EN BANC

G.R. No. 247348 – CHRISTIAN CADAJAS y CABIAS, *petitioner*, v. PEOPLE OF THE PHILIPPINES, *respondent*.

Promulgated:
November 16, 2021

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SEPARATE CONCURRING AND DISSENTING OPINION

LEONEN, *J.*:

I agree with the *ponente* that Christian Cadajas's (Cadajas) conviction for violation of Section 4(c)(2) of Republic Act No. 10175 in relation to Sections 4(a), 3(b) and 3(c)(5) of Republic Act No. 9775 should be upheld. In my view, the inherent immorality of child pornography does not prohibit us from characterizing the offense as *malum prohibitum*. This characterization is more consistent with the constitutional mandate of giving special protection to children against all forms of abuse. Especially in cyberspace, we need to be vigilant and uphold our ruling that a child cannot give consent to a lascivious act. We should not permit the sweetheart theory as a defense against child pornography. In this digital era, we should recalibrate how we view the right to informational privacy and how we give primacy to the best interests of a child.

I

Right to privacy is a fundamental right under the Constitution. In essence, it is the "right to be let alone."[1] It "is an essential condition to the dignity and happiness and to the peace and security of every individual, whether it be of home or of persons and correspondence."[2] It is equally fundamental yet distinct as the right to liberty itself:

> Liberty in the constitutional sense not only means freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is the beginning of all freedom — it is the most comprehensive of rights and the right most valued by civilized [humans].
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> The concept of liberty compels respect for the individual whose claim to privacy and interference demands respect. As the case of *Morfe v. Mutuc*, borrowing the words of Laski, so very aptly stated:

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1 *Ople v. Torres*, 354 Phil. 948, 970 (1998) [Per J. Puno, En Banc].
2 *People v. Court of First Instance of Rizal* 189 Phil. 75, 92 (1980) [Per J. Guerrero, First Division].

> [Human] is one among many, obstinately refusing reduction to unity. [Their] separateness, [their] isolation, are indefeasible; indeed, they are so fundamental that they are the basis on which [their] civic obligations are built. [They] cannot abandon the consequences of [their] isolation, which are, broadly speaking, that [their] experience is private, and the will built out of that experience personal to [themselves]. If [they surrender their] will to others, [they surrender themselves]. If [their] will is set by the will of others, [they cease] to be a master of [themselves]. I cannot believe that a [human] no longer a master of [themselves] is in any real sense free.[3]

The right to privacy has many facets protected under the Constitution and our laws:

> Indeed, if we extend our judicial gaze[,] we will find that the right of privacy is recognized and enshrined in several provisions of our Constitution. It is expressly recognized in Section 3(1) of the Bill of Rights:
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> > Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
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> Other facets of the right to privacy are protected in various provisions of the Bill of Rights, *viz*:
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> > "Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.
> >
> > Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.
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> > [. . . .]
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> > Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.
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> > [. . . .]

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[3] *City of Manila v. Laguio*, 495 Phil. 289, 318 (2005) [Per J. Tinga, En Banc].

> Sec. 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.
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> Sec. 17. No person shall be compelled to be a witness against himself.
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> Zones of privacy are likewise recognized and protected in our laws. The Civil Code provides that "[e]very person shall respect the dignity, personality, privacy and peace of mind of [their] neighbors and other persons" and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The Revised Penal Code makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in special laws like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act and the Intellectual Property Code. The Rules of Court on privileged communication likewise recognize the privacy of certain information.[4] (Citations omitted)

Aside from these, the Judiciary and the Congress have strengthened the protection of the right to privacy. In 2008, the Supreme Court promulgated the Rules on the Writ of Habeas Data through the initiative of then Chief Justice Reynato Puno.[5] The writ aims to "protect a person's right to control information regarding oneself, particularly in instances where such information is being collected through unlawful means in order to achieve unlawful ends."[6] Similarly, Congress enacted two important pieces of legislation in 2012. These are the Data Privacy Act[7] and the Cybercrime Prevention Act of 2012.[8] The Data Privacy Act aims to ensure that personal information processed by the government and private sector are secured and protected.[9] Meanwhile, the Cybercrime Prevention Act of 2012 punishes all forms of misuse, abuse, and illegal access "of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein."[10]

Chief Justice Puno sparked judicial interest in the right to privacy. In his speech that I cited in my separate opinion in *Versoza v. People*,[11] he discussed the three strands of privacy in American Jurisprudence, namely,

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4 *Ople v. Torres*, 354 Phil. 948, 972–974 (1998) [Per J. Puno, En Banc].

