 203315, Sep. 18, 2013; & People v. Gersamio, G.R. No. 207098, July 8, 2015.
[19] People v. Buca, G.R. No. 209587, Sep. 23, 2015.
[20] To be fair to the Court, there have also been decisions where it has done away with the term "defloration." *See* People v. Edgar Padigos, G.R. No. 181202, Dec. 05, 2012; People v. Osma, G.R. No. 187734, Aug. 29, 2012; & People v. Isang, G.R. No. 183087, Dec. 4, 2008.

Furthermore, the flower-female genitalia comparison can lead to gender stereotypes of young women and girls as delicate, fragile, and weak, which in turn can lead to their stigmatization because their "defilement" practically robs them of their chance to grow and blossom just like what is expected from a young flower. Thus,

> A bud plucked from the stalk would never have its chance to blossom. A young plant prematurely clipped of its branches would never develop and grow to its full and natural potential. Both would need care and attention to be able to recover and mend. In the ultimate end, however, what has been lost could never be regained or restored.[21]

This pronouncement is reminiscent of an old case where the Court has also stigmatized the offended party.

> She was also aware that by testifying, she made public a painful and humiliating secret which others would have simply kept to themselves forever, jeopardized her chances of marriage or foreclosed the possibility of a blissful married life, as her husband may not fully understand the excruciatingly painful experience which would haunt her.[22]

It is important that courts use gender-sensitive language especially in their decisions on rape and sexual assault cases. Sanitizing terms in the form of metaphors and other comparative words can lead to gender stereotypes. It can create stigma against the victim and at the same time trivialize the crime and the acts of the perpetrator.

B. *Stereotyping* –

Most of the rape cases examined accorded credibility to the offended parties mainly because they were "minors," "of tender age," "young and immature," or "not yet exposed to the ways of the world."

There is merit in finding that young children, (and specifically in the context of the reviewed cases – girls) could not possibly concoct a story about being raped or sexually assaulted considering their youth and innocence. It is also true that the younger and more "unexposed" they are to the world, the more unlikely they are to fabricate the sordid details of the ordeal that they have gone through. From these truisms, generalizations have been created about children's behavior, attributes,[23] and reactions to rape and sexual assault, which facilitated the Court's creation of doctrines regarding children's credibility when they testify in court. Thus, if the victims were minors, young and immature, and not exposed to the world, they were accorded credibility by all levels of the judiciary. Relying on earlier pronouncements about credibility of the offended parties, doctrines have been enunciated repeatedly in rape cases involving young and immature offended parties. Again, there is nothing intrinsically wrong with these doctrines or their consistent application. However, in doing so, courts also risk failing to make more nuanced observations and distinctions about and between child-victims. Thus,

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[21] *Estrada*, G.R. No. 178318.
[22] People v. Matrimonio, G.R. Nos. 82223-4, Nov. 13, 1992.
[23] *See* REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING TRANSNATIONAL LEGAL PERSPECTIVES, 10 (2010).

People v. Tejero:[24]

[W]hen the offended parties are young and immature girls, as in this case, courts are inclined to lend credence to their version of what transpired, considering not only their relative vulnerability, but also the shame and embarrassment to which they would be exposed if the matter about which they testified were not true.[25]

People v. Biala:[26]

The Court has held time and again that the testimony of child-victim is normally given full weight and credit considering not only her relative vulnerability but also the shame to which she would be exposed if the matter to which she testified was not true. Youth and immaturity are generally badges of truth and sincerity.[27]

People v. Estrada,[28]

Moreover, the testimony of a rape victim, especially one who is young and immature, deserves full credit considering that no woman would concoct a story of defloration, allow an examination of her private parts and thereafter allow herself to be perverted in a public trial if she was not motivated solely by the desire to have the culprit apprehended and punished.[29]

People v. Relanes:[30]

[N]o young girl would concoct a sordid tale of so serious a crime as rape at the hands of her own father, undergo medical examination, then subject herself to the stigma and embarrassment of a public trial, if her motive [was] other than a fervent desire to seek justice.[31]

People v. Tolentino[32]

[N]o young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subjected to public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her.[33]

People v. Baraoil:[34]

A young girl would not usually concoct a tale of defloration; publicly admit having been ravished and her honor tainted; allow the examination of her private parts; and undergo all the trouble and inconvenience, not to mention the trauma and scandal of a public trial, had she not in fact been raped and been truly moved to

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[24] People v. Roger Tejero, G.R. No. 187744, June 20, 2012; & People v. Jose Salvador, G.R. No. 207815 June 22, 2015.
[25] *Id.*
[26] People v. Bernardino Biala, G.R. No. 217975, Nov. 23, 2015.
[27] *Id. See also* People v. Pastor Llanas, Jr. y Belches, G.R No. 190616, June 29, 2010.
[28] *Estrada*, G.R. No. 178318.
[29] *Id.*
[30] People v. Relanes, G.R. No. 175831, Apr. 12, 2011.
[31] *Id.*
[32] People v. Manuel Tolentino, G.R. No. 187740 Apr. 10, 2013.
[33] *Id.*
[34] People v. Antonio Baraoil, G.R. No. 194608, July 9, 2012.

> protect and preserve her honor, and motivated by the desire to obtain justice for the wicked acts committed against her.[35]

People v. Buca:[36]

> The Court has held time and again that testimonies of rape victims who are young and immature deserve full credence, considering that no young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subject to a public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her. Youth and immaturity are generally badges of truth. It is highly improbable that a girl of tender years, one not yet exposed to the ways of the world, would impute to any man a crime so serious as rape if what she claims is not true.[37]

Aside from youth and immaturity, the offended parties in the above cases have been further attributed with the following motivations for telling the truth. In *Tejero and Salvador,* it was "shame and embarrassment to which they would be exposed if the matter about which they testified were not true." The offended parties here were 14 and 15 years old respectively. The possibility of shame befalling them was also the motivation attributed for the credibility of the offended parties in *Biala* and *Llanas,* who were 11 and 15 years old respectively.

In the *Tolentino, Estrada, Relantes, Baraoil* and *Buca* cases*,* the reasons given for the offended parties' motivations for telling the truth were not only the general desire to obtain justice and have themselves vindicated for the wrong done to them, but also their taking the risk of undergoing a trial where they are expected to be "perverted," subjected to scandal, and stigmatized. In *Tolentino, Estrada*, and *Relantes,* the offended parties were 11, 12 and 13 respectively; but in *Baraoil* and *Buca*, the offended parties were merely five and seven years old respectively. Certainly, these last two victims, assuming that they feared being in a trial, could not possibly be thinking about the stigma, shame, scandal or perversion associated with rape and sexual assault trials where victims are insensitively made to relive what was done to them and be "victims" again just so they could successfully prosecute the accused. It cannot also be said that their ability to comprehend the vindication of rights is the same as older victims. Hence, to attribute their credibility to a profound sense of justice and further rule that risking double victimization is also proof of truthful testimony coming from a five or seven-year old girl would be inaccurate. This has become part of jurisprudence because stereotypes and generalizations have found themselves broadly applied to cases, despite a need for a far more nuanced and differentiated examination of parties and application of doctrine.

