

Balancing the Victim’s Quest for Justice *vis-à-vis* the Rights of the Accused: The Case of *People v. Tulagan*

Harvey A. Bilang*

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I. INTRODUCTION

On 12 March 2019, the Supreme Court promulgated its decision in *People v. Tulagan*,¹ where it attempted

* '16 J.D., *second honors*, St. Thomas More Award for the Most Distinguished Graduate, Ateneo de Manila University School of Law. The Author is currently working as a Court Attorney at the Supreme Court of the Republic of the Philippines.

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1. *People v. Tulagan*, G.R. No. 227363, Mar. 12, 2019, available at <http://sc.judiciary.gov.ph/2825> (last accessed July 25, 2019).

[f]or the guidance of the Bench and the Bar ... to reconcile the provisions on Acts of Lasciviousness, Rape[,] and Sexual Assault under the Revised Penal Code (RPC), as amended by Republic Act[]No. 8353 *vis-à-vis* Sexual Intercourse and Lascivious Conduct[,] under Section 5 (b) of [Republic Act] No. 7610, to fortify the earlier decision of the Court and doctrines laid down on similar issues, and to clarify the nomenclature and the imposable penalties of said crimes, and damages in line with existing jurisprudence.²

Pursuant to such objective, the Court in *Tulagan* thus laid down the following table of penalties:³

CRIME COMMITTED	AGE OF VICTIM		
	Under 12 years old or demented	12 years old or below 18, or 18 under special circumstances ⁴	18 years old and above

2. *Id.* at 7-8 (emphasis omitted).

3. *Id.* at 29-30.

4. The Court refers to the definition of children under Section 3 (a) of Republic Act No. 7610, to wit —

[a] person below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation[,] or discrimination because of a physical or mental disability or condition.

Id. at 29 n. 74 (citing An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, Providing Penalties for its Violation and for Other Purposes [Special Protection of Children Against Abuse, Exploitation and Discrimination Act], Republic Act No. 7610 (1992)). More specifically, it covers

a person below eighteen (18) years of age or one over said age and who, upon evaluation of a qualified physician, psychologist[,] or psychiatrist, is found to be incapable of taking care of himself fully because of a physical or mental disability or condition or of protecting himself from abuse[.]

Tulagan, G.R. No. 227363, at 29 n. 74 (citing Department of Justice, Rules and Regulations on Reporting and Investigation of Child Abuse Cases Implementing

<i>Acts of Lasciviousness committed against children exploited in prostitution or other sexual abuse</i>	Acts of Lasciviousness under Article 336 of the RPC in relation to Section 5 (b) of R.A. No. 7610: <i>reclusión temporal</i> in its medium period	Lascivious conduct ⁵ under Section 5 (b) of R.A. No. 7610: <i>reclusión temporal</i> in its medium period to <i>reclusión perpetua</i>	Not applicable
<i>Sexual Assault committed against children exploited in prostitution or other sexual abuse</i>	Sexual Assault under Article 266-A (2) of the RPC in relation to Section 5 (b) of R.A. No. 7610: <i>reclusión temporal</i> in its medium period	Lascivious Conduct under Section 5 (b) of R.A. No. 7610: <i>reclusión temporal</i> in its medium period to <i>reclusión perpetua</i>	Not applicable
<i>Sexual Intercourse committed against</i>	Rape under Article 266-A (1) of the	Sexual Abuse ⁷ under Section 5	Not applicable

Special Protection of Children Against Abuse, Exploitation and Discrimination Act, Republic Act No. 7610, § 2 (a) (1993)).

5. Lascivious conduct is defined as

the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus[,] or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person[.]

Tulagan, G.R. No. 227363, at 29 n. 75 (citing Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2(h)).

7. The Court also cites the definition of sexual abuse as to include

<i>children exploited in prostitution or other sexual abuse</i>	RPC: <i>reclusión perpetua</i> , except when the victim is below seven years old in which case death penalty shall be imposed ⁶	(b) of R.A. No. 7610: <i>reclusión temporal</i> in its medium period to <i>reclusión perpetua</i>	
<i>Rape by Carnal Knowledge</i>	Rape under Article 266-A (1) in relation to Art. 266-B of the RPC: <i>reclusión perpetua</i> , except when the victim is below seven years old in which case death penalty shall be imposed	Rape under Article 266-A (1) in relation to Art. 266-B of the RPC: <i>reclusión perpetua</i>	Rape under Article 266-A (1) of the RPC: <i>reclusión perpetua</i>
<i>Rape by Sexual Assault</i>	Sexual Assault under Article 266-A (2) of the RPC in relation to Section 5 (b) of R.A. No.	Lascivious Conduct under Section 5 (b) of R.A. No. 7610: <i>reclusión temporal</i> in	Sexual Assault under Article 266-A (2) of the

the employment, use, persuasion, inducement, enticement[,] or coercion of a child to engage in or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation, prostitution, or incest with children.

Tulagan, G.R. No. 227363, at 30 n. 77 (citing Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (g)).

6. This is subject to Republic Act No. 9346 or “An Act Prohibiting the Imposition of Death Penalty in the Philippines.” *Tulagan*, G.R. No. 227363, at 30 n. 76 (citing An Act Prohibiting the Imposition of Death Penalty in the Philippines, Republic Act No. 9346 (2006)).

	7610: <i>reclusión temporal</i> in its medium period	its medium period to <i>reclusión perpetua</i>	RPC: <i>prisión mayor</i>
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In a nutshell, the case of *Tulagan* concluded that:

- (1) In case the victim is below 18 years old,⁸ and the act committed against him or her constitutes either Acts of Lasciviousness or Rape by Sexual Assault, the offender should always be charged and punished under Section 5 (b) of Republic Act No. 7610 (R.A. No. 7610);⁹
- (2) In case the victim is below 12 years old, and the act committed against her constitutes Rape by Sexual Intercourse, then the offender should always be charged and punished with Statutory Rape, as defined under the Revised Penal Code (RPC), as amended by Republic Act No. 8353 (R.A. No. 8353);¹⁰ and
- (3) In case the victim is 12 years old and above but below 18, and the act committed against her constitutes Rape by Sexual Intercourse, then the offender may be punished either under the RPC provisions on Rape, or under Section 5 (b) of R.A. No. 7610 depending on the circumstances of the child-victim.¹¹

The foregoing conclusions of the Court in *Tulagan*, as well as the premises on which the said conclusions were hinged, will be dissected in this Article.

8. Or above 18 but is unable to fully take care or protect themselves. For purposes of this Article, reference to “children” or persons aged 12 and above but below 18 years old includes those persons “who are above 18 but is unable to fully take care or protect themselves.” Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3.

9. *Tulagan*, G.R. No. 227363, at 29-30

10. *Id.* at 30.

11. *Id.*

II. HISTORY: THE REVISED PENAL CODE, REPUBLIC ACT NO. 7610, AND
REPUBLIC ACT NO. 8353

The RPC was enacted as early as 1930, and has since then been the law that defined what sexual crimes were.¹² Although it has been amended several times through the years, and some special laws have been enacted to fill certain gaps,¹³ the RPC has, for the most part, governed what is criminally punished as a sexual crime, or what it calls as “crimes against chastity.”¹⁴ Rape, as it was defined at the time under Article 335 of the RPC, was limited to the concept of

having carnal knowledge [(i.e., penile penetration of the vagina)] of a woman under any of the following circumstances:

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12. See An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, arts. 245 & 333-343 (1930).
13. See, e.g., Special Protection of Children Against Abuse, Exploitation and Discrimination Act; 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 [The Anti-Rape Law of 1997], Republic Act No. 8353 (1997); An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes [Anti-Violence Against Women and their Children Act of 2004], Republic Act No. 9262, (2004); An Act Declaring Sexual Harassment Unlawful in the Employment, Education or Training Environment, and for Other Purposes [Anti-Sexual Harassment Act of 1995], Republic Act No. 7877, (1995); An Act Defining and Penalizing the Crime of Child Pornography, Prescribing Penalties Therefor And For Other Purposes [Anti-Child Pornography Act of 2009], Republic Act No. 9775, (2009); An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing The Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations, and for Other Purposes, [Anti-Trafficking in Persons Act of 2003], Republic Act No. 9208 (2003) (as amended); & An Act Defining and Penalizing the Crime of Photo and Video Voyeurism, Prescribing Penalties Therefor, and for Other Purposes [Anti-Photo and Video Voyeurism Act of 2009], Republic Act No. 9995 (2010).
14. REVISED PENAL CODE, tit. XI.

- (1) By using force or intimidation;
- (2) When the woman is deprived of reason or otherwise unconscious; and
- (3) When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.¹⁵

Meanwhile, the crime of Acts of Lasciviousness was defined in Article 336 of the RPC. It states, “[a]ny person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by *prisión correccional*.”¹⁶

Six decades later, Articles 335 and 336 of the RPC would prove to be inadequate. On 5 March 1991, the Supreme Court promulgated its decision in the case of *People v. Ritter*.¹⁷ In *Ritter*, the accused was indicted for rape with homicide for the death of a 12-year-old girl resulting from a foreign object being left inside her vaginal canal.¹⁸ The accused lured two street children — one girl and one boy — into his hotel room, performed sexual acts on them, attempted to penetrate the girl’s vagina using his penis but failed to do so, and instead inserted an object into her vagina.¹⁹ Months later, the girl was hospitalized, as parts of a foreign object were left inside her vagina, which caused infections and complications on her internal organs.²⁰ These infections later on caused her death.²¹

The trial court convicted the accused.²² Upon appeal, however, the Court acquitted the accused on the ground of reasonable doubt.²³ The Court

15. *Id.* art. 335, (1-3).

16. *Id.* art. 336.

17. *People v. Ritter*, 194 SCRA 690 (1991).

18. *Id.* at 693.

19. *Id.* at 694.

20. *Id.* at 696-97.

21. *Id.* at 697.

22. *Id.* at 700.