5 Public Information Office Supreme Court, *Completing the Circle of Human Rights: The Puno Initiative*, available at <http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/CCHR-01-FINAL-03SEPT2010-BB.pdf> (last accessed on November 29, 2021).

6 In re Rodriguez, 676 Phil. 84, 103 (2011) [Per J. Sereno, En Banc].

7 Republic Act No. 10173 (2012).

8 Republic Act No. 10175 (2012).

9 Republic Act No. 10173 (2012), sec. 2.

10 Republic Act No. 10175 (2012), sec. 2.

11 *Versoza v. People*, G.R. No. 184535, September 03, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65765> [Per Curiam, En Banc].

locational or situational privacy, informational privacy, and decisional privacy:

> Locational privacy, also known as situational privacy, pertains to privacy that is felt in a physical space. It may be violated through an act of trespass or through an unlawful search. Meanwhile, informational privacy refers to one's right to control "the processing—i.e., acquisition, disclosure, and use—of personal information."
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> Decisional privacy, regarded as the most controversial among the three, refers to one's right "to make certain kinds of fundamental choices with respect to their personal and reproductive autonomy."[12] (Citations omitted)

This speech has been influential in several of our jurisprudence.[13] To this day, we are still refining our concept of privacy, particularly the right to informational privacy.[14]

As early as *Morfe v. Mutuc*,[15] we have recognized the increasing importance of the protection of the right to privacy in the digital age. Such right is of particular importance given the nature of the internet and our inescapable dependence on it despite the possible disruption that it can bring. In my separate opinion in *Disini v Secretary of Justice*,[16] I explained:

> The internet or cyberspace is a complex phenomenon. It has pervasive effects and are, by now, ubiquitous in many communities. Its possibilities for reordering human relationships are limited only by the state of its constantly evolving technologies and the designs of various user interfaces. The internet contains exciting potentials as well as pernicious dangers.
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> The essential framework for governance of the parts of cyberspace that have reasonable connections with our territory and our people should find definite references in our Constitution. However, effective governance of cyberspace requires cooperation and harmonization with other approaches in other jurisdictions. Certainly, its scope and continuous evolution require that we calibrate our constitutional doctrines carefully: in concrete steps and with full and deeper understanding of incidents that involve various parts of this phenomenon. The internet is neither just one relationship nor is it a single technology. It is an interrelationship of many technologies and cultures.

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[12] J. Leonen, Separate Opinion in *Versoza v. People*, G.R. No. 184535, September 03, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65765> [Per Curiam, En Banc]. The speech entitled The Common Right to Privacy was delivered during the Forum on The Writ of Habeas Data and Human Rights, sponsored by the National Union of Peoples' Lawyers on March 12, 2008 at the Innotech Seminar Hall, Commonwealth Ave., Quezon City. It was also cited in Footnote 20 of *Vivares v. St. Theresa's College*, 744 Phil. 451 (2014) [Per J. Velasco, Third Division].

[13] See *Vivares v. St. Theresa's College*, 744 Phil. 451 (2014) [Per J. Velasco, Third Division] and *De Lima v. Duterte*, G.R. No. 227635, October 15, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65820> [Per J. Bersamin, En Banc].

[14] *Gamboa v. P/Suppt. Chan*, 691 Phil. 602 (2012) [Per J. Sereno, En Banc].

[15] 130 Phil. 415, (1968) [Per J. Fernando, En Banc].

[16] 727 Phil. 28, (2014) [Per J. Abad, En Banc].

. . . .