It is more plausible that the parents would be the ones to deeply feel the hurt and sense of retribution to the extent that they would be willing to subject their child to the humiliation and stigma associated with trials involving rape and sexual assault. As articulated by the court in *People v. Batula*,[38]

> In *People v. Geraban* [ ] we held:

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[35] *Id*.
[36] People v. Buca, G.R. No. 209587, Sep. 23, 2015.
[37] *Id*. (Citing People v. Perez, 595 Phil. 1232, 1251-1252 (2008)).
[38] G.R. No. 181699, Nov. 28, 2012.

> It is unnatural for a parent, more so for a mother, to use her offspring as an engine of malice especially if it will subject her child to the humiliation, disgrace and even stigma attendant to a prosecution for rape, if she were not motivated solely by the desire to incarcerate the person responsible for her child's defilement.[39]

An even more serious problem in rape and sexual assault cases, however, is the tendency to measure the standard of credibility of an offended party only within already established parameters of who is a truthful witness, according to stereotyped attributes found in previous Supreme Court decisions. In other words, victims who do not fit the stereotype of a credible witness find themselves with the *onus* of showing additional proof in order to qualify as credible. Hence,

> Thus, an errorless recollection of a harrowing experience cannot be expected of a witness, especially when she is recounting details from an experience as humiliating and painful as rape. Furthermore, rape victims, especially child victims, should not be expected to act the way mature individuals would when placed in such a situation. Verily, in this case, minor inconsistencies in the testimony of 'AAA' are to be expected because (1) she was a minor child during her defloration; (2) she was to testify on a painful and humiliating experience; (3) she was sexually assaulted several times; and, (4) she was examined on details and events that happened almost six months before she testified.[40]

> It is not uncommon for a young girl to conceal for some time the assault on her virtue. Her initial hesitation may be due to her youth and the molester's threat against her. Besides, rape victims, especially child victims, should not be expected to act the way mature individuals would when placed in such a situation. It is not proper to judge the actions of children who have undergone traumatic experience by the norms of behavior expected from adults under similar circumstances ... It is, thus, unrealistic to expect uniform reactions from them. Certainly, the Court has not laid down any rule on how a rape victim should behave immediately after she has been violated. This experience is relative and may be dealt with in any way by the victim depending on the circumstances, but her credibility should not be tainted with any modicum of doubt. Indeed, different people react differently to a given stimulus or type of situation, and there is no standard form of behavioral response when one is confronted with a strange or startling or frightful experience. [41]

> One should not expect a fourteen-year old girl to act like an adult or mature and experienced woman who would know what to do under such difficult circumstances and who would have the courage and intelligence to disregard a threat on her life and complain immediately that she had been forcibly deflowered. It is not uncommon for young girls to conceal for sometime the assaults on their virtue because of the rapist's threat on their lives, more so when the rapist is living with her.[42]

> As we have repeatedly held, there is no standard norm of behavior for victims of rape immediately before and during the forcible coitus and its ugly aftermath. This is especially true with minor rape victims.[43]

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[39] *Id*.
[40] People v. Gaduyon y Tapispisan, G.R. No. 181473, Nov. 11, 2013 (citations omitted).
[41] People v. Alcober, G.R. No. 192941, Nov. 13, 2013 (citations omitted).
[42] *Tejero*, G.R. No. 187744.
[43] *Llanas*, G.R No. 190616.

In the above cases, the inconsistencies in the testimonies of the witnesses, their hesitancy in reporting the crime, and their state of fearfulness were not only restrictively attributed by the Court to youth and immaturity. The Supreme Court further rationalized and inferred that such behavior and responses, while not expected from children, are to be expected from adult, mature, or experienced women. Though the Supreme Court may have correctly ruled that "different people react differently to a given stimulus or type of situation, and there is no standard form of behavioral response when one is confronted with a strange or startling or frightful experience," it seems that as far as rape and sexual assault cases are concerned, there is actually a "standard form" of behavior: that expected from young and immature girls on the one hand and that expected from mature women on the other.

It is also noteworthy to point out that these pronouncements about stereotypical mature women being more consistent in testifying, less fearful of threats, and less likely to delay in reporting crimes as compared to girls are mostly applied to rape and sexual assault cases only. In other crimes like murder, courts have not found it necessary to use youth and immaturity as explanations for minor inconsistencies, delays in reporting, or fear of reprisal on the part of the witnesses. At most, the court has acknowledged the young age of the witness as one factor but the explanation has precluded the inclusion of constructed stereotypes on the supposed contrary behavior or response expected from adults who find themselves in the same situation. Thus, in *People v. Berondo, Jr.*,[44] the Court ruled:

> Accused-appellants guilt is anchored only on the testimony of Nietes. Accused-appellant, however, faults Nietes for belatedly reporting the identities of the assailants. He claims that the delay impaired Nietes credibility; thus, the latter's testimony should be disregarded.
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> We disagree. Delay in revealing the identity of the perpetrators of a crime does not necessarily impair the credibility of a witness, especially where sufficient explanation is given (citing People v. Castillo y Masangkay and Castillo y Arce, G.R. No. 118912, May 28, 2004). No standard form of behavior can be expected from people who had witnessed a strange or frightful experience (citing People v. Dulanas, G.R. No. 159058, May 3, 2006). Jurisprudence recognizes that witnesses are naturally reluctant to volunteer information about a criminal case or are unwilling to be involved in criminal investigations because of varied reasons. Some fear for their lives and that of their family (citing People v. Zuniega, G.R. No. 126117, February 21, 2001); while others shy away when those involved in the crime are their relatives (citing People v. Paraiso, G.R. No. 131823, January 17, 2001) or townmates (citing People v. Ignas, G.R. Nos. 140514-15). And where there is delay, it is more important to consider the reason for the delay, which must be sufficient or well-grounded, and not the length of delay (citing People v. Natividad, G.R. No. 138017, February 23, 2001).
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> In this case, although it took Nietes more than two years to report the identity of the assailants, such delay was sufficiently explained. Nietes stated that he feared for his life because the three accused also lived in the same town and the incident was the first killing in their area. He only had the courage to reveal to Dolores what he had witnessed because his conscience bothered him.[45]

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[44] G.R. No. 177827, Mar. 30, 2009.
[45] *Id.*

In all but one of the cases cited in *Berondo, Jr.*, the witnesses involved who had minor inconsistencies in their testimonies, experienced fear of reprisal, and belatedly reported the crime, were all adults. In one of those cases, *Castillo v. Masangkay*,[46] the witness whose credibility was questioned was a 13-year old boy. While the court took note of his youth, it elaborated further why he should be considered a credible witness.