23. *Ritter*, 194 SCRA at 717-19 & 723.

ruled that the accused cannot be convicted of Statutory Rape because the prosecution was unable to establish that the girl was below 12 years old at the time of the sexual intercourse with the accused.²⁴ The accused could not likewise be convicted of simple rape because there was no evidence on record that the girl gave in to the accused's bestial desires through force or intimidation, or that she was deprived of reason or otherwise unconscious.²⁵ The accused could not also be convicted of homicide as the prosecution failed to establish the direct causation between the accused's acts and the girl's death.²⁶ The Court, however, despite acquitting the accused, lamented, thus

And finally, the Court deplores the lack of criminal laws which will adequately protect street children from exploitation by pedophiles, pimps, and, perhaps, their own parents or guardians who profit from the sale of young bodies. The provisions on statutory rape and other related offenses were never intended for the relatively recent influx of pedophiles taking advantage of rampant poverty among the forgotten segments of our society. Newspaper and magazine articles, media [exposés], college dissertations, and other studies deal at length with this serious social problem[,] but pedophiles like the appellant will continue to enter the Philippines[,] and foreign publications catering to them will continue to advertise the availability of Filipino street children unless the Government acts and acts soon. We have to acquit the appellant because the Bill of Rights commands us to do so. We, however, express the Court's concern about the problem of street children and the evils committed against them. Something must be done about it.²⁷

Heeding the call of the Court in *Ritter*, Congress responded by enacting what would later on become R.A. No. 7610 or the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act."²⁸ In the sponsorship speech of Senator Santanina Rasul for the bill, which subsequently became R.A. No. 7610, she said that

24. *Id.* at 706.

25. *Id.*

26. *Id.* at 708-09 & 718-19.

27. *Id.* at 723.

28. See Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2.

undoubtedly, the most disturbing, to say the least, is the persistent report of children being sexually exploited and molested for purely material gains. Children with ages ranging from three to 18 years are used and abused. We hear and read stories of rape, manhandling[,] and sexual molestation in the hands of cruel sexual perverts, local and foreigners alike. As of October 1990, records show that 50 cases of physical abuse were reported, with the ratio of six females to four males.

...

No less than the Supreme Court, in ... [*Ritter*], held *that we lack criminal laws which will adequately protect street children from exploitation by pedophiles.*²⁹

R.A. No. 7610 tried to cover as many of the large gaps in Philippine criminal laws as possible, when it came to the realm of the protection of children. It thus defined as a crime a number of acts that were previously unpunished, such as child prostitution,³⁰ child trafficking,³¹ employment of children in indecent shows³² and obscene publications,³³ among others. It also contains provisions for the further protection of working children,³⁴ children from indigenous cultural communities,³⁵ and children in situations of armed conflict.³⁶ For purposes of this Article, R.A. No. 7610's Section 5 assumes the most significance. It states —

SECTION 5. *Child Prostitution and Other Sexual Abuse.* — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate[,] or group, indulge in

29. *Quimvel v. People*, 823 SCRA 192, 299 (2017) (J. Caguioa, dissenting opinion) (citing CONG. REC. Vol. III, No. 104, at 1204 (Mar. 19, 1991)).

30. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, §§ 5-6.

31. *Id.* §§ 7-8.

32. *Id.* § 9.

33. *Id.*

34. *Id.* §§ 12-13.

35. *Id.* §§ 17-21

36. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, §§ 22-26.

sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of *reclusión temporal* in its medium period to *reclusión perpetua* shall be imposed upon the following:

- (a) Those who engage in or promote, facilitate[,] or induce child prostitution which include, but are not limited to, the following:
 - (1) Acting as a procurer of a child prostitute;
 - (2) Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;
 - (3) Taking advantage of influence or relationship to procure a child as prostitute;
 - (4) Threatening or using violence towards a child to engage him as a prostitute; or
 - (5) Giving monetary consideration, goods[,] or other pecuniary benefit to a child with intent to engage such child in prostitution.
- (b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse; *Provided*, That when the victims is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: *Provided*, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be *reclusión temporal* in its medium period; and
- (c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment.³⁷

Section 5 (a) punishes the person who induces a child to engage in prostitution,³⁸ or what is commonly known as “*bugaw*” or “pimp.” Section 5 (b), in turn, punishes the person who engages in sexual intercourse or commits

37. *Id.* § 5 (a-b).

38. *Id.* § 5 (a).

lascivious conduct against the child,³⁹ while Section 5 (c) penalizes the manager or owner of the establishment where the prostitution takes place.⁴⁰ Of the three sub-sections, Section 5 (b) is the most noteworthy, for it is under this provision that an ensuing confusion — that *Tulagan* sought to settle — took place. As will be shown later, despite Section 5 (b)'s seemingly limited application to “[children] exploited in prostitution or subjected to other sexual abuse,”⁴¹ the said provision would unfortunately be applied in every case of sexual abuse committed against any child.

Meanwhile, around five years later, Congress enacted R.A. No. 8353, or the “Anti-Rape Law of 1997.” R.A. No. 8353 reclassified rape from a crime against chastity to a crime against persons, thereby transferring the same from Article 335 of the RPC to Article 266-A of the said Code.⁴² Because of R.A. No. 8353, Rape (and, consequently, Acts of Lasciviousness) could now be committed through any of the following modes:

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

39. *Id.* § 5 (b).

40. *Id.* § 5 (c).

41. *Id.* § 5 (b).

42. The Anti-Rape Law of 1997, § 2.

penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.⁴³

Paragraph 2 above defined a new crime, Rape by Sexual Assault — the acts constituting which were formerly punished *only* as Acts of Lasciviousness. According to R.A. No. 8353, either of the following acts constitute Rape by Sexual Assault: (a) inserting a penis into another person's mouth or anal orifice, or (b) inserting any instrument or object, into the genital or anal orifice of another person.⁴⁴

It must be noted that R.A. No. 7610 did not explicitly repeal any provision in the RPC. Instead, it even made a number of references to the RPC.⁴⁵ It is similarly worth noting that R.A. No. 8353 did not explicitly repeal any provision in R.A. No. 7610 either.⁴⁶

III. THE TWO SCHOOLS OF THOUGHT: *LARIN*, *OLIVAREZ*, AND *MALTO* VERSUS *CABILA*

The conflict in the jurisprudence on the matter started with the 1998 case of *People v. Larin*,⁴⁷ a case decided by the Court's First Division.⁴⁸ The accused in *Larin* was charged with a violation of Section 5 (b) of R.A. No. 7610 for committing lascivious conduct on a 14-year-old girl, specifically, "shaving her pubic hair, performing the lewd act of cunnilingus on her, licking her breasts, forcing her to hold and squeeze his penis; and forcibly kissing her on the cheeks and lips the day after, against her will and consent."⁴⁹ Finding the accused guilty of the acts imputed against him, the Court in *Larin* convicted the accused of violating Section 5 (b) of R.A. No. 7610, ratiocinating, thusly —

43. *Id.* & REVISED PENAL CODE, art. 266-A.

44. The Anti-Rape Law of 1997, § 2 & REVISED PENAL CODE, art. 266-A (2).

45. See Special Protection of Children Against Abuse, Exploitation and Discrimination Act, §§ 5 (b); 6, para. 2; & 10 (a).

46. See The Anti-Rape Law of 1997.

47. *People v. Larin*, 297 SCRA 309 (1998).

48. *Id.* at 309.

49. *Id.* at 313.

A child is deemed exploited in prostitution or subjected to other sexual abuse, when the child indulges in sexual intercourse or lascivious conduct (a) for money, profit, or any other consideration; or (b) under the coercion or influence of any adult, syndicate[,] or group. Under [R.A. No.] 7610, children are 'persons below eighteen years of age or those unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation[,] or discrimination because of their age or mental disability or condition.'

It must be noted that the law covers not only a situation in which a child is abused for profit, but also one in which a child, through coercion or intimidation, engages in any lascivious conduct. Hence, the foregoing provision penalizes not only child prostitution, the essence of which is profit, but also other forms of sexual abuse of children.⁵⁰

Through the foregoing pronouncement in *Larin*, the Court laid the foundations for the interpretation that Section 5 (b) of R.A. No. 7610 applies in each and every case of sexual abuse committed against children, contrary to the section's limiting language (and history, considering *Ritter*) that it applies only when the victim is "a child exploited in prostitution or subjected to other sexual abuse."⁵¹ By ruling that Section 5 (b) was applicable simply because the child was coerced or influenced by an adult in performing lascivious conduct,⁵² the Court effectively opened the option for prosecutors to charge persons under R.A. No. 7610, and for courts to thereafter convict the accused under the said charge, even when the facts of the case necessitate only a charge under the RPC.

The doctrine in *Larin* would then be reiterated in subsequent cases, including *Olivarez v. Court of Appeals*,⁵³ another case decided by the Court's First Division.⁵⁴ In *Olivarez*, the accused was charged with a violation of R.A.

50. *Id.* at 319. (citing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (a)).

51. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

52. *Larin*, 297 SCRA at 319.

53. *Olivarez v. Court of Appeals*, 465 SCRA 465 (2005).

54. *Id.* at 465.

No. 7610 for touching the breasts and kissing the lips of a 16-year-old girl.⁵⁵ In finding the accused guilty, the majority opinion in *Olivarez* used *Larin* as basis and ruled that “a child is deemed subjected to other sexual abuse when the child indulges in lascivious conduct under the coercion or influence of any adult. In this case, [AAA] was sexually abused because she was coerced or intimidated by petitioner to indulge in a lascivious conduct.”⁵⁶

The decision in *Olivarez*, however, was not decided unanimously. Justice Antonio T. Carpio (Justice Carpio) filed a dissenting opinion, arguing, in the main, that the accused in *Olivarez* should only be convicted of Acts of Lasciviousness, defined and punished under Article 336 of the RPC, instead of Section 5 (b) of R.A. No. 7610.⁵⁷ Justice Carpio opined that the term “other sexual abuse” in Section 5 (b)’s use of ‘exploited in prostitution or subjected to other sexual abuse,’”⁵⁸ refers “to any sexual abuse other than the acts of lasciviousness complained of and other than exploitation in prostitution.”⁵⁹ Justice Carpio expounded, thus —

A child performing in indecent shows in a cabaret is a child subjected to ‘other sexual abuse.’ A customer in such [a] cabaret who commits acts of lasciviousness on the child is liable for violation of Section 5 of [R.A. No.] 7610. Also, a photographer who commits acts of lasciviousness on a child he [or she] is shooting for an obscene publication is liable for violation of Section 5 of [R.A. No.] 7610. The penalty for such acts of lasciviousness is more severe than if the acts are committed without the special circumstances of the child’s subjection to ‘*other sexual abuse*.’

