

On Consent and Resistance: CEDAW as a Framework for Reinterpreting Evidentiary Presumptions in Rape Cases

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Abstract

In rape cases, the resistance of the victim has been a significant factor in proving the presence of force, threat, or intimidation. This, in part, is due to the presumption created by Article 266-D of the Revised Penal Code which provides that resistance may be accepted as evidence in the prosecution of rape. This evidentiary presumption has often been interpreted by the Philippine Supreme Court to mean that the victim's lack of resistance is evidence of her consent. This paper argues that although this jurisprudential pattern is far from consistent, the fact of its existence already contravenes the Philippines's treaty obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By examining decisions of the Supreme Court vis-à-vis the Opinions of the CEDAW Committee in *Vertido v. Philippines* (2010) and in *R.P.B. v. Philippines* (2014), this paper presents a thorough analysis of the impact of gender stereotypes in the prosecution of rape cases. It concludes by explaining how CEDAW can guide courts in the reinterpretation of Article 266-

D to ensure that judicial outcomes are anchored on standard gender-sensitive precepts in compliance with the Convention and its supplemental treaty, the Optional Protocol.

Keywords: CEDAW, Optional Protocol, rape, resistance

Introduction

Gender-based violence has become a serious and urgent human rights concern for countless Filipino women (Hega et al., 2017). Cultural values, beliefs, norms, and even social institutions have supported intimate partner violence, deprived victims of recourse, and legitimized the discrimination committed against women (Russo & Pirlott, 2006).

In the Philippines, several laws have been passed to address the pervasive nature of gender-based violence and discrimination. Among these measures is the Anti-Rape Law of 1997 (Republic Act No. 8353) which amended Article 266 of the Revised Penal Code (RPC).

The Anti-Rape Law, as amended, created the presumption that any physical overt act manifesting resistance, in any degree, may be accepted as evidence in the prosecution of rape, viz:

Article 266-D. Presumptions.—Any physical overt act manifesting resistance against the act of rape in any degree from the offended party, or where the offended party is so situated as to render her/him incapable of giving valid consent, may be accepted as evidence in the prosecution of the acts punished under Article 266-A. (As amended by Republic Act No. 8353 and Republic Act No. 11648; Emphasis supplied.)

In *People v. Dulay* (2002), the Supreme Court cited the Bicameral Conference Committee Meeting on Senate Bill No. 950 and House Bill No. 6265—the forerunners of the Anti-Rape Law—where 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. In enacting the amendment, the lawmakers reasoned that rape victims cannot mount

a physical struggle in cases where they were gripped by overpowering fear or subjugated by moral authority.

Article 266-D, therefore, aimed to temper the case law requirement of physical struggle with the victim's fear of the rapist or incapacity to give valid consent. However, instead of fulfilling this purpose, the courts' interpretation of Article 266-D has led to a long line of acquittals due to the complainants' alleged failure to show or to prove resistance.

In the case of *People v. Martinez* (2020), the Supreme Court acquitted the accused in one count of rape because the prosecution failed to prove the element of force. The Court inferred the absence of force from the finding that, "[t]here is no testimony whatsoever about the nature of the force employed, or about any struggle, or even resistance however slight."

Similarly, in *People v. Amarela* (2018), there was an acquittal because the victim failed to mention how the crime was committed "without any sign of struggle or resistance" on her end.

In *People v. Amogis* (2001), the Court maintained that in rape cases, "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."

These cases show that the appreciation of evidence in rape cases may often be tainted by myths and stereotypes surrounding the "ideal" way for a rape victim to respond. Contrary to the import of these rulings, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee unequivocally expressed in two of its decisions that no presumption of consent should be made by the fact that the woman has not physically resisted the unwanted sexual conduct of the offender (*Vertido v. Philippines*, 2010; *R.P.B. v. Philippines*, 2014).

By analyzing Philippine Supreme Court decisions vis-à-vis the "views" of the CEDAW Committee in *Vertido v. Philippines* (*Vertido*; 2010) and in *R.P.B. v. Philippines* (*R.B.P.*; 2014), this paper will examine how and why gender stereotypes create pressing legal issues in relation to the appreciation of evidence in cases of rape and sexual violence.