> Appellants conviction depends on the credibility of the lone eyewitness, Romeo Hernandez, whose testimony, appellant maintained, is unnatural and improbable. He regarded Romeo's failure to aid the victim while being attacked and to report the crime immediately as suspicious and contrary to human experience, considering that they were brothers.
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> Romeo cannot be faulted for not helping his brother even as the latter was being stabbed and struck to death. No standard form of behavioral response can be expected from anyone when confronted with a startling or frightful occurrence (citing People v. Lachica, G.R. No. 131915, September 3, 2003). Moreover, this Court does not find anything unnatural in Romeo's failure to help his brother as he was only thirteen years old when the crime happened. Furthermore, as also observed by the Court of Appeals, Romeo did plead with appellants to stop beating his brother. He simply had to flee when appellants turned to him.
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> Neither can appellant cast suspicion on Romeos failure to report immediately the crime and the identities of his brother's assailants. As correctly pointed out by the Court of Appeals, Romeo in his testimony attributed his silence to his confusion upon seeing his mother cry hysterically and afterwards faint. He also feared that if he disclosed the identities of the assailants right away, his father might look for them and figure into more trouble. It was for these reasons that he waited until after the interment of the victim before issuing a statement to the authorities. Delay in revealing the identity of the perpetrator of a crime, when sufficiently explained, does not impair the credibility of a witness.[47]

It is clear that there were other circumstances which contributed to Romeo's credibility in the *Castillo* case. This has also been true for some rape decisions; but what is glaringly absent in the above case is the comparison between the behavior of 13-year old Romeo and an adult witness in order to further strengthen the testimony of the former. In rape and sexual assault cases, the Court's decisions have been replete with comparisons between the expected response or behavior from a girl and that of a mature woman. In *Castillo*, the court has simply found plausible explanations to bolster the witnesses' credibility, without resorting to stereotypes. Unfortunately, the same cannot be said about most of the Court's decisions in rape and sexual assault cases.

However, in *People v. Brioso*,[48] the Supreme Court discussed fear as a factor in delayed reporting but it did not merely attribute the same to the young age of the victim.

> Further, it has been written that a rape victim's actions are oftentimes overwhelmed by fear rather than by reason. It is this fear, springing from the initial rape, that the perpetrator hopes to build a climate of extreme psychological terror, which would, he hopes, numb his victim into silence and submissiveness. Moreover, delay in reporting an incident of rape is not an indication of a fabricated charge and does not necessarily cast doubt on the credibility of the complainant. It is likewise settled in jurisprudence that human reactions vary and are

[46] G.R. No. 118912, May 28, 2004.
[47] *Id*.
[48] G.R. No. 209344, June 27, 2016.

> unpredictable when facing a shocking and horrifying experience such as sexual assault, thus, not all rape victims can be expected to act conformably to the usual expectations of everyone. In the instant case, AAA, being only four (4) years old at the time that she was violated and threatened with death if she reports the incident, would naturally be cowed into silence because of fear for her life.[49]

In *People v. Dayapdapan*,[50] the Supreme Court was also able to do away with stereotypes.

> A young girl like complainant cannot be expected to have the intelligence to defy what she may have perceived as the substitute parental authority that appellant wielded over her. That complainant had to bear more sexual assaults from appellant before she mustered enough courage to escape his bestiality does not imply that she willingly submitted to his desires. Neither was she expected to follow the ordinary course that other women in the same situation would have taken. There is no standard form of behavior when one is confronted by a shocking incident. Verily, under emotional stress, the human mind is not expected to follow a predictable path.[51]

C. Double Victimization –

The Supreme Court has acknowledged that in prosecuting for rape and sexual assault, offended parties undergo a difficult and humiliating ordeal. Aside from having to repeat in detail what a woman (or girl-child) has experienced, the condition of the victim's "anatomy" in the aftermath of the crime is revealed through the medico-legal expert and scrutinized during the trial. To aggravate matters, victim blaming has almost always been a key strategy adopted by the defense. The ruling in the case of *People v. Gersamio*[52] sums up several decisions on the re-victimization of the offended party. There, the Supreme Court stated that "no woman would concoct a story of defloration, allow an examination of her private parts and submit herself to public humiliation and scrutiny via an open trial, if her sordid tale was not true and her sole motivation was not to have the culprit apprehended and punished."[53]

The following decisions underscore the fact that the Court has effectively taken judicial notice of the re-victimization of offended parties in rape and sexual assault cases:

People v. Estrada:

> Moreover, the testimony of a rape victim, especially one who is young and immature, deserves full credit considering that no woman would concoct a story of defloration, allow an examination of her private parts and thereafter allow herself to be perverted in a public trial if she was not motivated solely by the desire to have the culprit apprehended and punished.[54]

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[49] *Id*.
[50] G.R. No. 209040 December 9, 2015
[51] *Id*.
[52] G.R. No. 207098, July 8, 2015.
[53] *Id*.
[54] *Estrada*, G.R. No. 178318.

People v. Saludo:[55]

As it has been repeatedly held, no woman would want to go through the process, the trouble and the humiliation of trial for such a debasing offense unless she actually has been a victim of abuse and her motive is but a response to the compelling need to seek and obtain justice.[56]

People v. Relanes,

As has been repeatedly held, 'no young girl would concoct a sordid tale of so serious a crime as rape at the hands of her own father, undergo medical examination, then subject herself to the stigma and embarrassment of a public trial, if her motive [was] other than a fervent desire to seek justice.'[57]

People v. Tubat:[58]

No woman would go through the process and humiliation of trial had she not been a victim of abuse and her only motive is to seek and obtain justice; xxx

People v. Tejero:

A young girl would not usually concoct a tale of defloration; publicly admit having been ravished and her honor tainted; allow the examination of her private parts; and undergo all the trouble and inconvenience, not to mention the trauma and scandal of a public trial, had she not in fact been raped and been truly moved to protect and preserve her honor, and motivated by the desire to obtain justice for the wicked acts committed against her.[59]

People v. Baraoil:

A young girl would not usually concoct a tale of defloration; publicly admit having been ravished and her honor tainted; allow the examination of her private parts; and undergo all the trouble and inconvenience, not to mention the trauma and scandal of a public trial, had she not in fact been raped and been truly moved to protect and preserve her honor, and motivated by the desire to obtain justice for the wicked acts committed against her.[60]

People v. Batula:

In People v. Geraban (G.R. No. 137048. May 24, 2001) we held:
It is unnatural for a parent, more so for a mother, to use her offspring as an engine of malice especially if it will subject her child to the humiliation, disgrace and even stigma attendant to a prosecution for rape, if she were not motivated solely by the desire to incarcerate the person responsible for her child's defilement.