Section 5 of [R.A. No.] 7610 penalizes those ‘who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse.’ The act of sexual intercourse or lascivious conduct may be committed on a child *already exploited in prostitution*, whether the child engages in prostitution for profit or someone coerces her into prostitution against her [or his] will. The element of profit or coercion refers

55. *Id.* at 470.

56. *Id.* at 475.

57. *Id.* at 484 (J. Carpio, dissenting opinion).

58. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

59. *Olivarez*, 465 SCRA at 488 (J. Carpio, dissenting opinion).

to the practice of prostitution, not to the sexual intercourse or lascivious conduct committed by the accused. A person may commit acts of lasciviousness even on a prostitute, as when a person mashes the private parts of a prostitute against her will.

The sexual intercourse or act of lasciviousness may be committed on a child *already subjected to other sexual abuse*. The child may be subjected to such *other sexual abuse* for profit or through coercion, as when the child is employed or coerced into pornography. A complete stranger, through force or intimidation, may commit acts of lasciviousness on such child in violation of Section 5 of [R.A. No.] 7610.

The phrase '*other sexual abuse*' plainly means that the child is already subjected to sexual abuse *other* than the crime for which the accused is charged under Section 5 of [R.A. No.] 7610. The '*other sexual abuse*' is an element separate and distinct from the acts of lasciviousness that the accused performs on the child.⁶⁰

Justice Carpio thus voted for the accused in *Olivarez* to be convicted only of Acts of Lasciviousness under the RPC, which imposes only the penalty of *prisión correccional*,⁶¹ instead of a violation of Section 5 (b) of R.A. No. 7610 which, in comparison, imposes the much heavier penalty of *reclusión temporal* in its medium period to *reclusión perpetua*.⁶²

The doctrines in *Larin* and *Olivarez* would then be reiterated in the case of *Malto v. People*,⁶³ another case decided by the Court's First Division.⁶⁴ Interestingly, however, the Court, in *Malto*, distinguished between Rape, as defined in the RPC, and a violation of Section 5 (b) of R.A. No. 7610.⁶⁵ The Court ruled, to wit —

Petitioner was charged and convicted for violation of Section 5 (b), Article III of [R.A. No.] 7610, not rape. The offense for which he was convicted is

60. *Id.* at 489-90.

61. *Id.* at 494.

62. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

63. *Malto v. People*, 533 SCRA 643 (2007).

64. *Id.* at 643.

65. *Id.* at 660.

punished by a special law while rape is a felony under the Revised Penal Code. *They have different elements. The two are separate and distinct crimes.*⁶⁶

Two years after *Olivarez*, the Court's Second Division issued its decision in the case of *Cabila v. People*.⁶⁷ In *Cabila*, the accused therein was indicted for "touching the private parts" of an 8-year old girl.⁶⁸ The trial court, as later on affirmed by the Court of Appeals (CA),⁶⁹ convicted the accused of a violation of Section 5 (b) of R.A. No. 7610.⁷⁰ When it reached the Court, however, the accused in *Cabila* was only convicted of Acts of Lasciviousness under the RPC.⁷¹ The Court, in "downgrading" the conviction of the accused therein, explained that the Information under which the accused was charged did not allege — and much less was it proved during the trial — that the victim was a "child exploited in prostitution or subjected to other sexual abuse."⁷²

Despite the promulgation of *Cabila*, however, the rulings laid down in *Larin*, *Olivarez*, and *Malto* would still be reiterated in subsequent cases like *Caballo v. People*.⁷³ This was understandable because the foregoing rulings were all cases decided by the Court in division. As there was yet no ruling decided by the Court sitting *en banc*, there was thus no established precedent overturning one line of cases in favor of the other.⁷⁴ Meanwhile, rape (by sexual intercourse or sexual assault) and acts of lasciviousness charges continued to be filed in courts, the Informations of which state that the

66. *Id.* (citing *People v. Padilla*, 426 SCRA 648, 654 (2004)) (emphasis supplied).

67. *Cabila v. People*, 538 SCRA 695 (2007).

68. *Id.* at 697.

69. *Id.* at 697 & 700.

70. *Id.* at 699.

71. *Id.* at 704.

72. *Id.* at 701.

73. *Caballo v. People*, 698 SCRA 227 (2013).

74. Section 4 (3), Article VIII of the 1987 Constitution provides that "no doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court sitting *en banc*." PHIL. CONST. art VIII, § 4 (3).

violation was “in relation to R.A. No. 7610” or “in relation to Section 5 (b), R.A. No. 7610.”⁷⁵

A. *The En Banc Cases Upholding the Blanket Application of R.A. No. 7610: Dimakuta, Quimvel, and Caoili.*

In 2015, the Court, sitting *en banc*, issued its decision in *Dimakuta v. People*.⁷⁶ In that case, the accused was indicted for touching the breasts and private part of a 16-year-old girl.⁷⁷ The CA convicted the accused for Acts of Lasciviousness under Article 336 of the RPC only,⁷⁸ notably siding with the Office of the Solicitor General’s recommendation to convict the accused on such a crime and not relate the crime with R.A. No. 7610 to increase the penalty.⁷⁹ Upon appeal to the Court, however, the conviction was modified in accordance with the doctrine laid down in *Larin* and *Olivarez*, with the Court reiterating that “a child is deemed subjected to other sexual abuse when he or she indulges in lascivious conduct under the coercion or influence of any adult.”⁸⁰ The Court elucidated, thus —

Article 226-A, paragraph 2 of the RPC, punishes inserting of the penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person if the victim did not consent [—] either it was done through force, threat[,] or intimidation; or when the victim is deprived of reason or is otherwise unconscious; or by means of fraudulent machination or grave abuse of authority as sexual assault as a form of rape. *However, in instances where the lascivious conduct is covered by the definition under R.A. No. 7610, where the penalty is reclusión temporal medium, and the act*

75. See, e.g., *People v. Dulay*, 681 SCRA 638, 653 (2012); *People v. Subesa* 660 SCRA 390, 393-95 (2011); *People v. Fragante* 642 SCRA 566, 569-72 (2011); *People v. Salino* 678 SCRA 711, 712 (2012); *People vs. Bonaagua* 650 SCRA 620, 625-26 (2011); & *People v. Dalisay* 605 SCRA 807, 812 (2009).

76. *Dimakuta v. People*, 773 SCRA 228 (2015).

77. *Id.* at 245.

78. *Id.* at 246.

79. *Id.* at 245-46.

80. *Id.* at 329 (citing *Olivarez*, 465 SCRA at 475 (majority opinion); *Larin*, 297 SCRA at 318; & *Amplayo v. People*, 457 SCRA 282, 295 (2005)).

is likewise covered by sexual assault under Article 266-A, paragraph 2 of the RPC, which is punishable by *prisión mayor*, the offender should be liable for violation of Section 5 (b), Article III of R.A. No. 7610, where the law provides for the higher penalty of *reclusión temporal medium*, if the offended party is a child victim. But if the victim is at least eighteen (18) years of age, the offender should be liable under [Article] 266-A, [paragraph] 2 of the RPC and not R.A. No. 7610, unless the victim is at least eighteen (18) years and she [or he] is unable to fully take care of herself [or himself] or protect herself [or himself] from abuse, neglect, cruelty, exploitation[,] or discrimination because of a physical or mental disability or condition, in which case, the offender may still be held liable for sexual abuse under R.A. No. 7610.

There could be no other conclusion[:] a child is presumed by law to be incapable of giving rational consent to any lascivious act, taking into account the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual[,] and social well-being of the youth, as well as, in harmony with the foremost consideration of the child's best interests in all actions concerning him or her. *This is equally consistent with the declared policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development; provide sanctions for their commission[,] and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation, and discrimination.* Besides, if it was the intention of the framers of the law to make child offenders liable only [for] Article 266-A of the RPC, which provides for a lower penalty than R.A. No. 7610, the law could have expressly made such statements.⁸¹

Clear from the foregoing disquisition by the Court is its desire to impose upon those who sexually abuse minors a heavier penalty, with a view to providing a stronger deterrent to the commission of such acts. With the undue focus on which law imposes a heavier penalty, the Court in *Dimakuta* unfortunately failed to consider that the two offenses have different elements, as it would subsequently hold in *Fianza v. People*,⁸² citing earlier cases, for instance, to wit —

81. *Dimakuta*, 773 SCRA at 264-65 (citing *Malto*, 533 SCRA at 664 & Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2) (emphases supplied).

82. *Fianza v. People*, 834 SCRA 254 (2017).

The elements of Acts of Lasciviousness under Article 336 of the RPC are: (a) the offender commits any act of lasciviousness or lewdness; (b) the lascivious act is done under any of the following circumstances: (i) by using force or intimidation; (ii) when the offended party is deprived of reason or otherwise unconscious; or (iii) when the offended party is under twelve (12) years of age; and (c) the offended party is another person of either sex. On the other hand, sexual abuse, as defined under Section 5 (b), Article III of [R.A. No.] 7610 has three (3) elements: (a) the accused commits an act of sexual intercourse or lascivious conduct; (b) the said act is performed with a child exploited in prostitution or subjected to other sexual abuse; and (c) the child is below eighteen (18) years old.⁸³

With the above discussion in *Dimakuta*, the Court, in effect, ruled that in *each and every case* of sexual abuse against a minor, specifically when the act done constitutes Acts of Lasciviousness or Rape by Sexual Assault, R.A. No. 7610 applies.⁸⁴ The ruling thus instituted an implied repeal of Article 336 and Article 266-A (2) of the RPC when the victim of the sexual abuse is a minor — all in the name of imposing a heavier penalty on the sexual offenders.