Next, it will bring to fore the problem with the Supreme Court's interpretation of resistance in rape cases and highlight why the reliance on certain evidentiary presumptions is contrary to provisions of the CEDAW, particularly:

1. Article 2(c) on the legal protection of women through competent public institutions.
2. Article 2(f) on the state obligation to take all appropriate measures to modify or abolish discriminatory laws, regulations, customs and practices.
3. Article 5(a) on the mandate to modify social and cultural patterns of conduct which are based on discriminatory stereotypes.

Although the decisions or "views" of the CEDAW Committee is generally not considered binding on State Parties, the authority vested in the Committee by the text of Convention supports the position that it is a source of reasoned authoritative interpretations of the CEDAW. Thus, this paper argues that the CEDAW Committee's views in *Vertido* (2010) and *R.P.B.* (2014) should give effect to the reinterpretation of the evidentiary presumptions on consent and resistance in cases of rape and sexual violence.

The State Obligations Against Gender Stereotyping

As an international bill of rights for women, the CEDAW maps out actions that must be taken to achieve gender equality. To fulfill this purpose, it legally binds all States Parties to fulfill, protect, and respect women's human rights.

Articles 2(c) and 2(f) of the CEDAW provides that States Parties must:

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:

x x x

(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;

x x x

(f) To take all appropriate measures, including legislation, to **modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;** (Emphasis supplied.)

In relation to the enactment of appropriate measures to address discrimination, Article 5(a) of the CEDAW declares that States Parties shall:

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.

These State obligations under Articles 2(c), 2(f), and 5(a) of CEDAW may be viewed according to the well-known tripartite framework of state obligations: “to respect, to protect and to fulfill.”

The obligation to respect requires States Parties to refrain from arbitrarily interfering with women’s human rights and fundamental freedoms. The Committee, in its General Recommendation No. 28, explains that the obligation to respect also mandates that Parties to Convention refrain from performing, sponsoring, or condoning any practice, policy, or measure which is violative of the CEDAW.

Obligation to protect, on the other hand, requires States Parties to take all appropriate measures to ensure that state and private actors

do not unlawfully infringe rights. Interpreted in light of Articles 2(f) and 5, as well as Articles 2(a)–(c) and 2(e), it has also been posited that the obligation to protect requires States Parties to take positive steps to ensure that appropriate laws, policies, and plans of action are properly administered and implemented to address wrongful gender stereotyping (Cusack, 2013).

Finally, the obligation to fulfill of the tripartite framework enjoins State Parties to ensure the full realization of rights in law and in practice. Applied to Articles 2(f) and 5 of the CEDAW, the obligation to fulfill compels State Parties to adopt all appropriate measures to prevent the practices of wrongful gender stereotyping committed by its State organs. Pursuant to the obligation to fulfill, State Parties should reexamine its laws, policies, and judicial practices to ensure that none of them enforce or perpetuate gender stereotypes to the detriment of survivors of gender-based violence.

Critical to the meaningful enforcement of the obligations under the CEDAW is the supplemental treaty known as the Optional Protocol (OP; Cook, 1991). Prior to the introduction of the Optional Protocol, there was no effective mechanism through which individuals could complain to the Committee about the violation of their rights under CEDAW (Hodson, 2014). Entered into force in 2000, the Optional Protocol established procedures for the investigation of individual or group complaints where women can seek relief at an international level when domestic remedies were inadequate or otherwise unavailable (Hall, 2010).

The Philippines is the first signatory of the CEDAW in the ASEAN region. It signed the treaty on July 15, 1980 and ratified the same on August 5, 1981. Subsequently, it also ratified the Optional Protocol on November 12, 2003. As a State Party to these instruments, the Philippines undertook the obligation to adopt appropriate measures to address all forms of gender-based discrimination. This includes actions that will strengthen its institutional mechanisms against gender-stereotyping and change the patterns of conduct of its State actors in order to prevent gender-based discrimination in its laws, policies, and court decisions.

By ratifying the Optional Protocol, the Philippines recognized the competence of the CEDAW Committee to receive and consider

communications submitted to it (Article 1, OP-CEDAW) and has agreed to “give due consideration to the views of the Committee, together with its recommendations, if any” (Article 7, para. 4, OP-CEDAW).