...

it is unnatural for a parent, more so for a mother, to use her offspring as an engine of malice especially if it will subject her child to the humiliation, disgrace and even

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[55] G.R. No. 178406, April 6, 2011
[56] *Id*.
[57] *Relanes*, G.R. No. 175831.
[58] G.R. No. 183093, Feb. 01, 2012.
[59] *Tejero*, G.R. No. 187744.
[60] *Baraoil*, G.R. No. 194608.

> stigma attendant to a prosecution for rape, if she were not motivated solely by the desire to incarcerate the person responsible for her child's defilement.[61]

People v. Tolentino:

> The rationale of this jurisprudential principle is that, 'no young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subjected to public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her.'[62]

People v. Court of Appeals:[63]

> No woman, especially one of tender age, would concoct a story of defloration, allow an examination of her private parts, and be subjected to public trial and humiliation if her claim were not true.[64]

People v. Buca,

> The Court has held time and again that testimonies of rape victims who are young and immature deserve full credence, considering that no young woman, especially of tender age, would concoct a story of defloration, allow an examination of her private parts, and thereafter pervert herself by being subject to a public trial, if she was not motivated solely by the desire to obtain justice for the wrong committed against her.[65]

Needless to say, acknowledging what transpires during trial and characterizing the proceedings as perverse, humiliating, disgraceful and stigmatizing are not enough. Compliance with CEDAW in eliminating discrimination at the *de jure* level entails adopting measures to ensure that the courts conduct more gender and child-sensitive criminal proceedings. Women and girl-children should be able to access justice without fear of being re-victimized and stigmatized. This should be the end-goal of all courts. Unfortunately, based on the consistency of the application of the above doctrine in rape cases, there is no discernible improvement in the situation of victims who opt to bring their cases to court. As early as 1999, a research published by the Ateneo Human Rights Center already made this observation regarding sexual abuse cases involving children:

> This analysis also shows that the court proceedings and examinations expose victims and their families to great embarrassment and social censure. The mere fact that one has been raped places a stigma on the victim despite the fact that she was unwillingly violated. In effect, there was less social repercussions on the perpetrator who has been acquitted than there were on the victim herself regardless of the final outcome of the case. In these instances, the court seems to display insensitivity to gender and child issues as shown in the language and manner of interrogation.[66]

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[61] *Batula*, G.R. No. 181699.
[62] *Tolentino, G*.R. No. 187740.
[63] G.R. No. 183652, Feb. 25, 2015.
[64] *Id*.
[65] *Buca*, G.R. No. 209587.
[66] EMMA PORIO, PH.D., CHILD ABUSE AND THE COURTS: A SOCIOLOGICAL PERSPECTIVE IN HUMAN RIGHTS TREATISE ON CHILDREN, 25 (1999).

What is more lamentable is that in a fairly recent decision, the Supreme Court has found a beneficial purpose for such insensitive handling of a rape case. Thus, in *People v. Gersamio*,[67] quoting the Court of Appeals, the Supreme Court said:

> Undergoing all of the humiliating and invasive procedures for the case – the initial police interrogation, the medical examination, the formal charge, the public trial and the cross-examination – **proves to be the litmus test for truth**, especially when endured by a minor who gives her consistent and unwavering testimony on the details of her ordeal.[68]

IV. A GENDERED ASSESSMENT OF SUPREME COURT DOCTRINES

1. *Paradigm Shift* –

As stated earlier, the decisions of the Court should reflect a paradigm shift in deciding cases due to the changes in the law on rape and the introduction of the concept of sexual assault. Generally, there has been due emphasis on the witnesses' demeanor or manner of testifying in the reviewed cases, on how they remained consistent in their narratives and how minor contradictions were not material enough to discredit the victims. "[T]here is no standard norm of behavior for victims of rape immediately before and during the forcible coitus and its ugly aftermath. This is especially true with minor rape victims."[69] In *People v. Morante*,[70] the Court summed up the established rule in rape cases, to wit —

> Due to its intimate nature, rape is usually a crime bereft of witnesses, and, more often than not, the victim is left to testify for herself. Thus, in the resolution of rape cases, the victim's credibility becomes the primordial consideration**. It is settled that when the victim's testimony is straightforward, convincing, and consistent with human nature and the normal course of things, unflawed by any material or significant inconsistency, it passes the test of credibility, and the accused may be convicted solely on the basis thereof. Inconsistencies in the victim's testimony do not impair her credibility, especially if the inconsistencies refer to trivial matters that do not alter the essential fact of the commission of rape. The trial court's assessment of the witnesses' credibility is given great weight and is even conclusive and binding**.[71]

2. *Language* –

However, these pronouncements have also been laced with inappropriate language, referring to rape as defloration and the victims as having been deflowered. Aside from the descriptions being inappropriate *per se*, it also casts doubt on whether courts (including trial courts) have actually changed their mindsets about rape as a crime against persons instead of a crime against chastity. As a matter of fact, in some cases, the Supreme

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[67] G.R. No. 207098, July 8, 2015.
[68] *Id*. (emphasis supplied).
[69] *Llanas*, G.R. No. 190616.
[70] G.R. No. 187732, Nov. 28, 2012.
[71] *Id*. (Citing People v. Dion, G.R. No. 181035, July 4, 2011) (emphasis supplied).

Court still refers to rape as a crime against chastity because they have cited previous rulings where the old rape law was still in effect and therefore applied.[72]

3. *Stereotypes* –

Moreover, stereotypes that juxtapose expected behaviors and responses of girl-children against adult women abound. These comparisons not only undermine young victims' ability to establish their credibility outside of their youth and immaturity, they also prejudice mature women because courts now require a higher quantum of proof as regards their own credibility and non-consent to rape. For instance, since it has been consistently ruled that delay in reporting is understandable in cases of children because of fear, shame, and some other reasons, a mature woman who may feel the same fear and shame would now be required to provide further explanation about delays in her case because she is expected to be more courageous, less fearful, and less hesitant to report the crime. As emphasized by the Supreme Court in *Tejero*, "[o]ne should not expect a fourteen-year old girl to act like an adult or mature and experienced woman who would know what to do under such difficult circumstances and **who would have the courage and intelligence to disregard a threat on her life and complain immediately** that she had been forcibly deflowered."[73]

4. *Rape Definition*, *Elements and Proof Required to Convict* –

That the definition of rape is ambiguous as regards non-consent further aggravates the problem.