This ruling would ultimately be echoed in three other cases where the Court sat *en banc*, namely: *People v. Quimvel*,⁸⁵ *People v. Caoili*,⁸⁶ and, ultimately, *Tulagan*.

In *Quimvel*, the accused was charged with “Acts of Lasciviousness in relation to Section 5 (b) of R.A. No. 7610” for inserting his hand inside the panty of a 7-year-old girl.⁸⁷ In finding the accused therein guilty, the majority opinion equated force or intimidation — the crucial element in prosecutions under the RPC⁸⁸ — with coercion or influence as used in Section 5 (b) of

83. *Id.* at 265–66 (citing *People v. Lomaque*, 697 SCRA 383, 405 (2013) & *People v. Baraga*, 725 SCRA 293, 300 (2014)) (emphases omitted).

84. *Dimakuta*, 773 SCRA at 264–65 & 267.

85. *Quimvel v. People*, 823 SCRA 192 (2017) (majority opinion).

86. *People v. Caoili*, 835 SCRA 107 (2017).

87. *Quimvel*, 823 SCRA at 217–18 (majority opinion).

88. See REVISED PENAL CODE, art. 266-A (1) (a).

R.A. No. 7610.⁸⁹ Even though the Information filed against the accused alleged that the act was done through “force and intimidation,” the majority opinion still held that the said Information was sufficient to charge the accused of a violation of Section 5 (b) of R.A. No. 7610 because (1) “‘force and intimidation’ is subsumed under ‘coercion and influence[;]’”⁹⁰ and (2) the Information explicitly stated Section 5 (b) of R.A. No. 7610 as the designation of the offense.⁹¹ For reference, the Information filed against the accused reads

The Undersigned Assistant City Prosecutor of Ligao City hereby accuses EDUARDO QUIMVEL y BRAGA also known as EDWARD/EDUARDO QUIMUEL y BRAGA of the crime of *Acts of Lasciviousness in relation to Section 5 (b) of R.A. No. 7610*, committed as follows:

That on or about 8 o’clock in the evening of July 18, 2007 at Palapas, Ligao City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd and unchaste design, *through force and intimidation*, did then and there, willfully, unlawfully[,] and feloniously, insert his hand inside the panty of [AAA], a minor of 7 years old and mash her vagina, against her will and consent, to her damage and prejudice.

ACTS CONTRARY TO LAW.⁹²

Apart from the majority opinion, Justices Diosdado M. Peralta and Estela M. Perlas-Bernabe (Justice Perlas-Bernabe) issued concurring opinions⁹³ agreeing with the conviction of the accused-appellant therein for Acts of Lasciviousness in relation to Section 5 (b) of R.A. No. 7610.

Justice Carpio, meanwhile, reiterated his points in his earlier dissent in *Olivarez*, and opined that R.A. No. 7610 could not apply in the instant case,

89. *Id.* at 227-28 & 230-31 (citing *Larin*, 297 SCRA at 319; *Malto*, 533 SCRA at 656-57; & *Caballo*, 698 SCRA at 242-43)).

90. *Quimvel*, 823 SCRA at 230 (majority opinion) (emphasis omitted).

91. *Id.* at 224-28.

92. *Id.* at 227.

93. *Id.* at 263 (J. Peralta, separate opinion) & 291 (J. Perlas-Bernabe, concurring opinion).

because there was no clear allegation that the victim was exploited in prostitution or subjected to other sexual abuse.⁹⁴ Justice Carpio elucidated,

The element that the child was exploited in prostitution or subjected to other sexual abuse increases the penalty from *prisión correccional* to *reclusión temporal* in its medium period if the victim is under 12 years old. This element distinguishes whether the crime would be punishable under [R.A. No.] 7610 or under the RPC. Thus, there is a need to strictly construe this element. The Court has been consistent in strictly interpreting elements in criminal cases which would increase the penalty against the accused. In *People v. Orilla*, the Court stated that ‘when the law or rules specify certain circumstances that can aggravate an offense or qualify an offense to warrant a greater penalty, *the information must allege such circumstances and the prosecution must prove the same to justify the imposition of the increased penalty.*’ In this case, however, the Information was silent on whether the victim was exploited in prostitution or was subjected to other sexual abuse, and it was also not proven by the prosecution during the trial of the case.⁹⁵

Justice Alfredo Benjamin S. Caguioa (Justice Caguioa) issued his own dissent, arguing that R.A. No. 7610 was not intended to cover all sexual abuses committed against children, and that it is a special law meant to protect a specific group of persons only: children exploited in prostitution or subjected to other sexual abuse.⁹⁶ Justice Caguioa thus said that

[i]n view of the foregoing discussion, Section 5 (b), to my mind, is, as earlier intimated, correctly understood to be a subset of the universe of acts of lasciviousness covered by Article 336, thereby requiring allegation and proof of the specific circumstances required for it to operate — which, again, are simply composed of its essential elements.

The Court’s role is to punish the guilty with the penalty provided by law for the offense proved by the People’s evidence. While I share the sentiment that the highest degree of protection must be afforded to children, I am mindful of the fact that, as far as this protection is equated to the proper penalty upon persons that offend against children, the extent of this

94. *Id.* at 254-55 (J. Carpio, dissenting opinion).

95. *Id.* at 261-62 (citing *People v. Orilla*, 422 SCRA 620, 645 (2004) & *People v. Corral*, 398 SCRA 494, 506-07 (2003)).

96. *Quimvel*, 823 SCRA at 298 (J. Caguioa, dissenting opinion).

protection only goes as far as the law can be reasonably and equitably interpreted to allow.

It is in this light that I cannot join the majority in imposing the higher penalty of *reclusión temporal* as provided in [R.A. No.] 7610, despite the fact that I stand with the rest of the members of the Court in absolute condemnation of the abuse committed against the child victim.⁹⁷

A few months after, the Court *en banc* issued the decision in *Caoli*. In that case, the Information alleged that the accused had sexual intercourse with his victim.⁹⁸ However, the prosecution was able to prove that the accused committed Rape by Sexual Assault, as the accused did not have carnal knowledge of his victim but instead inserted a finger into her vagina. The Regional Trial Court (RTC) convicted the accused under Article 266-A (2) of the RPC (Rape by Sexual Assault), which only punishes the offender with *prisión mayor*.⁹⁹ The Court then ruled that this was improper, as Rape by Sexual Intercourse and Rape by Sexual Assault have different elements.¹⁰⁰ Rape by Sexual Intercourse could only be committed through penile penetration of a woman's vagina,¹⁰¹ while Rape by Sexual Assault, to recall, could be committed against a member of either sex, either by (a) inserting a penis into another person's mouth or anal orifice; or (b) inserting any instrument or object, into the genital or anal orifice of another person.¹⁰²

The Court thus held that the accused could only be convicted of Acts of Lasciviousness, as it was the offense absorbed under the charge of Rape by Sexual Intercourse.¹⁰³ The Court, however, stated that the accused was guilty

97. *Id.* at 323.

98. *Caoli*, 835 SCRA at 128-29.

99. *Id.* at 132-33.

100. *Caoli*, 835 SCRA at 141-42 (citing *People v. Pareja*, 714 SCRA 313, 158 (2014); *People v. Alfredo*, 638 SCRA 749 & 746 (2010); *People v. Espera*, 706 SCRA 704, 717-18 (2013); & *People v. Abulon*, 530 SCRA 675, 703 (2007)).

101. *Caoli*, 835 SCRA at 141-42 (citing *Espera*, 706 SCRA at 717-18 & *Abulon*, 530 SCRA at 703).

102. *Caoli*, 835 SCRA at 142 (citing *Espera*, 706 SCRA at 718).

103. *Caoli*, 835 SCRA at 144 & 149-150 (citing 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5 & *People v. Leonardo*, 624 SCRA 166, 192 (2010)).

of “Lascivious Conduct under Section 5 (b) of R.A. No. 7610” so that it could impose on him, as they did, the heavier penalty of *reclusión perpetua*.¹⁰⁴

Interestingly, Justice Carpio no longer registered his dissent, and only Justice Caguioa insisted on the interpretation that R.A. No. 7610 does not apply to any and all cases of sexual abuse committed against children.¹⁰⁵

Despite the rulings of the Court *en banc* in *Quimvel* and *Caoli*, however, the confusion still persisted, especially on how prosecutors should allege the applicability of R.A. No. 7610 in Informations and how the courts should call the crimes in issuing their convictions. Furthermore, it is important to note that the factual moorings of the two cases involve victims of sexual abuse constituting Acts of Lasciviousness or Rape by Sexual Assault. At the time of *Caoli*'s promulgation, therefore, there was still no case directly applying the provisions of R.A. No. 7610 where the minor was victimized through Rape by Sexual Intercourse.

B. The Court's Dilemma: People v. Ejercito

In 2018, the Court's Second Division rendered a decision in the case of *People v. Ejercito*.¹⁰⁶ In *Ejercito*, the accused was charged with Rape by Sexual Intercourse under the RPC, as amended by R.A. No. 8353, for having carnal knowledge of a 15-year-old girl through force and intimidation, specifically, by pointing a gun at her and threatening to kill her and her family.¹⁰⁷ The Court was faced with a dilemma. On the one hand, it could convict the accused for Rape under the RPC, where the accused would automatically suffer the penalty of *reclusión perpetua*.¹⁰⁸ On the other hand, however, it was

104. *Caoli*, 835 SCRA at 154 & 157. The range of the penalty under Section 5 (b) of R.A. No. 7610, when the victim is 12 years old or above but below 18 is *reclusión temporal* in its medium period to *reclusión perpetua*. *Id.* at 154.