Gender Stereotyping and the CEDAW: The Cases of *Vertido v. Philippines* (2010) and *R.B.P. v. Philippines* (2014)

Vertido v. Philippines (2010) is the first CEDAW communication with a central focus on wrongful gender stereotyping in judicial decisions. It is arguably the leading decision, of the CEDAW Committee and of any international human rights treaty body, on the commission of gender stereotyping by State actors (Cusack & Timmer, 2011). Both the author and the CEDAW Committee framed the communication as one concerning the Philippines’s legal liability for judicial stereotyping in a rape trial, rather than for rape only.

In *Vertido* (2010), the author of the communication filed a complaint with the local police alleging that the accused dragged her to a motel room where he forcibly pinned her to the bed. The weight of the accused caused the author to lose consciousness. When she regained consciousness, the accused was already raping her. The case languished in the trial court for 8 years until Judge Virginia Hofileña-Europa acquitted the accused. Judge Europa based her decision to acquit on several “guiding principles” derived from other rape cases. These guiding principles include the notion that rape allegations are easy to make and that the complainant must take advantage of perceived opportunities to escape.

After the trial court acquitted the accused, the author subsequently submitted a communication to the CEDAW Committee, alleging that the acquittal of the accused constituted a violation, by the Philippines, of the rights to nondiscrimination and an effective remedy, and the freedoms from wrongful gender stereotyping and gender-based violence against women.

In its decision, the CEDAW Committee stressed that to expect the victim to have resisted in the situation reinforces in a particular manner the myth that women must physically resist the sexual assault. Acting

under Article 7, paragraph 4, of the Optional Protocol, the Committee found that the Philippines violated the rights of the author under the CEDAW. The Committee concluded that the Philippines failed to fulfill its obligations under Article 2(c) of the CEDAW which mandates the protection of women against discrimination through competent tribunals and public institutions and Articles 2(f) and 5(a) of same Convention which declare the state obligation to eliminate wrongful gender stereotyping.

In *Vertido* (2010), the CEDAW Committee effectively dismantled the gendered assumptions that form the basis of the focus on resistance:

[T]he Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that **there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.** (para. 8.5; Emphasis supplied.)

The CEDAW Committee also affirmed, in no uncertain terms, that the Convention requires States Parties to “take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women” (*Vertido*, 2010, para. 8.4). Judge Europa’s decision was observed to contain “several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the creditability of the victim” (*Vertido*, 2010, para. 8.6). The Committee stressed that stereotyping affects women’s right to a fair and just trial and hence, the judiciary must take caution not to create inflexible standards of what women or girls should be or how they should act when confronted with a situation of rape. In making these pronouncements, the Committee, in effect, strongly cautioned about the preconceived notions of the judiciary of what defines a “victim” in rape cases.

After its determination of the violations under the Convention, the Committee called on the Philippines to take specific steps to address gender stereotyping in compliance with Articles 2(f) and 5(a) of the CEDAW. The Committee emphasized that the Convention places obligations on all State organs, including its courts and tribunals, and that “States parties can be responsible for judicial decisions which violate the provisions of the Convention” (*Vertido*, 2010, para. 8.4). In particular, the Committee opined that the Philippines’s compliance to its due diligence obligation to banish gender stereotypes needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the case (*Vertido*, 2010). It then recommended that the Philippines, as a State Party to the CEDAW, must “ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions” (*Vertido*, 2010, para. 8.9).

Following the *Vertido* (2010) ruling is the case of *R.P.B. v. Philippines* (2014) where the Committee had the opportunity to evaluate rape myths and gender stereotypes in light of the intersectionality of age and disability.

In *R.P.B.* (2014), the author was a minor girl who was deaf and mute. She came from a poor family with seven children from suburban Metro Manila. She was raped by her then 19-year-old neighbor in her own residence. During the court hearings, no interpreters for deaf litigants were available so the interpretation relied exclusively on a non-governmental organization, the Philippine Deaf Resource Center. The basis of the acquittal was the trial court’s finding that, “no force or intimidation was employed by the accused. No physical force was used to quell R.’s alleged resistance. Her mouth was not covered nor stuffed with any object” (*R.P.B.*, 2014, para. 2.5). The court further noted that the author’s demeanor was inconsistent with that of an ordinary Filipina whose instinct dictates that she summons every ounce of her strength and courage to thwart any attempt to besmirch her honor and blemish her purity:

It is unnatural for an intended rape victim . . . not to make even a feeble attempt to free herself despite a myriad of opportunities

to do so". In particular, she could have tried to escape or shout for help, given that "her being a deaf mute does not render her incapable of creating noise"; she "could have slapped, punched, kicked and pushed the accused" when he was trying to undress her, given that her physical condition rendered her able to resist; in addition, her clothes were intact, which does not evince a struggle on her part. (*R.P.B.*, 2014, para. 2.5)

In her complaint to the Committee, *R.P.B.* argued that the court's actions violated Articles 1, 2(c), 2(d), and 2(f) of the Convention. In this case, the Committee reiterated its position in *Vertido* (2010) that there should be no assumption in law that a woman gives her consent because she has not physically resisted. In resolving the complaint, the Committee drew on its General Recommendations Nos. 18 and 19 (Committee 10th and 11th sessions, 1992), and held that the Philippines, particularly the judiciary, violated the rights of the author under Article 2(c), 2(d), and 2(f), in conjunction with Article 1 of the Convention.

General Recommendation No. 18 states that women with a disability are to be considered a vulnerable group and that it is "crucial to ensure that women with disabilities enjoy effective protection against sex and gender-based discrimination by States parties and have access to effective remedies." Corollarily, General Recommendation No. 19 declares that States should "ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity" and provide "effective complaints procedures and remedies, including compensation" (*R.P.B.*, 2014, para. 8.3).

In both *Vertido* (2010) and *R.P.B.* (2014), the CEDAW Committee affirmed that stereotyping affects women's right to a fair trial. These gender stereotypes perpetuate discriminatory beliefs that prevent rape victims from obtaining substantial justice. The *Vertido* (2010) and *R.P.B.* (2014) decisions show that the reliance of courts on resistance as basis for conviction pose harm to women and impede their access to justice for rape, sexual assault, and other forms of gender-based violence.

Presumption of Consent: Supreme Court's (Mis)Reliance on Resistance

The author in *Vertido* (2010) stressed that the decision of Judge Europa is one among many trial court decisions in rape cases that discriminate against women and perpetuate discriminatory beliefs about rape victims. Indeed, even decisions of the Supreme Court are plagued by gender stereotypes that reinforce flawed standards on what constitutes “consent” in rape cases.

Similar to the case of *Vertido* (2010) where it was found that the assessment of the credibility of the victim's version of events was influenced by a number of stereotypes, the following decisions of the Supreme Court illustrate that gender stereotypes, particularly on the expectation that the woman will resist the sexual aggression, cloud the Court's appreciation of evidence and often lead to an acquittal based on reasonable doubt. These cases also show that there is danger in presuming consent on the basis of lack of resistance because the Court's appreciation of resistance varies depending on the degree of force, threat, or intimidation present in the case.

Resistance Must Be Present if There Is No Force, Threat, or Intimidation Because Otherwise, the Act Is Consensual

People v. Tionloc (2017) concerns an 18-year-old man who had sexual intercourse with “AAA,” a woman who was 24 years old during the incident. While AAA feared for her life because a knife lying on the table nearby could be utilized to kill her if she resisted, the Supreme Court found that her fear was a mere product of her own imagination. The Court held that in rape cases alleged to have been committed by force, threat or intimidation, it is imperative for the prosecution to establish that the element of voluntariness on the part of the victim is absolutely lacking. The Court acquitted the accused and reasoned that:

“AAA” could have resisted right from the start. But she did not, and chose not to utter a word or make any sign of rejection of appellant's sexual advances. It was only in the middle of their sexual congress when “AAA” tried to move which can hardly

be considered as an unequivocal manifestation of her refusal or rejection of appellant's sexual advances. (Emphasis supplied.)

A case with a similar outcome is *People v. Claro* (2017) where the complainant alleged that the accused held her by the hand and pulled her upstairs to rape her. The Court, however, maintained that there was no evidence showing that she resisted in that whole time, or exhibited a reluctance to enter the motel with him. In reversing the judgment of conviction rendered by both the Regional Trial Court and the Court of Appeals, the Supreme Court explained that: "What she did not do was eloquent proof of her consent."