As earlier stated, the law does not categorically define rape as sexual intercourse with a woman without her consent. "Without her consent" is substituted with the ways by which rape is committed according to the law. Thus, there is rape when either "force, threat, or intimidation," or "fraudulent machination[,] or grave abuse of authority" are present. There is also rape when the "offended party is deprived of reason or otherwise unconscious." Lastly, when the offended party is below 12, statutory rape is committed and consent becomes irrelevant.

It can be observed that the Supreme Court has been more generous in appreciating that *lack of resistance* is not indicative of consent in cases where children are the offended parties. It usually finds that intimidation substitutes for resistance. Likewise, the doctrine of people reacting in varied ways when faced with a traumatic experience has been applied more frequently to child victims. In the case of *People v. Velasco*[74] where the offended party was 14 years old, the Court said:

> The failure of the victim to shout for help does not negate rape and the victim's lack of resistance especially when intimidated by the offender into submission does not signify voluntariness or consent. It is likewise settled in jurisprudence that human reactions vary and are unpredictable when facing a shocking and horrifying experience such as sexual assault, thus, not all rape victims can be expected to act conformably to the usual expectations of everyone.[75]

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[72] *See* People v. Ortega, G.R. No. 186235, Jan. 25, 2012 & People v. Patentes, G.R. No. 190178, Feb. 12, 2014.
[73] *Tejero*, G.R. No. 187744 (emphasis supplied).
[74] G.R. No. 190318, Nov. 27, 2013.
[75] *Id.*

In *People v. Quintos*,[76] the Court elaborated on the concept of consent and its correlation with resistance.

> In any case, resistance is not an element of the crime of rape. It need not be shown by the prosecution. Neither is it necessary to convict an accused. The main element of rape is 'lack of consent.'
>
> 'Consent,' 'resistance,' and 'absence of resistance' are different things. Consent implies agreement and voluntariness. It implies willfulness. Similarly, resistance is an act of will. However, it implies the opposite of consent. It implies disagreement.
>
> Meanwhile, absence of resistance only implies passivity. It may be a product of one's will. It may imply consent. However, it may also be the product of force, intimidation, manipulation, and other external forces.
> Thus, when a person resists another's sexual advances, it would not be presumptuous to say that that person does not consent to any sexual activity with the other. That resistance may establish lack of consent. Sexual congress with a person who expressed her resistance by words or deeds constitutes force either physically or psychologically through threat or intimidation. It is rape.
>
> Lack of resistance may sometimes imply consent. However, that is not always the case. While it may imply consent, there are circumstances that may render a person unable to express her resistance to another's sexual advances. **Thus, when a person has carnal knowledge with another person who does not show any resistance, it does not always mean that that person consented to such act. Lack of resistance does not negate rape.**
>
> Hence, Article 266-A of the Revised Penal Code does not simply say that rape is committed when a man has carnal knowledge with or sexually assaults another by means of force, threat, or intimidation. **Article 266-A recognizes that rape can happen even in circumstances when there is no resistance from the victim**.[77]

In the afore-quoted case, the Court ruled that resistance "is not necessary to establish rape, especially when the victim is unconscious, deprived of reason, manipulated, demented, or young either in chronological age or mental age."[78] The offended party in the above case was 21 years old but had a mental age of six.

While lack of resistance could be easily dismissed as immaterial in cases of child victims, the same has not been true for adult women. For them, resistance, though not technically an element of rape, is considered by the court as vital in proving that the sexual intercourse was against their will – without their consent. Where force was clearly present or a woman was patently intimidated by the perpetrator because he had a weapon or where the woman was rendered unconscious, non-consent has not been at issue because it was obvious to the court that the sexual intercourse committed against the women amounted to rape.[79]

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[76] G.R. No. 199402, Nov. 12, 2014.
[77] *Id*. (emphases supplied).
[78] *Id*.
[79] *See* People v. Regaspi, G.R. No. 198309, Sep. 7, 2015 & People v. Domingo, G.R. No. 225743, June 7, 2017.

However, where there was no clear proof of force or intimidation and the woman possessed even a modicum of consciousness, the degree of resistance exerted by women has become determinative of consent or non-consent to the sexual intercourse. Such degree of resistance required of women has become difficult to satisfy as the court seems to demand a heavier *onus* for mature women in proving that their "acts of resistance" was tantamount to non-consent or indicative of the fact that the sexual act was "against their will," — enough for their perpetrators to be guilty of rape.

In the aforementioned *Dulay* case, the Supreme Court actually already abandoned the standard of tenacious resistance. *Dulay* held that "Article 266-D [of R.A. No. 8353] is intended to soften the jurisprudence of the 1970s when resistance to rape was required to be tenacious."[80] However, In *People v. Marquez*,[81] the Court reiterated its ruling in a previous case, *People v. Amogis*,[82] which stated that resistance must be tenacious. *Amogis*, in turn, cited *People v. Cabading*,[83] — a case decided *when the old law was still in effect and where rape was classified as a crime against chastity*. Thus,

> **Resistance Should be Made Before the Rape is Consummated.**
>
> In *People v. Amogis*, this Court held that **resistance must be manifested and tenacious**. A mere attempt to resist is not the resistance required and expected of a woman defending her virtue, honor and chastity**. And granting that it was sufficient, she should have done it earlier or the moment appellant's evil design became manifest. In other words, it would be unfair to convict a man of rape committed against a woman who, after giving him the impression thru her unexplainable silence of her tacit consent and allowing him to have sexual contact with her, changed her mind in the middle and charged him with rape.**
>
> ...
>
> The Age Gap Between the Victim and Appellant Negates Force, Threat or Intimidation.
>
> AAA's state of 'shivering' could not have been produced by force, threat or intimidation. She insinuates that she fell into that condition after Meneses had sexual intercourse with her. However, **their age gap negates force, threat or intimidation; he was only 14 while she was already 24, not to mention that they were friends**. In addition, per 'AAA's' own declaration, Meneses and appellant did not also utter threatening words or perform any act of intimidation against her.
>
> Drunkenness Should Have Deprived the Victim of Her Will Power to Give her Consent.
>
> The fact that AAA was tipsy or drunk at that time cannot be held against the appellant. **Where consent is induced by the administration of drugs or liquor, which incites her passion but does not deprive her of her will power, the accused is not guilty of rape**.