> While the Internet has engendered innovation and growth, it has also engendered new types of disruption. A noted expert employs an "evolutionary metaphor" as he asserts:
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> > [Generative technologies] encourage mutations, branchings away from the status quo — some that are curious dead ends, others that spread like wildfire. They invite disruption — along with the good things and bad things that can come with such disruption.
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> Addressing the implications of disruption, he adds:
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> > Disruption benefits some while others lose, and the power of the generative Internet, available to anyone with a modicum of knowledge and a broadband connection, can be turned to network-destroying ends. . . [T]he Internet's very generativity — combined with that of the PCs attached — sows the seeds for a "digital Pearl Harbor."
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> The Internet is an infrastructure that allows for a "network of networks." It is also a means for several purposes. As with all other "means enhancing capabilities of human interaction," it can be used to facilitate benefits as well as nefarious ends. The Internet can be a means for criminal activity.
>
> Parallel to the unprecedented escalation of the use of the Internet and its various technologies is also an escalation in what has been termed as cybercrimes.[17]

Privacy scholars explain that the right to informational privacy, to a certain extent, requires "limitation on inspection, observation, and knowledge by others."[18] Thus, it has the following aspects: (1) to keep inalienable information to themselves; (2) to prevent first disclosure; and (3) to prevent further dissemination in case the information has already been disclosed.[19] More recently, the European Union has paved the way for the fourth aspect— the right to be forgotten, or the right to prevent the storage of data.[20]

As regards the first component of the right to informational privacy, a person has the right not to be exposed on the internet in matters involving one's private life, such as acts having no relation to public interest or

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17 J. Leonen, Dissenting and Concurring Opinion in *Disini v. Secretary of Justice*, 727 Phil. 28, 308–320 (2014) [Per J. Abad, En Banc].

18 C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, *in* 21 FREEDOM OF SPEECH 216 (Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul eds., 2004).

19 Id.

20 The right to be forgotten gained international prominence after the European Union's decision on *Google Spain SL v. Agencia Espanola de Proteccion de Datos* (AEPD), E.C.R. Case C-131/12 (2014). See Michael J. Kelly and and David Satola, *The Right to be Forgotten*, 1 U. ILL. L. REV. 1 (2017).

concern.[21] Closely related to the first component is the right to prevent first disclosure, allowing individuals to regulate the extent, time, and manner of disclosure, if at all, of their information. In case the data have been illegally disclosed, a person does not lose protection since they have the right to prevent their further dissemination.[22] In some cases, one has the right to prevent the storage of their data, which gives one the right to be forgotten. Privacy scholars describe this right as "forced omission," or the process of making the information difficult to find on the internet.[23]

Undue disclosure of digital information can already do damage even if deleted at a later time. Anyone who gains access to such information can use it for their own purpose. They can take it out of context and use it for a purpose contrary to what the person originally intended. For instance, intimate photos of lovers shared through private chats can be weaponized by a disgruntled lover. Applications that do not have end-to-end encryption can also be intercepted by unscrupulous third persons.

Even an innocent posting of photos on social media can be dangerous and consequential to a person's life. Take *Vivares v. St. Theresa's College*.[24] Swimsuit photos of graduating high school students were taken during a birthday party and uploaded on Facebook. This seemingly inconsequential act gave cause for St. Theresa's College to conduct disciplinary procedure, which in turn prevented these students from graduating with their class.

Given the ease for which we can lose control of our information online, this Court's warning on the vigilance in exposing oneself in cyberspace is relevant:

> [Online social network] users should be aware of the risks that they expose themselves to whenever they engage in cyberspace activities. Accordingly, they should be cautious enough to control their privacy and to exercise sound discretion regarding how much information about themselves they are willing to give up. Internet consumers ought to be aware that, by entering or uploading any kind of data or information online, they are automatically and inevitably making it permanently available online, the perpetuation of which is outside the ambit of their control. Furthermore, and more importantly, information, otherwise private, voluntarily surrendered by them can be opened, read, or copied by third parties who may or may not be allowed access to such.
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> It is, thus, incumbent upon internet users to exercise due diligence in their online dealings and activities and must not be negligent in protecting their rights. Equity serves the vigilant. Demanding relief from the courts, as here, requires that claimants themselves take utmost care in safeguarding

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21 C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, *in* 21 FREEDOM OF SPEECH 216 (Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul eds., 2004).

22 Id.

23 Michael J. Kelly and and David Satola, *The Right to be Forgotten*, 1 U. ILL. L. REV. 1, 4 (2017).

24 744 Phil. 451 (2014) [Per J. Velasco, Third Division].