105. *Caoli*, 835 SCRA at 217-18 (J. Caguioa, dissenting opinion).

106. *People v. Ejercito*, G.R. No. 229861, July 2, 2018, available at <http://elibrary.judiciary.gov.ph/thebookshelf/showdocsfriendly/1/64370> (last accessed July 25, 2019).

107. *Id.* at *1-2.

108. *Id.* at *4 (citing REVISED PENAL CODE, art. 266-B).

bound by the established doctrines in the numerous other cases that preceded it, all of which effectively stated that R.A. No. 7610 automatically applies when the victim of the sexual abuse was a minor.¹⁰⁹ If the Court were to follow the doctrines laid down in *Quimvel* and *Caoili*, it would have had to impose upon the accused the penalty of *reclusión temporal* in its medium period to *reclusión perpetua* instead of, as previously mentioned, an outright *reclusión perpetua* under the RPC, as amended by R.A. No. 8353.¹¹⁰

For ease of comparison, a table below is provided showing the change in penalties when the offense is related to R.A. No. 7610:

Acts of the accused constitute the crime of:	Penalty provided under RPC or R.A. No. 8353	Penalty provided under Section 5 (b), R.A. No. 7610
Acts of Lasciviousness	<i>Prisión correccional</i> ¹¹¹	<i>Reclusión temporal</i> medium period to <i>reclusión perpetua</i> ¹¹²
Rape by Sexual Assault	<i>Prisión mayor</i> ¹¹³	<i>Reclusión temporal</i> medium period to <i>reclusión perpetua</i> ¹¹⁴

109. *Ejercito*, G.R. No. 229861, at *1-2 (citing *Quimvel*, 823 SCRA at 227-28, 230-33, & 238-39 (majority opinion)).

110. *See Ejercito*, G.R. No. 229861, at *5 & *15-16 (citing *Caoili*, 835 SCRA at 153-54 (majority opinion) & REVISED PENAL CODE, art. 266-B).

111. REVISED PENAL CODE, art. 336.

112. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

113. REVISED PENAL CODE, art. 266-B & The Anti-Rape Law of 1997, § 2.

114. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

Rape by Sexual Intercourse	<i>Reclusión perpetua</i> ¹¹⁵	<i>Reclusión temporal</i> medium period to <i>reclusión perpetua</i> ¹¹⁶
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The Court in *Ejercito* eventually ruled that the accused should be convicted under the RPC.¹¹⁷ The Court explained that R.A. No. 8353 was not only a more recent statutory enactment compared with R.A. No. 7610, but it was also the more special and comprehensive law on rape.¹¹⁸ The Court viewed R.A. No. 7610 as the “general” law,¹¹⁹ and R.A. No. 8353 as the more “specific” law when it comes to rape;¹²⁰ thus, it only followed the fundamental rule in statutory construction that in case of conflict between a general law and a special law, the latter should prevail.¹²¹ The Court further opined that

115. REVISED PENAL CODE, art. 266-B & The Anti-Rape Law of 1997, § 2.

116. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

117. *Ejercito*, G.R. No. 229861, at *16-17.

118. *Id.* at 10-11.

119. *Id.* at 8-11 (citing REVISED PENAL CODE, art. 335, 266-A, & 266-B; Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b); & The Anti-Rape Law of 1997, § 2)).

120. *Ejercito*, G.R. No. 229861, at *8.

121. *Id.* (citing *Teves v. Sandiganbayan*, 447 SCRA 309, 330 (2004)).

[n]either should the conflict between the application of Section 5 (b) of [R.A. No.] 7610 and [R.A. No.] 8353 be resolved based on which law provides a higher penalty against the accused. The superseding scope of [R.A. No.] 8353 should be the sole reason of its prevalence over Section 5 (b) of [R.A. No.] 7610. The higher penalty provided under [R.A. No.] 8353 should not be the moving consideration, given that penalties are merely accessory to the act being punished by a particular law. The term ‘[p]enalty is defined as [p]unishment imposed on a wrongdoer usually in the form of imprisonment or fine[; p]unishment imposed by lawful authority upon a person who commits a deliberate or negligent act.’ Given its accessory nature, once the proper application of a penal law is determined over another, then the imposition of the penalty attached to that act punished in the prevailing penal law only follows as a matter of course. *In the final analysis, it is the determination of the act being punished together with its attending circumstances [—] and not the gravity of the penalty ancillary to that punished act [—] which is the key consideration in resolving the conflicting applications of two penal laws.*¹²²

IV. SETTLING THE CONFUSION: *PEOPLE V. TULAGAN*

In light of the persisting confusion on the applicability of the three laws when it comes to sexual abuse cases committed against minors, and possibly because of the clarifications laid down in *Ejercito*, the Supreme Court attempted to once and for all settle the confusing doctrines on the matter.

On 12 March 2019, the Court promulgated its decision in *Tulagan*, where it definitively laid down the proper designation of the crime and the corresponding imposable penalty for each scenario.¹²³ For ease of reference, a simpler table of the applicable laws outlining *Tulagan’s* conclusions is provided below:

Age of victim / Acts done by accused	<i>Acts of Lasciviousness</i>	<i>Rape by Sexual Assault</i>	<i>Rape by Sexual Intercourse</i>
<i>Victim is below 12 years old</i>	Section 5(b), R.A. No. 7610 ¹²⁴	Section 5(b), R.A. No. 7610 ¹²⁵	Article 266-A (1) (d), RPC, i.e., Statutory Rape ¹²⁶

<p style="text-align: center;"><i>Victim is 12 years old and above, but below 18 years old</i></p>	<p style="text-align: center;">Section 5(b), R.A. No. 7610¹²⁷</p>	<p style="text-align: center;">Section 5(b), R.A. No. 7610¹²⁸</p>	<p><i>It depends.</i> If the victim is raped through force or intimidation, then apply RPC.¹²⁹</p> <p>If the victim is deemed a “child exploited in prostitution or subjected to other sexual abuse” through the coercion or influence of any adult, then apply Section 5 (b), R.A. No. 7610.¹³⁰</p>
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122. *Ejercito*, G.R. No. 229861, at *14-15 (emphasis omitted) (citing *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, 835 SCRA 350, 434 (2017) (citing BLACK’S LAW DICTIONARY 1270, 1168, & 1269 (8th ed. 2004))); LEONOR BOADO, NOTES AND CASES ON THE REVISED PENAL CODE 9 & 11 (2012 ed.); & FEDERICO B. MORENO, PHILIPPINE LAW DICTIONARY 688 (3d ed. 1988)).

123. *Tulagan*, G.R. No. 227363, at *29-30.

124. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

125. *Id.*

126. REVISED PENAL CODE, art. 266-A (1) (d).

127. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

128. *Id.*

129. REVISED PENAL CODE, art. 266-A (1) (a).

130. *Id.*

A. On the Doctrines for Acts of Lasciviousness and Rape by Sexual Assault

The Court, in *Tulagan*, ruled that if the victim is below 18 years old and the act committed falls under the definition of “lascivious conduct” as defined under R.A. No. 7610 and its Implementing Rules and Regulations (IRR), then the accused must be charged and punished under Section 5 (b) of R.A. No. 7610.¹³¹ The IRR defines “lascivious conduct” as follows:

‘Lascivious conduct’ means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse[,] or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person[.]¹³²

Noteworthy is the fact that the Court’s adopted definition of “lascivious conduct” — the one provided by R.A. No. 7610’s IRR — is so broad that it embraces acts punished either as Acts of Lasciviousness¹³³ or Rape by Sexual Assault.¹³⁴ By using the almost all-encompassing definition of “lascivious conduct” under the IRR, the Court virtually eradicated the distinction

131. *Tulagan*, G.R. No. 227353, at *29 (citing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (a) & Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2 (h)).

132. Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2 (h).

133. “Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article [on rape, Article 266-A], shall be punished by *prisión correccional*.” REVISED PENAL CODE, art. 336.

134. This type of rape is defined as “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” under any of the circumstances mentioned in Article 266-A on rape of the RPC. REVISED PENAL CODE, art. 266-A (2) & The Anti-Rape Law of 1997, § 2.

between (1) Acts of Lasciviousness under the RPC, and Rape by Sexual Assault under R.A. No. 8353, on the one hand; and (2) Section 5 (b) of R.A. No. 7610, on the other. In other words, the Court equated the former with the latter since the acts constituting the former fall under the wide umbrella of acts under “lascivious conduct.”

The Court also justified its blanket application to Section 5 (b) of R.A. No. 7610 to all cases of Acts of Lasciviousness and Rape by Sexual Assault by explaining its understanding of “other sexual abuse” in the phrase “children exploited in prostitution or subjected to *other sexual abuse*” used in Section 5 (b). The Court said —

[It] hold[s] that it is under President *Pro Tempore* Laurel’s amendment on ‘expanded scope’ of ‘child abuse’ under Section 5 (b) and the definition of ‘child abuse’ under Section 3, Article I of R.A. No. 7610 that should be relied upon in construing the element of ‘exploited under prostitution and other sexual abuse.’ In understanding the element of ‘exploited under prostitution and other sexual abuse,’ [it] take[s] into account two provisions of R.A. No. 7610, namely: (1) Section 5, Article III, which states that ‘[c]hildren, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate[,] or group, indulge in sexual intercourse or lascivious conduct, are deemed to be exploited in prostitution and other sexual abuse[;] and (2) Section 3, Article I, which states that ‘child abuse’ refers to the maltreatment, whether habitual or not, of the child, which includes, sexual abuse.

...