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[80] *Dulay*, G.R. Nos. 144344-68.
[81] G.R. No. 212193 Feb. 15, 2017.
[82] G.R. No. 133102, Oct. 25, 2001.
[83] G.R. No. L-74352, June 6, 1989.

> Here, and as narrated by AAA on the witness stand, appellant and Meneses were her friends. Thus, as usual, she voluntarily went with them to the house of appellant and chatted with them while drinking liquor for about four hours. And while "AAA" got dizzy and was 'shivering,' the prosecution failed to show that she was completely deprived of her will power
>
> 'AAA's' degree of dizziness or 'shivering' was not that grave as she portrays it to be for she is used to consuming liquor. And if it is true that the gravity of her 'shivering' at that time rendered her immobile such that she could not move her head to signal her rejection of appellant's indecent proposal or to whisper to him her refusal, then she would have been likewise unable to stand up and walk home immediately after the alleged rape.[84]

The above case is disturbing on so many levels. First, it resurrects the doctrine of tenacious resistance, which was already abandoned when the rape law was amended. To reiterate, the court in the *Dulay* case explained why resistance need not be tenacious. It stated that physical struggle to show resistance may be tempered with the "victim's fear of the rapist or incapacity to give valid consent." It is, therefore, quite perplexing why the Court would find it necessary to revert to its previous ruling wherein the old law was still the legal framework. Second, the decision is riddled with gender stereotypes. Requiring that resistance must be manifested before the rape is consummated perpetuates discrimination against women. While it has been held that the "[s]lightest penetration of the labia of the female victim's genitalia consummates the crime of rape,"[85] and therefore it is but logical to require that resistance must happen before the slightest penetration, this is not the context within which the pronouncement was made by the court in the case of *Marquez*. The import of the statement that "resistance should be made before the rape is consummated" is that women should say no at the beginning of the attempt at sexual intercourse, *before the man becomes so full of carnal lusts that he no longer is capable of stopping*. Therefore, if the woman changes her mind, in the middle, and the man still continues, there is no rape because it is impossible, not to mention "unfair" to abruptly curtail man's libidinous desires. There is no rape when the woman, *even if she resists, does not do so at the start* and it is her fault if she changes her mind thereafter.

Another stereotype perpetuated in this case is the impossibility of the rape just because the woman was older than the accused and the fact that they were actually friends. An age gap by itself cannot negate force, threat, or intimidation. While the court emphasized that the accused was only 14 years old and the victim 24, the former was a liquor-drinking adolescent who had another accused as company. Being friends or acquaintances has never been a deterrent from committing rape or sexual assault.

Admittedly, the offended party was drinking. Both accused knew that she was intoxicated. The court concluded that the victim's intoxication was not enough to deprive her of the will to refuse sexual intercourse. The issue, however, is whether or not the offended party's state of drunkenness affected her capacity to give informed consent. If we follow the Court's argument that when "consent is induced by the administration of ... liquor, which incites her passion but does not deprive her of her will power, the accused is not guilty of rape," then what kind of free consent from the victim is contemplated before rape is committed? If a drug or liquor can incite passion and the victim, as a consequence, does not protest or does so with little tenacity, is there not rape if nevertheless, knowing

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[84] *Id*. (emphases supplied).
[85] People v. Reyes, G.R. No. 173307, July 17, 2013.

such state of drunkenness, the accused proceeded to takes advantage and have sexual intercourse with the woman whom he knows to have lowered inhibitions?

In the case of *People v. Amarela*,[86] the Court specifically took notice of the gender stereotypes prevailing in rape cases. It ruled:

> we simply cannot be stuck to the Maria Clara stereotype of a demure and reserved Filipino woman. We, should stay away from such mindset and accept the realities of a woman's dynamic role in society today; she who has over the years transformed into a strong and confidently intelligent and beautiful person, willing to fight for her rights. In this way, we can evaluate the testimony of a private complainant of rape without gender bias or cultural misconception.[87]

In reality, the gender stereotype referred to above has been mostly applied to young women and girl-children. As stated, mature women generally are faced with the *onus* of proving non-consent, absent the elements of force, manifest intimidation, and deprivation of reason. In the same decision, the Court further said:

> Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent or is capable in the eyes of the law of giving consent. **The female must not at any time consent; her consent,** given at any time prior to penetration, however reluctantly given, or if accompanied with mere verbal protests and refusals, **prevents the act from being rape, provided the consent is willing and free of initial coercion**.[88]

The decision is ambiguous. While it says that consent must be willingly given otherwise it is rape, it emphasizes that the "female must not **at any time** consent."[89] If this phrase is to be construed as the accused having to ascertain that there is consent by the woman to sexual intercourse during the entire time of the act, what is meant by consent being "free of **initial** coercion?" It seems to imply that a woman cannot claim coercion at a later stage because she already consented at the onset, especially if the consent is accompanied by "mere verbal protests and refusals." This decision reifies the *Marquez* ruling.

Furthermore, how much resistance is a mature woman required to show and how often, before she is believed?

The *Amarela* case cites the case of *People v. Butiong*,[90] which in turn, draws from the legal encyclopedia of Corpus Juris Secundum (CJS). First of all, there is no need to resort to the CJS because the Philippine jurisdiction has its own jurisprudence in the *Dulay* case, which came to be after R.A. No. 8353 became effective. In *Dulay*, the Supreme Court ruled that "the law now provides that resistance may be proved by any physical overt act in any degree from the offended party."[91] Second, even if we examine the cited legal encyclopedia, the restatements therein refer to common law. Be that as it may, it still provided that there is no consent if the *woman is not in a position to exercise any judgment about*

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[86] G.R. Nos. 225642-43, Jan. 17, 2018.
[87] *Id*.
[88] *Id*. (citing *People v. Charlie Butiong*, G.R. No. 168932, Oct. 19, 2011) (emphasis supplied).
[89] *Id*. (emphasis supplied).
[90] *Butiong*, G.R. No. 168932, Oct. 19, 2011.
[91] *Dulay*, G.R. No. 144344-68.

the matter.[92] More importantly, it elucidates the application of the doctrine of consent that is *initially given* by the woman.