> a right which they allege to have been violated. These are indispensable. We cannot afford protection to persons if they themselves did nothing to place the matter within the confines of their private zone. [Online social network] users must be mindful enough to learn the use of privacy tools, to use them if they desire to keep the information private, and to keep track of changes in the available privacy settings, such as those of Facebook, especially because Facebook is notorious for changing these settings and the site's layout often.[25]

While the *ponente* cited the *Spouses Hing v. Choachuy*[26] framework in assessing violations of the right to privacy vis-à-vis one's expectation of privacy, the current technological developments require us to reexamine our doctrine. Thus, in *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*,[27] I cautioned the majority against the vulnerability of data and the necessity of redefining legitimate expectation of privacy in this digital age:

> The truth is that most of today's digital data is vulnerable to one who is curious enough, exceedingly determined, skillful, and willing to deploy the necessary time and resources to make discovery of our most private information. Ubiquitous surveillance systems that ensure the integrity as well as increase confidence in the security of the data kept in a system are ever present. Copying or transferring digital data occurs likewise with phenomenal speed. Data shared in cyberspace also tends to be resilient and difficult to completely delete. Users of various digital platforms, including bank accounts, are not necessarily aware of these vulnerabilities.
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> Therefore, the concept of "legitimate expectation of privacy" as the framework for assessing whether personal information fall within the constitutionally protected penumbra need to be carefully reconsidered. In my view, the protected spheres of privacy will make better sense when our jurisprudence in the appropriate cases make clear how specific types of information relate to personal identity and why this is valuable to assure human dignity and a robust democracy in the context of a constitutional order.[28]

The need to protect this fundamental right is more imperative given the rise of surveillance capitalism. Digital infrastructures and technological advancements are being used to aggregate people and their choices as data objects.[29] This is made possible with the indiscriminate buying and selling of our personal data and other sensitive information without regard to the informational aspect of privacy. Big technology companies and small startup

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25 Id. at 479–480.

26 See *ponencia*, p. 7–9; *Spouses Hing v. Choachuy*, 712 Phil. 337 (2013) [Per J. Del Castillo, Second Division].

27 802 Phil. 314 (2016) [Per J. Perez, En Banc].

28 J. Leonen, Dissenting and Concurring Opinion in *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*, 802 Phil. 314, 386 (2016) [Per J. Perez, En Banc].

29 Shoshana Zuboff, *"We Make Them Dance": Surveillance Capitalism, the Rise of Instrumentarian Power, and the Threat to Human Rights, in* HUMAN RIGHTS IN THE AGE OF PLATFORMS 13–15 (Rikke Frank Jørgensen ed., 2019), available at <http://library.oapen.org/handle/20.500.12657/24492> (last accessed on March 24, 2022).

businesses have been optimizing this model to predict and clandestinely manipulate human behavior for monetary and other purposes.[30] This impels us to recalibrate how we view the right to privacy in cyberspace and how we can protect the vulnerable.

II

While the Bill of Rights considers the right to privacy as inviolable, this guarantee can be invoked only against the State. The Constitution limits the power of the State to intrude on one's privacy when required by law, a lawful court order, or when it is necessitated by public safety or order. [31] The unjustified intrusion of the State to the right to privacy results in the exclusion of any evidence obtained in violation of this right.[32]

The purpose of this rule is three-fold, namely, to deter unreasonable searches and seizure; to uphold judicial integrity; and to assure the public that the government will not benefit from its unlawful conduct.[33] The exclusionary rule ensures the right to due process of citizens in making sure that they will be protected against unwarranted State encroachment on their fundamental constitutional rights.[34]

We clarified in *People v. Marti*[35] that one's constitutional right to privacy cannot be invoked against acts of private individual:

> [T]he constitution, in laying down the principles of the government and fundamental liberties of the people, does not govern relationships between individuals. Moreover, it must be emphasized that the modifications introduced in the 1987 Constitution. . . relate to the issuance of either a search warrant or warrant of arrest vis-à-vis the responsibility of the judge in the issuance thereof. . . The modifications introduced deviate in no manner as to whom the restriction or inhibition against unreasonable search and seizure is directed against. The restraint stayed with the State and did not shift to anyone else.
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> Corollarily, alleged violations against unreasonable search and seizure may only be invoked against the State by an individual unjustly traduced by the exercise of sovereign authority. To agree with appellant that an act of a private individual in violation of the Bill of Rights should

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30 Id. at 19–20.