The term ‘other sexual abuse,’ on the other hand, should be construed in relation to the definitions of ‘child abuse’ under Section 3, Article I of R.A. No. 7610 and ‘sexual abuse’ under Section 2 (g) of the *Rules and Regulations on the Reporting and Investigation of Child Abuse Cases*. In the former provision, ‘child abuse’ refers to the maltreatment, whether habitual or not, of the child which includes sexual abuse, among other matters. In the latter provision, ‘sexual abuse’ includes the employment, use, persuasion, inducement, enticement[,] or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation, prostitution, or incest with children. *Thus, the term ‘other sexual abuse’ is broad enough to include all other acts of sexual abuse other than prostitution.* Accordingly, a single act of lascivious conduct is punished under Section 5 (b), Article III,

when the victim is 12 years old and below 18, or 18 or older under special circumstances.¹³⁵

In the Court's opinion, therefore, the fact that Section 5 (b) uses the phrase "children exploited in prostitution or subjected to other sexual abuse" does not mean that the provision's application is *limited*. Its construction of "other sexual abuse" is so broad and encompassing that essentially the whole phrase "children exploited in prostitution or subjected to other sexual abuse" has lost any real meaning as it covers *all other acts of sexual abuse*, anyway.

The Court, in *Tulagan*, in essence held that as long as the victim of acts constituting either Acts of Lasciviousness or Rape by Sexual Assault is below 18 years old, then the perpetrator should always be charged and convicted under Section 5 (b) of R.A. No. 7610.¹³⁶

In reaching these conclusions, the Court relied heavily in its earlier pronouncements in *Dimakuta* and *Caoili*, both of which, as discussed, had conclusions that were rooted in putting premium on the impossible penalty in looking at the applicable law. In fact, the Court quotes in *Tulagan* the exact same portions of *Dimakuta* earlier quoted above in this Article, which stated that

in instances where the lascivious conduct is covered by the definition under R.A. No. 7610, where the penalty is *reclusión temporal* medium, and the act is likewise covered by sexual assault under Article 266-A, paragraph 2 of the RPC, which is punishable by [*prisión*] *mayor*, *the offender should be liable for violation of Section 5 (b), Article III of R.A. No. 7610, where the law provides for the higher penalty of reclusión temporal medium, if the offended party is a child victim.*¹³⁷

135. *Tulagan*, G.R. No. 227353, at *34-36 (emphases supplied and omitted) (citing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (b) (1-4); CONG. REC. Vol. I, No. 7, at 262 (Aug. 1, 1991); & Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 2 (g)).

136. *See Tulagan*, G.R. No. 227353, at *21 & *24-25.

137. *Tulagan*, G.R. No. 227353, at *12 (citing *Dimakuta*, 773 SCRA at 264-65) (emphasis supplied).

Viewed from the perspective of *Ejercito*, the case of *Tulagan* was thus a classic example of “one step forward, two steps back.” The Court, albeit in division, already recognized in *Ejercito* that the corresponding penalty should not be a factor in determining the law which should apply in a specific case.¹³⁸ Yet, in *Tulagan*, the Court simply reverted to *Dimakuta*, and so held that Section 5 (b) should apply because it imposes a higher penalty on the accused.¹³⁹

B. On Rape by Sexual Intercourse

The foregoing rulings of the Court in *Tulagan* on Acts of Lasciviousness and Rape by Sexual Assault, however, seem inconsistent with its pronouncements in cases of Rape by Sexual Intercourse.

In *Tulagan*, the Court held that when the victim is below 12 years old, and the act committed constitutes Rape by Sexual Intercourse, then the accused must be prosecuted and convicted under the RPC’s provisions on Statutory Rape.¹⁴⁰ On the other hand, when the victim is 12 years old and above but below 18, prosecutors and the courts must scrutinize the facts and determine if there was consent.¹⁴¹ The Court explained, thus —

It bears emphasis that violation of the first clause of Section 5 (b), Article III of R.A. No. 7610 on sexual intercourse with a child exploited in prostitution or subject to other sexual abuse, is *separate and distinct* from statutory rape under paragraph 1[-](d), Article 266-A of the RPC. Aside from being dissimilar in the sense that the former is an offense under special law, while the latter is a felony under the RPC, *they also have different elements.*

...

If the victim who is 12 years old or less than 18 and is deemed to be a child ‘exploited in prostitution and other sexual abuse’ because she agreed to indulge in sexual intercourse ‘for money, profit or any other consideration or due to coercion or influence of any adult, syndicate or group,’ then the

138. *Ejercito*, G.R. No. 229861, at *14-15.

139. *Tulagan*, G.R. No. 227353, at *12 & *40 (citing *Dimakuta*, 773 SCRA 264-65).

140. *Tulagan*, G.R. No. 227353, at *15-16 (citing REVISED PENAL CODE, art. 266-A (1) (d)).

141. *See Tulagan*, G.R. No. 227353, at *22.

crime could not be rape under the RPC, because this no longer falls under the concept of statutory rape, and there was consent. That is why the offender will now be penalized under Section 5 (b), R.A. No. 7610, and not under Article 335 of the RPC[,]now Article 266-A[]. But if the said victim does not give her consent to sexual intercourse in the sense that the sexual intercourse was committed through force, threat[,] or intimidation, the crime is rape under paragraph 1, Article 266-A of the RPC.¹⁴²

Curiously, the Court was comfortable with differentiating the provisions of the RPC on Rape by Sexual Intercourse, on the one hand, and sexual intercourse with a “child exploited in prostitution or subjected to other sexual abuse” contemplated by R.A. No. 7610, on the other. The Court was, surprisingly, willing to admit that the foregoing provisions have different elements, and that they cover two different situations: one covers sexual intercourse through force and intimidation — in short, there was an absence of consent — and the other provision covers situations where there might also be absence of consent, or consent was obtained but the same was vitiated as it was secured through coercion, influence, or other monetary or non-monetary consideration. The Court further expounded that

when the offended party is 12 years old or below 18 and the charge against the accused is carnal knowledge through ‘force, threat[,] or intimidation,’ then he will be prosecuted for rape under Article 266-A (1) (a) of the RPC. In contrast, in case of sexual intercourse with a child who is 12 years old or below 18 and who is deemed ‘exploited in prostitution or other sexual abuse,’ *the crime could not be rape under the RPC[] because this no longer falls under the concept of statutory rape, and the victim indulged in sexual intercourse either ‘for money, profit or any other consideration or due to coercion or influence of any adult, syndicate or group,’ which deemed the child as one ‘exploited in prostitution or other sexual abuse.’*

...

In *Quimvel*, it was held that the term ‘coercion or influence’ is broad enough to cover or [is] even synonymous with the term ‘force or intimidation.’ Nonetheless, it should be emphasized that ‘coercion or influence’ is used in Section 5 of R.A. No. 7610 to qualify or refer to the means through which ‘any adult, syndicate[,] or group’ compels a child to indulge in sexual intercourse. On the other hand, the use of ‘money, profit or any other consideration’ is the other mode by which a child indulges in sexual

142. *Tulagan*, G.R. No. 227353, at *20 & *22 (emphasis supplied).

intercourse, without the participation of ‘any adult, syndicate or group.’ In other words, ‘coercion or influence’ of a child to indulge in sexual intercourse is clearly exerted NOT by the offender whose liability is based on Section 5 (b) of R.A. No. 7610 for committing sexual act with a child exploited in prostitution or other sexual abuse. Rather, the ‘coercion or influence’ is exerted upon the child by ‘any adult, syndicate, or group’ whose liability is found under Section 5 (a) for engaging in, promoting, facilitating or inducing child prostitution, whereby the sexual intercourse is the necessary consequence of the prostitution.

...

As can be gleaned above, ‘force, threat[,] or intimidation’ is the element of rape under the RPC, while ‘due to coercion or influence of any adult, syndicate[,] or group’ is the operative phrase for a child to be deemed ‘exploited in prostitution or other sexual abuse,’ which is the element of sexual abuse under Section 5 (b) of R.A. No. 7610. The ‘coercion or influence’ is not the reason why the child submitted herself to sexual intercourse, but it was utilized in order for the child to become a prostitute. Considering that the child has become a prostitute, the sexual intercourse becomes voluntary and consensual because that is the logical consequence of prostitution as defined under Article 202 of the RPC, as amended by R.A. No. 10158 where the definition of ‘prostitute’ was retained by the new law:

Article 202. *Prostitutes; Penalty.* — For the purposes of this article, women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct, are deemed to be prostitutes.

Any person found guilty of any of the offenses covered by this article shall be punished by *arresto menor* or a fine not exceeding 200 pesos, and in case of recidivism, by *arresto mayor* in its medium period to *prisión correccional* in its minimum period or a fine ranging from 200 to 2,000 pesos, or both, in the discretion of the court.

Therefore, there could be no instance that an Information may charge the same accused with the crime of rape where ‘force, threat or intimidation’ is the element of the crime under the RPC, and at the same time violation of Section 5 (b) of R.A. No. 7610 where the victim indulged in sexual intercourse because she is exploited in prostitution either ‘for money, profit[,] or any other consideration or due to coercion or influence of any adult, syndicate[,] or group’ — the phrase which qualifies a child to be deemed ‘exploited in prostitution or other sexual abuse’ as an element of violation of Section 5 (b) of R.A. No. 7610.¹⁴³

143. *Id.* at *24-27 (citing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (a)-(b) & An Act Decriminalizing Vagrancy,

V. ANALYSIS: THE COURT'S MISSTEPS

In sum, the Court held in *Tulagan* that Section 5 (b) of R.A. No. 7610 applies in all cases of Acts of Lasciviousness or Rape by Sexual Assault committed against children because they are subjected to lascivious conduct through an adult's coercion or influence — thus, they are automatically deemed “children exploited in prostitution or *subjected to other sexual abuse.*”¹⁴⁴ The Court, however, does not make the same conclusion when the act done against the child-victim constitutes Rape by Sexual Intercourse. In fact, the Court, in its discussion on Rape by Sexual Intercourse, was willing and able to differentiate the circumstance of the use “force, threat, or intimidation” — present in all the three crimes punished under the RPC or R.A. No. 8353 — from “coercion or influence” under Section 5 (b) of R.A. No. 7610.¹⁴⁵

The Court even effectively stated that the crimes as defined in the RPC or R.A. No. 8353 are incompatible with the crime punished under R.A. No. 7610 when it said that “there could be no instance that an Information may charge the same accused with the crime of rape where ‘force, threat or intimidation’ is the element of the crime under the RPC, and at the same time violation of Section 5 (b) of R.A. No. 7610.”¹⁴⁶ This is consistent with its ruling in *Malto* that Section 5 (b) of R.A. No. 7610 “is punished by a special law while rape is a felony under the Revised Penal Code. They have different elements. The two are separate and distinct crimes.”¹⁴⁷

It is therefore, at first, hard to understand why the Court was willing to recognize the foregoing distinctions between the provisions of the RPC, as amended by R.A. No. 8353, and Section 5 (b) of R.A. No. 7610 only when

Amending for this Purpose Article 202 of Act No. 3815, as Amended, Otherwise Known as the Revised Penal Code, Republic Act No. 10158, (2012)) (emphases supplied).