There are also cases where the Supreme Court demanded that resistance be present due to assumptions that the accused could not have used force, threat, or intimidation. Stated otherwise, instead of proving the presence of force, threat, or intimidation solely through the acts of the accused, the Supreme Court's interpretation of Article 266-D shifted the focus to the victim's response which vary depending on the circumstances. In *People v. Relox* (2004), the Court found that it was impossible for the victim to not put up more resistance against an accused who was old and unarmed:

First, it is incredible that Adela could not put up more resistance against **appellant who was already old and unarmed the entire time**. The force and intimidation alleged to have been employed are not of such character as to render Adela a helpless victim. As the trial court observed eight months after the alleged rape, the 60-year-old appellant "could hardly walk, could hardly stand, could hardly move." Thus, it is **hard to understand why Adela was unable to free her two arms from appellant who was using only one hand to hold them down**.

Second, assuming that her body was pinned down, there was nothing to prevent Adela from screaming in order to wake up the children or dissuade her father from continuing his intention.

Third . . . the fact that Adela failed to flee at a moment when she was let go by appellant remains unexplained. (Emphasis supplied.)

If There Is Extreme Force, Threat, or Intimidation, No Need to Prove Resistance Because Resistance Will Be Futile

There is an existing line of jurisprudence which holds that where the degree of force, threat, or intimidation is so tenacious that the complainant is rendered helpless, resistance is not required. In the case of *Vertido* (2010), the CEDAW Committee acknowledged the presence of this jurisprudential pattern. According to the Committee, although there is a Philippine legal precedent which states that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, "to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault" (*Vertido*, 2010, para. 8.5).

In the case of *People v. Galang* (2003), while the Supreme Court did not rely on resistance per se, it gave the impression that the resistance of the rape victim is an expected behavior, even if the resistance may be weak or ineffective against the aggressor. The Court explained that in situations where intimidation exists and the victim is cowed into submission as a result thereof, resistance is rendered futile. Hence, it would be extremely unreasonable "to expect the victim to resist with all her might and strength. If resistance would nevertheless be futile because of continuing intimidation, then offering none at all would not mean consent to the assault as to make the victim's participation in the sexual act voluntary."

The Supreme Court made a similar declaration in the case of *People v. Abanilla* (2003) where the accused was charged with three counts of rape committed against his 17-year-old daughter. Interpreting Article 266-D of the RPC, the Court explained that resistance may be proved by any physical overt act in any degree from the offended party. However, it likewise found that resistance was not necessary in light of appellant's moral ascendancy over the complainant. Because the complainant was

rendered helpless as a result of moral ascendancy, resistance here was also futile.

The same reasoning was applied in the case of *People v. Arivan* (2008). The Supreme Court held here that the law does not impose upon a rape victim the burden of proving resistance. However, the Court qualified this rule by stating that it applies “particularly when intimidation is exercised upon the victim and the latter submits herself to the appellant’s advances out of fear for her life or personal safety.”

The foregoing cases illustrate that on one hand, the Supreme Court has required the presence of resistance if there is no force, threat, or intimidation because the lack thereof would imply that the act is consensual. On the other hand, the Court has also created the judicial standard that if there is extreme force, threat, or intimidation, there is no need to prove the victim’s resistance because the severity of the force, threat, or intimidation renders the same futile. However, even when resistance is futile, the mere fact that it is expected by the Court runs contrary to the Committee’s opinion in *Vertido* (2010) that “there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence” (para. 8.5).

It was observed by the Committee in *Vertido* (2010) that the decision of Judge Europa refers to principles such as:

- physical resistance is not an element to establish a case of rape,
- people react differently under emotional stress,
- the failure of the victim to try to escape does not negate the existence of the rape, and
- that the law does not impose upon a rape victim the burden of proving resistance.

However, the decision still shows that the judge did not apply these principles in evaluating the victim’s credibility against expectations on how she should have reacted before, during, and after the rape. Judge

Europa's recognition of these principles on one hand and her apparent expectation of the victim's resistance on the other, is a conflict also clearly present in several Supreme Court cases including *People v. Galang* (2003), *People v. Abanilla* (2003), and *People v. Arivan* (2008). Aside from making the evidentiary presumptions of resistance contingent to the magnitude of force, threat, or intimidation used, there is also variance in jurisprudence as to the actual degree of resistance necessary in the prosecution of rape:

Cases Where Resistance Must Be Manifested and Tenacious

In *People v. Tionloc* (*Tionloc*; 2017), citing *People v. Amogis* (2001), the Court held that "a mere attempt to resist is not the resistance required and expected of a woman defending her virtue, honor and chastity." In the case of *Tionloc* (2017), the Court reasoned that the victim should have resisted earlier or the moment appellant's evil design became manifest. In the Court's mind, 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 more recent case of *People v. Cubay* (2019) reiterated the ruling in *Tionloc* (2017). In this case, the accused Dante Cubay was charged with 44 counts of rape against the victim who was a congenital deaf mute. He admitted he had sexual congress with the complainant but asserted they were all consensual. The Supreme Court decided in favor of the accused and held that the fact that AAA pushed him when he undressed and touched her body hardly equates with "force or intimidation" within the penal provision defining and penalizing rape. In the words of the Court, "[i]t may mean a gentle 'no,' 'not yet,' 'wait,' 'I am shy,' 'not here,' and many more possible interpretations or meanings."

A similar ruling was made in *People v. Carreon* (2020). Here, the Court made mention of how it took the Regional Trial Court's clarificatory questioning to elicit from AAA the pithy statement "*lumaban po*." The Court once again stressed that "resistance must be manifested and tenacious" and the victim's mere attempt to resist "is not the resistance required and expected of a woman defending her honor and chastity."

Cases Where Resistance Must Be Manifested but Not Necessarily Tenacious

The Supreme Court, in other decisions, maintained that although physical overt acts manifesting resistance is admissible as evidence of lack of consent, tenacious resistance is not required.

Citing *People v. Dulay* (2002), the Court in *People v. Abanilla* (2003), laid down the principle that resistance may be proved by any physical overt act in any degree from the offended party. Furthermore, tenacious resistance or a determined and persistent physical struggle on the part of the victim is not necessary.

In *People v. Arivan* (2008), the Court appreciated the evidence of force and intimidation used against the victim: “[t]hreatening that he would kill her brother, he dragged her inside the hut where he succeeded in ravishing her.” In this case, the Court explained that the test remains to be whether the threat or intimidation produces a reasonable fear in the mind of the victim that if she resists or does not yield to the desires of her attacker, the threat would be carried out. Applying this test, the Court found the appellant guilty beyond reasonable doubt to the crime of rape. Contrary to the rulings that resistance must be tenacious, the Court stressed here that for rape to be committed, it is not necessary for the victim to have resisted unto death or to have sustained physical injuries in the hands of the accused as long as the intercourse takes place against her will and she submits because of genuine apprehension of harm to her and her family.

In an earlier case, *People v. Soberano* (1995), the Supreme Court stressed that it has in many times in the past ruled that the lack of consent and resistance on the part of the victim of her rapist need not be carried to the point of sustaining death or physical injuries at the hands of the rapist. All that is necessary is that the force or intimidation applied against her should have enabled the assailant to effect sexual penetration.

Cases Where Resistance Is Not Necessary at All

There are also a handful of cases that negate the necessity of requiring proof of resistance in the prosecution of rape. In *People v. Gajardo* (2017),

the Court through Justice Del Castillo, clarified that resistance is not an element of rape: “A rape victim has no burden to prove that she did all within her power to resist the force or intimidation employed upon her. As long as the force or intimidation is present, whether it was more or less irresistible is beside the point.”

In *People v. Baldo* (2009), the Supreme Court observed that not all victims react the same way. Some people may cry out, some may faint, some may be shocked into insensibility, while others may appear to yield to the intrusion. Some may offer strong resistance while others may be too intimidated to offer any resistance at all. In ruling for the complainant, the Court noted that AAA’s failure to shout or to tenaciously resist the assailant should not be taken against her. The Court held that this lack of resistance did not *ipso facto* make voluntary her submission to the criminal act.

CEDAW as a Framework for Reinterpreting Article 266-D

Several legal conflicts can arise solely as a result of expecting the victim to resist the sexual aggression. First, Article 266-A of the RPC does not describe the element of force, threat, or intimidation in terms of degree or magnitude but courts often consider the extent of their presence when they evaluate evidence of resistance. Second, there is a gray area when there is force, threat, or intimidation but the same is not severe. In such a case, should resistance still be evidentiary requirement in proving the victim’s lack of consent? Finally, instead of proving the existence of force, threat, or intimidation solely through the acts of the accused, such interpretation of Article 266-D shifts the attention to the response of the complainant from the perspective of the accused.