Thus,

> At common law rape could be committed only where the unlawful carnal knowledge of a female was had without her consent or against her will; lack of consent was an essential element of the offense; and there can be no rape in the common-law sense without the element of lack of consent. Under the statutes punishing the offense, an essential element of the crime of rape is that the act was committed without the consent of the female, or, as it is otherwise expressed, against her will. **The act of sexual intercourse is against the female's will or without her consent when, for any cause, she is not in a position to exercise any judgment about the matter.**
>
> Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent or is capable in the eyes of the law of giving consent. Thus, mere copulation, with the woman passively acquiescent, does not constitute rape. The female must not at any time consent; her consent, given at any time prior to penetration, however reluctantly given, or if accompanied with mere verbal protests and refusals, prevents the act from being rape, provided the consent is willing and free of initial coercion. Thus, where a man takes hold of a woman against her will and she afterward consents to intercourse before the act is committed, his act is not rape. **However, where the female consents, but then withdraws her consent before penetration, and the act is accomplished by force, it is rape; and where a woman offers to allow a man to have intercourse with her on certain conditions and he refuses to comply with the conditions, but accomplishes the act without her consent, he is guilty of rape.**[93]

The last underscored sentence which qualifies consent in such a way that rape can still be committed, despite the fact that initial consent may have been given, has been omitted in *Butiong* when it quoted *CJS*. Thus, when *Amarela* reiterates the same pronouncements, it stops at "*provided the consent is willing and free of initial coercion*" — making the presence or absence of such "initial consent" the only basis of whether or not rape was committed.

In sum, the Court is setting dangerous precedent in the afore-cited cases. First, these cases bring back tenacious resistance as a requirement to prove non-consent in cases where force or intimidation is not glaringly apparent; second, resistance is supposed to be manifested before rape is consummated which contemplates resistance at the *initial sexual contact* but not during; third, prescinding from the second, a woman can no longer manifest her non-consent if she consented at the initial stage of sexual intercourse but changed her mind thereafter; fourth, if drugs or liquor are administered to induce consent or the accused knew that the woman was under the influence of either, consent is deemed given as long as these substances "[do] not deprive her of her will power" even though said drug or liquor "incites her passion;" and fifth, it is generally not likely that rape could be committed if the accused is considerably younger than the woman and if they are friends.

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[92] 75 CJS, Rape, § 11, at 473-74.
[93] *Id*. (emphases supplied).

5.) *Marital Rape Established* –

Marital Rape has been firmly established by the court in *People v. Jumawan*,[94] where it ruled that "[h]usbands do not have property rights over their wives' bodies. Sexual intercourse, albeit within the realm of marriage, if not consensual, is rape."[95] The accused herein was charged and found guilty of two counts of rape committed by means of force upon a person.

> The Philippines, as State Party to the CEDAW, recognized that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between them. Accordingly, the country vowed to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (citing CEDAW, Article 5, Part I.) One of such measures is R.A. No 8353 insofar as it eradicated the archaic notion that marital rape cannot exist because a husband has absolute proprietary rights over his wife's body and thus her consent to every act of sexual intimacy with him is always obligatory or at least, presumed.
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> ...
>
> A woman is no longer the chattel-antiquated practices labeled her to be. 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 (citing Universal Declaration of Human Rights, Article 1) to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent. Surely, the Philippines cannot renege on its international commitments and accommodate conservative yet irrational notions on marital activities (citing UN Declaration on the Elimination of Violence Against Women, Article 4) that have lost their relevance in a progressive society.[96]

This case clearly elucidates how Supreme Court decisions can take the lead in promoting compliance with CEDAW. In this particular instance, it is the obligation to remove "the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[97] As the case stated, "[t]he ancient customs and ideologies from which the irrevocable implied consent theory evolved have already been superseded by modem global principles on the equality of rights between men and women and respect for human dignity established in various international conventions, such as the CEDAW."[98]

This doctrine was reiterated in *Quintos,* where the accused alleged that the victim was his sweetheart. There, the Supreme Court stated that "[R.A. No.] 9262 recognizes that wives, former wives, co-parents, and sweethearts may be raped by their husbands, former husbands, co-parents, or sweethearts by stating that committing acts of rape against these persons are considered violence against women."[99]

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[94] G.R. No. 187495, April 21, 2014.
[95] *Id*.
[96] *Id*.
[97] CEDAW, intro.
[98] *Jumawan,* G.R. No. 187495.
[99] *Quintos,* G.R. No. 199402.

6.) *Mental Incapacity and Statutory Rape* –

The Court has promulgated decisions with different pronouncements on rape committed against women whose mental ages were below 12 years old. In the case of *Quintos*, the offended party was a 21-year old woman but her mental age was 6 years and 2 months. Unfortunately, such mental age was not alleged in the information. Therefore, it was considered as a factor in determining consent but not in determining whether the crime committed was statutory rape.

> However, to qualify the crime of rape and increase the penalty of accused from *reclusion perpetua* to death under Article 266-B in relation to Article 266-(A)(1) of the Revised Penal Code, an allegation of the victim's intellectual disability must be alleged in the information. If not alleged in the information, such mental incapacity may prove lack of consent but it cannot increase the penalty to death. Neither can it be the basis of conviction for statutory rape.
>
> In this case, the elements of sexual congress and lack of consent were sufficiently alleged in the information. They were also clearly and conveniently determined during trial. The fact of being mentally incapacitated was only shown to prove AAA's incapacity to give consent, not to qualify the crime of rape.[100]

Likewise, in *People v. Bangsoy*,[101] the Court affirmed that rape committed against a woman who has a mental age below 12 is statutory rape.

> Sexual intercourse with a woman who is a mental retardate with a mental age of below 12 years old constitutes statutory rape. Notably, AAA was also below 12 years old at the time of the incident, as evidenced by the records showing that she was born on March 1, 1993.
>
> ...
>
> Nonetheless, the Information averred that AAA was a mental retardate and that the appellant knew of this mental retardation. These circumstances raised the crime from statutory rape to qualified rape or statutory rape in its qualified form under Article 266-B of the Revised Penal Code. Since the death penalty cannot be imposed in view of Republic Act No. 9346 (An Act Prohibiting the Imposition of the Death Penalty in the Philippines), the CA correctly affirmed the penalty of *reclusion perpetua* without eligibility for parole imposed by the RTC on the appellant.[102]

However, in the more recent case of *People v. Falco*,[103] the Court emphasized that a different ground should be used as basis to convict for rape committed against a victim who has the mental age of a child. It stated that the correct offense is simple rape under Art. 226-A (b) and not (d). Thus,

> In this case, it is not disputed that AAA was already 22 years old when she was raped albeit she has a mental age of 4-5 years old.

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[100] *Id*.
[101] G.R. No. 204047, Jan. 13, 2016.
[102] *Id*. (citing People v. Abella, G.R. No. 177295, Jan. 6, 2010; People v. Mateo, G.R. No. 170569, Sep. 30, 2008; & People v. Arlee, 380 Phil. 164, 180 (2000)).
[103] G.R. No. 220143, June 7, 2017.