144. *Tulagan*, G.R. No. 227363, at *27-28, *36, & *66 (citing Rules and Regulations on the Reporting and Investigation of Child Abuse Cases Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (h)) (emphasis supplied).

145. *Tulagan*, G.R. No. 227363, at *22 & *27.

146. *Id.* at *27.

147. *Malto*, 533 SCRA at 660.

the act involved is Rape by Sexual Intercourse but not when the act committed by the accused constitutes Acts of Lasciviousness or Rape by Sexual Assault. It is confusing because, after all, the circumstances under which Rape by Sexual Intercourse, Rape by Sexual Assault, or Acts of Lasciviousness may be committed are the same, namely: (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; or (d) when the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.¹⁴⁸ The only real difference between the three offenses is the precise act done by the accused against the victim which, to recall, are:

<i>Crime</i>	<i>Act Committed</i>
Rape by Sexual Intercourse	Carnal knowledge, ¹⁴⁹ or commonly described as penile penetration of the vagina ¹⁵⁰
Rape by Sexual Assault	Either (a) inserting a penis into another person's mouth or anal orifice; or (b) inserting any instrument or object, into the genital or anal orifice of another person. ¹⁵¹
Acts of Lasciviousness	Any other act of lasciviousness

As the circumstances under which the foregoing crimes may be committed are the same, it is, as earlier mentioned, confusing why the Court was unwilling to extend the same type of analysis it had in cases of Rape by

148. REVISED PENAL CODE, art. 266-A (1).

149. *Id.*

150. *Caoli*, 835 SCRA at 142 (majority opinion).

151. REVISED PENAL CODE, 266-A (2).

Sexual Intercourse to cases of Rape by Sexual Assault or Acts of Lasciviousness.

Taking a second look, however, at *Dimakuta*, *Caoili*, *Quimvel*, and, ultimately, *Tulagan*, would reveal that the foregoing inconsistencies are brought about by the Court's desire to impose heavier penalties on those who commit sexual abuses against minors, pursuant to its perceived mandate to fulfill, by its lonesome, the Constitutionally-declared policy of the State to provide children "special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development."¹⁵²

While the Court was impelled by a laudable desire in ruling the way it did in *Dimakuta* and *Tulagan*, it was nevertheless noticeable that the Court lost sight of the fundamental rule in statutory construction that in "the interpretation of penal laws is strictly construed against the State and liberally construed against the accused."¹⁵³ As the Court in a case from 1950 held —

One other rule of interpretation that quarrels with the theory of implied repeal or amendment is that penal law is to be construed, in case of doubt, strictly against the state. '*Criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Only those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt, it[] must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought.*'¹⁵⁴

The above is not just a rule of statutory construction, it is a rule that is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative,

152. PHIL. CONST. art XV, § 3 (2).

153. *Gosiaco v. Ching*, 585 SCRA 471, 479 (2009).

154. *People v. Garcia*, 85 Phil 651, 656 (1950) (citing EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 460-62 (1940)) (emphasis supplied).

not in the Judicial Department. It is the legislature, not the court, which is to define a crime and ordain its punishment.¹⁵⁵

Therefore, with due respect to the Court in *Dimakuta* and *Tulagan*, the main concern should not have been whether the penalty imposed by law for a certain crime is “enough.” Instead, the focus should have been on applying the law as it is.

It was, therefore, immaterial whether the Court deemed as insufficient the imposition of “merely” *prisión correccional* or *prisión mayor* for those convicted of Acts of Lasciviousness or Rape by Sexual Assault committed against children because, borrowing the words of the Court in the case of *People v. Temporada*,¹⁵⁶ the “Court is not the proper forum for this sort of debate. The Constitution forbids it, and the principle of separation of powers abhors it. The Court applies the law as it finds it and not as how it thinks the law should be.”¹⁵⁷

The foregoing statement finds its roots, not only in what essentially judicial power is, but also in the following provision of the RPC:

ARTICLE 5. *Duty of the Court in Connection with Acts Which Should Be Repressed but Which are Not Covered by the Law, and in Cases of Excessive Penalties.* — Whenever a court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision, and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of penal legislation.

In the same way the court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper, without suspending the execution of the sentence, when a strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.¹⁵⁸

With palpable regret, the Court, in *Ritter*, decided to uphold its sworn duty to apply the law in the given set of facts, and instead just called the

155. *United States v. Wiltberger*, 18 U.S. 35, 43 (1820).

156. *People v. Temporada*, 574 SCRA 258 (2008).

157. *Id.* at 306.

158. REVISED PENAL CODE, art. 5.

attention of its co-equal branch — the one in charge of making the laws — on the absence of — or gap in — the law.¹⁵⁹ Fortunately, the co-equal branch listened. In another case, *Corpuz v. People*,¹⁶⁰ some members of the Court opined that the continued application of penalties which were dependent of the value of money or property stolen or appropriated have become unjust,¹⁶¹ some even arguing that the penalties constituted cruel or inhuman punishment,¹⁶² because the basis of the penalties remained the same since the 1930s, without due regard for inflation.¹⁶³ Despite recognizing the need to adjust the penalties imposed per value then provided by the RPC, the Court decided to exercise restraint and instead used Article 5 of the RPC to call the attention of the legislature on the injustice, thus —

There seems to be a perceived injustice brought about by the range of penalties that the courts continue to impose on crimes against property committed today, based on the amount of damage measured by the value of money [80] years ago in 1932. However, this Court cannot modify the said range of penalties because that would constitute judicial legislation. What the legislature's perceived failure in amending the penalties provided for in the said crimes cannot be remedied through this Court's decisions, as that would be encroaching upon the power of another branch of the government.

...

Verily, the primordial duty of the Court is merely to apply the law in such a way that it shall not usurp legislative powers by judicial legislation and that in the course of such application or construction, it should not make or supervise legislation, or under the guise of interpretation, modify, revise, amend, distort, remodel, or rewrite the law, or give the law a construction which is repugnant to its terms. The Court should apply the law in a manner that would give effect to their letter and spirit, especially when the law is clear as to its intent and purpose. Succinctly put, the Court should shy away from encroaching upon the primary function of a co-equal branch of

159. *Ritter*, 194 SCRA at 723 (1991).

160. *Corpuz v. People*, 724 SCRA 1 (2014).

161. *Id.* at 69 (C.J. Sereno, concurring and dissenting opinion); *Id.* at 78 (J. Carpio, dissenting opinion); & *Id.* at 132 (J. Abad, dissenting opinion).

162. *Corpuz*, 724 SCRA at 78 (J. Carpio, dissenting opinion) & *Id.* at 132 (J. Abad, dissenting opinion).

163. *Corpuz*, 724 SCRA at 143 (J. Leonen, concurring and dissenting opinion) & *Corpuz*, 724 SCRA at 128-29 (J. Abad, dissenting opinion).

the Government; otherwise, this would lead to an inexcusable breach of the doctrine of separation of powers by means of judicial legislation.¹⁶⁴

Roughly three years after *Corpuz*, the legislature would respond and enact Republic Act No. 10951¹⁶⁵ to correct the injustice.

Respectfully, the path that the Court took in *Corpuz* would have been the ideal path for the Court in *Dimakuta* and *Tulagan*. If there was indeed an ambiguity in the applicability of the laws (RPC, as amended by R.A. No. 8353 and R.A. No. 7610), then the proper recourse would have been to apply the letter of the law, that is, to limit the application of R.A. No. 7610 to “children exploited in prostitution or subjected to other sexual abuse” for two reasons:

- (1) As discussed, any doubt or ambiguity in the construction of penal laws should be strictly construed against the State, and liberally in favor of the accused.¹⁶⁶ To reiterate, “[o]nly those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute’s operation.”¹⁶⁷
- (2) There was no clear legislative intent for R.A. No. 7610 to partially repeal the provisions of the RPC if the victim was below 18 years old. To repeat, R.A. No. 7610 even made a number of references to the RPC, without mentioning that it expressly partially repeals the same.¹⁶⁸ It is well to stress that

[r]epeals by implication are not favored as laws are presumed to be passed with deliberation and full knowledge of all laws existing on the subject.

164. *Corpuz*, 724 SCRA at 36 & 57 (citing *People v. Quijada*, 259 SCRA 191, 227-28 (1996)) (emphasis supplied).

165. An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based, and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known As “The Revised Penal Code,” as Amended, Republic Act No. 10951 (2017).

166. *Garcia*, 85 Phil at 656 (citing CRAWFORD, *supra* note 154, at 460-62).

167. *Id.* (citing CRAWFORD, *supra* note 154, at 462).

168. *See* Special Protection of Children Against Abuse, Exploitation and Discrimination Act, §§ 5 (b); 6, para. 2; & 10 (a).

Such repeals are not favored for a law cannot be deemed repealed unless it is clearly manifest that the legislature so intended it. The failure to add a specific repealing clause indicates that the intent was *not* to repeal any existing law, unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and old laws.¹⁶⁹

There is no such irreconcilable inconsistency and repugnancy in the case of the RPC and R.A. No. 7610.