The abovementioned issues are made far more salient by the continuous vacillations and the inconsistent applications of the Supreme Court of the evidentiary presumptions under Article 266-D. As previously mentioned, the 1997 amendments under the Anti-Rape Law, particularly on Article 266-D, was intended to soften the jurisprudence on rape of the 1970s when resistance was required to be tenacious. However, cases

after the 1997 amendments, including *People v. Amogis* (2001), *People v. Tionloc* (2017), and *People v. Carreon* (2020) still reiterate the dictum that “resistance must be manifested and tenacious.” Following *Vertido* (2010) and *R.P.B.* (2014), there are still acquittals because the crime was committed “without any sign of struggle or resistance” on the victim’s end (see *People v. Claro* [2017]; *People v. Amarela* [2018]; *People v. Martinez* [2020]; *People v. Cubay* [2019]).

In particular, in *People v. Cubay* (*Cubay*; 2019) where the accused was charged with 44 counts of rape against an 18-year-old who was a congenital deaf mute, it appears the Supreme Court did not fairly account for the condition of the victim. Her inability to verbalize that she was forced or intimidated into sexual submission was interpreted to mean that she consented to all 44 counts of the sexual act. According to the Court, the testimony of the victim that the accused “undressed, touched my body . . . I was afraid” is at best equivocal and hardly equates with “force or intimidation” within the penal provision defining and penalizing rape. The Court, through Justice Lazaro-Javier, further noted that “then eighteen (18) year old AAA, albeit she is a deaf-mute with low capacity to learn formal sign language, is in truth, mentally capable of giving or withholding consent.” The observation that AAA’s testimony is “noticeably terse, vague, equivocal, and seriously wanting in details” ultimately led to the acquittal of the accused. This case arguably shows that the Court was remiss in fully applying the recommendation of the CEDAW Committee in *R.P.B.* (2014) where the Philippines was directed to ensure that all criminal proceedings involving rape and other sexual offenses are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim’s gender, age, and disability. The Supreme Court, in the case of *Cubay* (2019), should not have stretched the presumption of innocence to such an extent that it created the presumption of consent.

In stark contrast with the ruling in *Cubay* (2019) is *People v. Quintos* (2014). In this earlier case, the Supreme Court held the intellectual disability of the witness does not make her testimony incredible, as long as she can recount her experience in a straightforward, spontaneous, and believable manner. More importantly, the Court, through Justice Leonen, unequivocally declared that:

[R]esistance 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.

x x x

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.** (Emphasis supplied.)

In the Dissenting Opinion of Justice J. C. Reyes Jr. in *People v. Cubay* (2019), he explained the problem with proving the elements of rape using the degree of resistance employed by the victim:

Absence of resistance only implies passivity. It may be the product of one's will. It may imply consent. However, it may also be the product of force, intimidation, manipulation and other external forces. To say that complainant, in keeping silent throughout her ordeal implied that she had given her consent would be a stretch of supposition and postulation that paints a colorful narrative on the events that transpired within the confines of the room where the rape incidents happened. (Emphasis supplied.)

The inconsistency in jurisprudence as to the degree of resistance required proves that the attempt of Article 266-D to temper the case law requirement of physical struggle was not successful. The Supreme Court, even in its later rulings has reiterated, if not revived, the requirement of tenacious resistance on the part of the victim. Although there are cases where the Court held that resistance is not an element of rape, there is a plethora of decisions where the accused was acquitted because the

complainant did not physically or tenaciously resist the unwanted sexual act. Thus, there is a need to consider a different approach or framework in examining the crime of rape, particularly with respect to the court's evidentiary presumptions on the resistance of the victim.

Sta. Maria (2019), who also examined decisions of the Supreme Court on rape and sexual assault, posits that a legal framework that facilitates the removal of barriers which cause discrimination of women by addressing the different forms of violence is crucial to the achievement of gender equality. Unfortunately, based on how the doctrine on rape cases has been consistently applied, there is no discernible improvement in the situation of victims who opt to bring their cases to court (Sta. Maria, 2019).