> ... This Court, in the case of *People v. Dalan* [ ], explained:
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> > We are not unaware that there have been cases where the Court stated that sexual intercourse with a mental retardate constitutes statutory rape. Nonetheless, the Court in these cases, affirmed the accused's conviction for simple rape despite a finding that the victim as a mental retardate with a mental age of a person less than 12 years old. Based on these discussions, we hold that the term statutory rape should only be confined to situations where the victim of rape is a person less than 12 years of age. If the victim of rape is a person with mental abnormality, deficiency, or retardation, the crime committed is simple rape under Article 266-A, paragraph 1 (b) as she is considered "deprived of reason" notwithstanding that her mental age is equivalent to that of a person under 12. In short, carnal knowledge with a mental retardate whose mental age is that of a person below 12 years, while akin to statutory rape under Article 266-A, paragraph l(d), should still be designated as simple rape under paragraph 1(b).[104]

It should be mentioned that in this case, the accused questioned the credibility of the victim on the basis of the conflicting answers that the latter gave.

> He insisted that he should be acquitted of the charge because doubts linger as to whether or not he had sex with AAA or the rape incident happened, considering AAA's conflicting responses to the queries regarding the same. The accused-appellant capitalizes on the fact that during AAA's cross-examination, the latter candidly stated that accused-appellant did not have sex with her.
>
> ...
>
> In the case at bar, even though AAA's testimony was not flawless in all particulars, We do not find any justifiable reason to deviate from the findings and conclusion of the R TC, as affirmed by the CA.
>
> The fact that AAA's testimony was practiced and instructed by her mother to impute such serious charge against the accused-appellant does not sway this Court. Given the victim's mental condition, being a 22-year old woman with a mental age of 4-5 years old, we find it highly improbable that she had simply concocted or fabricated the rape charge against the accused-appellant. We neither find it likely that she was merely coached into testifying against accused-appellant, precisely, considering her limited intellect. In her mental state, only a very startling event would leave a lasting impression on her so that she would be able to recall it later when asked.[105]

Notably, even if the court used "deprived of reason" as basis for the accused's conviction, the court's rationale was still basically grounded on the mental age of the offended party. The only factor that qualifies the offended party as being deprived of reason is her intellectual capacity. Thus, it is posited that if the mental age of the victim is below 12, it is more appropriate to convict the accused under statutory rape rather than under the section of the law describing deprivation of reason. An intellectually disabled woman who possesses limited agency to give consent because she has the mental age of a child (who is below 12) will benefit from established doctrines about the credibility of children in

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[104] *Id*. (citing G.R. No. 203086, June 11, 2014).
[105] *Falco*, G.R. No. 220143.

statutory rape cases. Adversely, being considered "deprived of reason" at the time of the commission of rape or sexual assault may likely expose said woman to gratuitous attacks on the accuracy of her facts because after all, she was "deprived of reason" when the alleged crime happened.

7.) *Sexual Assault* –

Under the law and current jurisprudence, the crime committed is sexual assault if the accused uses a finger or any object other than the male genitalia. In the case of *People v. Soria*,[106] the Court ruled:

> It is evident from the testimony of AAA that she was unsure whether it was indeed appellant's penis which touched her labia and entered her organ since she was pinned down by the latters weight, her father having positioned himself on top of her while she was lying on her back. AAA stated that she only knew that it was the bird of her father which was inserted into her vagina after being told by her brother BBB. Clearly, AAA has no personal knowledge that it was appellant's penis which touched her labia and inserted into her vagina. Hence, it would be erroneous to conclude that there was penile contact based solely on the declaration of AAA's brother, BBB, which declaration was hearsay due to BBB's failure to testify. Based on the foregoing, it was an error on the part of the RTC and the CA to conclude that appellant raped AAA through sexual intercourse. Instead, we find appellant guilty of rape by sexual assault.[107]

Likewise, in *Salvador*, the Court held that rape by sexual assault is committed if a finger is inserted in the vagina:

> By his act of inserting his finger in BBB's organ, the crime of rape by sexual assault has been consummated. The RTC and the CA therefore correctly ruled that appellant should be found guilty of rape as defined in Article266-A, paragraph 2 of the RPC. Thus, the fact that there were no injuries found in the medical exam deserves scant attention. As correctly stated by the RTC and the CA, the finding of any injury as yielded by the physical exam is not a requirement in rape cases[108]

V. FINAL WORD

Although marital rape has been firmly established and the credibility of girl-children in rape and sexual assault cases has been facilitated by jurisprudence developed and applied consistently by courts, the stereotypes embedded in these decisions has had a negative impact on mature women. Non-consent as an element of rape and its required manifestation which is usually the degree or extent of resistance is getting to be difficult to prove especially for these women, unless force or intimidation is patently present, or unless they are rendered unconscious. Absent these factors, resistance by mature women is expected to be tenacious and reporting of the rape prompt. Further, if courts require that non-consent be signified "before the rape is consummated," *i.e.,* at the beginning of the sexual intercourse, are women now precluded from changing their minds *after* the beginning? Is there no rape when this happens? The recent cases of *Marquez* and *Amarela*

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[106] G.R. No. 179031, Nov. 14, 2012
[107] *Id.*
[108] *Salvador, G.R. No. 207815* (citing People v. Castillo, G.R. No. 193666, Feb. 19, 2014).

perpetuate the stereotype that men cannot control their biological urges and therefore, women should already refuse and clearly manifest this at the beginning. If they do not do so, then rape is off the table because it would be unfair to men to expect them to stop.

Gender bias still permeates the decisions of the highest court of the land. In this Paper, it is highlighted in rape cases. A genuine commitment to the Philippine's CEDAW obligations requires that the Supreme Court rid itself of insensitive language and gender stereotypes. It should also address the problem of double victimization of offended parties instead of regarding such practice as a litmus test in examining the credibility of women. Discrimination is present when women are prevented from exercising their right to effective remedy and access to justice due to insensitive criminal proceedings. Discrimination is also present when decisions maintain the subordinate status of women by perpetuating **Male Privilege**, which is aptly articulated in *Marquez* and is worth reiterating:

> A mere attempt to resist is not the resistance required and expected of a woman defending her virtue, honor and chastity. And granting that it was sufficient, she should have done it earlier or the moment appellant's evil design became manifest. In other words, it would be unfair to convict a man of rape committed against a woman who, after giving him the impression thru her unexplainable silence of her tacit consent and allowing him to have sexual contact with her, changed her mind in the middle and charged him with rape.[109]

[109] *Marquez,* G.R. No. 212193.