The Court in *Dimakuta* and *Tulagan* could have thus taken the route chosen by *Corpuz*: apply the letter of the law, and call on Congress to correct the perceived injustice (the “insufficient” penalties for acts of lasciviousness and rape by sexual assault if committed against children), instead of construing the laws such that the law which imposes the heavier penalty would apply while justifying such interpretation through the State policy to provide special protection to children.

It is worth noting that the Court already used *Tulagan* as an opportunity to abandon some erroneous conclusions in *Dimakuta* (and *Malto*) such as, for instance, that “a child is presumed by law to be incapable of giving rational consent to any lascivious act.”¹⁷⁰ The Court in *Tulagan* overturned the said statement for it “would virtually eradicate the concepts of statutory rape and statutory acts of lasciviousness, and trample upon the express provision of the said law.”¹⁷¹

Instead, however, of doing the same and correcting the missteps in *Dimakuta*, *Caoli*, and *Quimvel*, the Court in *Tulagan* chose to rely on precedent — on *stare decisis*¹⁷² — when it had the opportunity to overturn the

169. *Recaña, Jr. v. Court of Appeals*, 349 SCRA 24, 33 (2001) (citing *Lo Cham v. Ocampo*, 77 Phil. 636, 638 (1946)).

170. *Dimakuta*, 773 SCRA at 265 & *Malto*, 533 SCRA at 663.

171. *Tulagan*, G.R. No. 227363, at *19.

172. *Stare decisis et non quieta movere* means “to adhere to precedents and not to unsettle things which are established,” — a doctrine manifested in Article 8 of the Civil Code of the Philippines (“Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.”). *Lazatin v. Desierto*, 588 SCRA 285, 293 (2009) (citing *An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE]*, art. 8 (1950)).

incorrect doctrines in these cases as they were already sitting *en banc* in *Tulagan*.¹⁷³

VI. CONCLUSION AND RECOMMENDATIONS

In justifying its confusing conclusions in *Dimakuta*, *Caoili*, *Quimvel*, and *Tulagan*, the Court — relying heavily on Section 3 (2), Article XV of the 1987 Constitution¹⁷⁴ — repeatedly asserted that its conclusions were “consistent with the declared policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development.”¹⁷⁵

What the Court failed to realize, however, is that the said State policy is, by the Court’s own words, one of the provisions of the Constitution which “are mere statements of principles and policies. As such, they are mere directives addressed to the executive and the legislative departments.”¹⁷⁶

The aforementioned State policy, while a collective goal for the whole of government, is primarily addressed to the Legislature to guide the latter in crafting laws. It was never meant to be used by the Court in unduly expanding the coverage of a penal law that is, by its letter, limited in its application: again, only in instances when the victim is a child “exploited in prostitution or subjected to other sexual abuse.”¹⁷⁷

173. See PHIL. CONST. art VIII, § 4 (3). (“[N]o doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court sitting *en banc*.”) PHIL. CONST. art VIII, § 4 (3).

174. PHIL. CONST. art XV, § 2 (3).

175. *Dimakuta*, 773 SCRA at 265; *Quimvel*, 823 SCRA at 282 (majority opinion); & *Tulagan*, G.R. No. 227363, at *28. See also *Caoili*, 835 SCRA at 162 (J. Peralta, separate concurring opinion).

176. *Tondo Medical Center Employees Association v. Court of Appeals*, 527 SCRA 746, 765 (2007). This case explicitly states that Section 3, Article XV of the Constitution is not self-executing. *Id.*

177. Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 5 (b).

The Court, in *Temporada*, in explaining the reason for rule of strict construction of penal statutes, already intimated that a violation of such rule may constitute judicial legislation, thus —

But also, for a court to enforce a penalty where the legislature has not clearly and unequivocally prescribed it could result in judicial usurpation of the legislative function. One court has noted that the reason for the rule is ‘to guard against the creation, by judicial construction, of criminal offenses not within the contemplation of the legislature[.]’ Thus[,] the rule requires that before a person can be punished[,] his case must be plainly and unmistakably within the statute sought to be applied. And, so, where a statute is open to more than one interpretation, it is strictly construed against the [S]tate. Courts further rationalize this application of the rule of strict construction on the ground that it was not the defendant in the criminal action who caused ambiguity in the statute. Along these same lines, courts also assert that since the [S]tate makes the laws, they should be most strongly construed against it.¹⁷⁸

Similarly, Justice Caguioa, in his separate opinion in *Tulagan*, finds that the majority opinion committed the said error, to wit —

Therefore, while I identify with the Court in its desire to impose a heavier penalty for sex offenders who victimize children [—] the said crimes being undoubtedly detestable [—] the Court cannot arrogate unto itself a power it does not have. Again, the Court’s continuous application of R.A. [No.] 7610 in *all* cases of sexual abuse committed against minors is, with due respect, an exercise of judicial legislation which it simply cannot do.¹⁷⁹

Verily, while the Court’s efforts in fulfilling the Constitutional mandate to provide special protection to children are undoubtedly admirable, the fulfillment of the said State policy ought not to be at the expense of the rights of the accused and the principle of separation of powers.

The Court is thus respectfully invited to revisit its conclusions in *Tulagan* and to further appreciate the complementary nature of the relationship between the RPC, as amended by R.A. No. 8353, and R.A. No. 7610.

178. *Temporada*, 574 SCRA at 308 (emphasis omitted) (citing 3 JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, at § 59:3 (6th ed. 2000)).

179. *Tulagan*, G.R. No. 227363, at *26, available at <http://sc.judiciary.gov.ph/2833/> (last accessed July 25, 2019) (J. Caguioa, concurring and dissenting opinion).

It ought to be stressed that Section 5 (b) of R.A. No. 7610 was never meant to repeal the provisions of the RPC.¹⁸⁰ It was enacted to fill the gaps in the law; to punish those acts that previously went unpunished.¹⁸¹ The RPC, as amended by R.A. No. 8353, already covers the instances where the sexual abuse happened with the absolute lack of consent.¹⁸² R.A. No. 7610, particularly its Section 5 (b), was meant to address the gap, namely, the instances where, for example, consent to the sexual act was given but it was obtained through monetary or non-monetary considerations.¹⁸³ To this end, Justice Perlas-Bernabe's appreciation of the phrase "subjected to other sexual abuse" is worth adopting, thus —

As Justice Carpio rationalized in *Quimvel*, '[t]he phrase 'or any other consideration or due to the coercion or influence of any adult, syndicate or group' was added to merely cover situations where a child is abused or misused for sexual purposes without any monetary gain or profit. This was significant because profit or monetary gain is essential in prostitution. Thus, the lawmakers intended that in case all the other elements of prostitution are present, but the monetary gain or profit is missing, the sexually abused and misused child would still be afforded the same protection of the law as if he or she were in the same situation as a child exploited in prostitution.'

Clearly[,] therefore, the phrase 'or subject to other sexual abuse' was meant only to expand the range of circumstances that are nonetheless, relevant to the child's circumstantial pre-disposition and hence, should not be confounded with the act of sexual abuse which is a separate and distinct element under the law.

...

However, it is fairly evident that with the coining of the new phrase 'a child exploited in prostitution or subject to other sexual abuse,' Congress intended to establish a special classification of children, i.e., those EPSOSA, which is further suggested by the term 'deemed.' It is a cardinal rule in statutory construction that when the

180. See Special Protection of Children Against Abuse, Exploitation and Discrimination Act, §§ 5 (b) & 6.

181. *Tulagan*, G.R. No. 227363, at *44, available at <http://sc.judiciary.gov.ph/2827/> (last accessed July 25, 2019) (J. Perlas-Bernabe, separate opinion) & *Tulagan*, G.R. No. 227363, at *15 & *33 (J. Caguioa, concurring and dissenting opinion).

182. REVISED PENAL CODE, arts. 266-A (1)-(2) & 336.

183. *Tulagan*, G.R. No. 227363, at *4 (J. Perlas-Bernabe, separate opinion).

law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application. As the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation.¹⁸⁴

Finally, it may be true, as the Court believes, that those who prey on innocent children deserve a heavier penalty than what the RPC or R.A. No. 8353 provide. This question, however, involves the wisdom of the law and, to borrow the words of the Supreme Court of the United States in *United States v. Wiltberger*,¹⁸⁵ “the power of punishment is vested in the legislative, not in the Judicial Department. It is the legislature, not the court, which is to define a crime[] and ordain its punishment.”¹⁸⁶

In this connection, it may very well be an opportune time to call the attention of the Legislature on the matter. Considering the confusion that had persisted through the years which ultimately led to the decision in *Tulagan*, it may be best for the Congress to enact a law that will, once and for all, settle the confusion and finally prescribe the proper penalties for each of the offenses.

To end, while the Author joins the Court’s crusade in seeking full justice for victims of rape and sexual abuse, especially child-victims, it is well to be equally aware and mindful that “[t]he individual citizen is but a speck of particle or molecule *vis-à-vis* the vast and overwhelming powers of government.”¹⁸⁷ “[O]urs is still a government of laws and not of men,”¹⁸⁸ and thus, the offenders have the “right to be punished only to the extent of the specific punishment imposed on them by the law.”¹⁸⁹

184. *Id.* at 10-11 (citing *Quimvel*, 823 SCRA at 256-60 (J. Carpio, dissenting opinion); *Amores v. House of Representatives Electoral Tribunal*, 622 Phil. 593, 598 (2010); & *Padua v. People*, 559 SCRA 519, 531 (2008)) (emphases supplied and emphasis omitted).

185. *United States v. Wiltberger*, 18 U.S. 35 (1820).

186. *Id.* at 43.

187. *Secretary of Justice v. Lantion*, 322 SCRA 160, 169 (2000).

188. *Republic v. Southside Homeowners Association, Inc.*, 502 SCRA 587, 612 (2006).

189. *Tulagan*, G.R. No. 227363 at 44 (J. Caguioa, concurring and dissenting opinion) (emphasis omitted).