Establishing legal protection for women on equal basis with men entails changes in the legal system that will improve the judicial handling of rape cases. This includes removing gender-based prejudices during the trial of rape cases, including the assumption that resistance is “expected of a woman defending her virtue, honor and chastity.” Compliance with CEDAW in eliminating discrimination at the *de jure* level requires the adoption of measures to ensure that courts conduct more gender and child-sensitive criminal proceedings (Sta. Maria, 2019).

The Committee in *Vertido* (2010) emphasized that the right to effective protection against discrimination, which includes the right to an effective remedy, is inherent in the CEDAW. Although the text of the Convention does not expressly provide for a right to a remedy for a violation of this right, the Committee notes in *Vertido* (2010) that the creation of an effective remedy necessitates that the adjudication of a case involving rape and sexual offences claims should be dealt within a fair, impartial, timely and expeditious manner.

In Articles 2(f) and 5(a) of the Convention, the State Party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. These provisions create a positive obligation on all State organs, including the judiciary, to prevent practices of discrimination—such as wrongful gender stereotyping—to ensure that rape victims obtain substantial justice in court decisions. In the

appreciation of evidence, courts of justice must, in light of these provisions, reject the idea that proof of a physically overt act manifesting resistance is *sine qua non* in the prosecution of rape cases. The concurring opinion of Justice Bellosillo in *People v. Servano* (2003), explains the problem with adopting such a restrictive interpretation of Article 266-D:

As worded, physical overt act manifesting resistance . . . **may be accepted in evidence** to create the presumption that any of the acts punished under Article 266-A has been committed. A **restrictive interpretation of this provision would straightjacket the prosecution**, leaving him no room to maneuver by presenting a host of other evidence that can well meet the quantum of proof required in the prosecution of rape. (Emphasis supplied.)

In the prosecution of rape and other crimes involving gender-based violence, reliance on stereotypes on how women react to force, threat, or intimidation significantly reduce their chances of obtaining redress. Hence, in view of the obligations under Articles 2(c), 2(f), and 5(a) of the Convention, State Parties must ensure that all legal structures and processes, rules of evidence, criminal investigations, and legal proceedings are impartial and fair, and not affected by gender stereotyping.

Although CEDAW stands as a framework to address gender-based violence, international treaties do not, by themselves, have legal power to protect women from abuses of their rights. In the prosecution of rape, for instance, it is generally for domestic courts, and not international or regional human rights bodies, to assess and review the facts and evidence of a particular case (Cusack & Timmer, 2011). Treaty bodies like the CEDAW Committee are not intended to operate as appellate courts or courts of fourth instance where decisions of domestic courts may be appealed to. It is through domestic courts that States Parties can ensure that all legal structures and proceedings are impartial, fair, and not tainted by gender-based prejudices.

The judiciary, as a state organ, has the obligation to desist from producing judicial outcomes that rely on gender-based myths about rape. In *Alanis III v. Court of Appeals* (2020), it was held that “[c]ourts, like

all other government departments and agencies, must ensure the fundamental equality of women and men before the law. Accordingly, where the text of a law allows for an interpretation that treats women and men more equally, that is the correct interpretation.”

In relation to the crime of rape, Philippine courts must, therefore, reexamine its current interpretation of Article 266-D and ensure that its decisions are devoid of underlying gender stereotypes, such as expectation of resistance.

To comply with Articles 2(c), 2(f), and 5(a) of the CEDAW, the Philippine judiciary must redefine the crime of rape by highlighting the essential element of lack of consent and by removing the presumption that lack of resistance is implied consent. Reinterpreting the law in view of the CEDAW and the Committee’s opinion in *Vertido* (2010) and *R.P.B.* (2014) will leave no room for varying and misplaced interpretations of Article 266-D. This reinterpretation will mean that the appreciation of evidence will be fundamentally anchored on standard gender-sensitive precepts which are devoid of discriminatory gender stereotypes.

Rape victims are placed at a legal disadvantage when gender stereotypes become grounds for justifying the acquittal of the accused. Because of the harm posed by this practice, CEDAW obliges States Parties to eliminate wrongful gender stereotyping. To dismantle structural inequality that stems from gender discrimination, the Philippines, as State Party to the CEDAW, must ensure that women will have access to justice without fear of being revictimized and stigmatized. Eliminating all forms of discrimination against women and protecting them against rape and gender-based violence is fundamental in fulfilling the State’s commitment to guarantee the full respect for human rights.

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