31 CONST. art. 3, sec. 3 (1). It provides that:
SECTION 3 (1). The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

32 CONST., art. 3, sec. 3, subpar. 2 states that "[a]ny evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."

33 J. Puno, Separate Opinion in *Republic v. Sandiganbayan*, 454 Phil. 504 (2003) [Per J. Carpio, En Banc].

34 *Atienza v. Commission on Elections*, 626 Phil. 654, 673 (2010) [Per J. Abad, En Banc], citing *City of Manila v. Hon. Laguio, Jr.*, 495 Phil. 289 (2005) [Per J. Tinga, En Banc].

35 271 Phil. 51 (1991) [Per J. Bidin, Third Division].

> also be construed as an act of the State would result in serious legal complications and an absurd interpretation of the constitution.
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> Similarly, the admissibility of the evidence procured by an individual effected through private seizure equally applies, in *pari passu*, to the alleged violation, non-governmental as it is, of appellant's constitutional rights to privacy and communication.[36]

In his separate opinion, Associate Justice Samuel Gaerlan opines that *Zulueta v. Court of Appeals*[37] created an exception to *People v. Marti*.[38] I do not agree given *Zulueta*'s different factual context. In *Zulueta*, the husband's right to privacy was asserted in an appropriate proceeding through a civil action for recovery of documents and damages. The exclusionary rule was also invoked and eventually applied against his wife, the intruder to his privacy, and not against the State. This context should be read in light of *Zulueta's* pronouncement:

> Indeed the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring "the privacy of communication and correspondence [to be] inviolable" is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a "lawful order [from a] court or when public safety or order requires otherwise, as prescribed by law." Any violation of this provision renders the evidence obtained inadmissible "for any purpose in any proceeding."[39]

In this case, the right to privacy comes to the fore since Cadajas invokes the exclusion of evidence allegedly taken in violation of his right to privacy. I agree in the result of *ponente's* analysis that the exclusionary rule will not apply in favor of Cadajas. However, I take exception from the finding that there is no violation of Cadajas' right to informational privacy. His recourse, if any, should be to institute a complaint in a proper proceeding.

Zulueta is not applicable because the proceeding here does not involve a private dispute, but a criminal case where the State is the offended party.[40] In effect, Cadajas invokes the exclusionary rule against the State although the latter was not responsible for the violation of his right. The facts of this case are more consistent with *People v. Marti*, where the exclusionary rule was not applied since the illegal intrusion was done by a private person.

Here, it is not disputed that AAA used to be Cadajas' girlfriend when she was only 14 years old. AAA's mother discovered their secret relationship

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36 Id. at 62–63.
37 324 Phil. 63 (1996) [Per J. Mendoza, Second Division].
38 Dissenting Opinion of J. Gaerlan, pp. 2–3.
39 *Zulueta v. Court of Appeals*, 324 Phil. 63, 68 (1996) [Per J. Mendoza, Second Division].
40 *People v. Court of Appeals*, 755 Phil. 80, 98 (2015) [Per J. Peralta, Third Division], citing People v. Santiago, 255 Phil. 851 (1989) [Per J. Gancayco, First Division].

upon browsing her daughter's Facebook Messenger not logged out from her cellphone. Lascivious messages and photos were sent through Facebook Messenger. While AAA deleted these exchanges from her personal account, her mother forced her to open Cadajas' account to secure a copy of their conversation.[41] For the first time, Cadajas invokes the exclusionary rule, alleging that his right to privacy has been violated.

I disagree with the *ponente* that Cadajas abandoned his right to privacy in Facebook by giving his password to AAA.[42] The act of giving his password to his girlfriend, by itself, is not permission to access his account without his consent. In entering a romantic relationship, one does not abandon their right to privacy. *Zulueta* is instructive on the integrity of such right. Even married couples do not lose the protection of such right and they can defend their constitutional right against the other in an appropriate proceeding.[43]

Here, while Cadajas' relationship has already been exposed to AAA's mother, he has a right to prevent further dissemination of personal information, especially those coming from his private account. His relationship with AAA and his act of giving his password to her do not give AAA license to access his account and secure a copy of their conversation from his account. There is already a violation of his right to privacy even if Cadajas enabled AAA to access his account.

Despite the violation to his right to privacy, I am not convinced that Cadajas valued his right to privacy and that he intended to enforce it. First, he did not have any obligation to give his password to AAA. Second, he did not question the authority of AAA to access his account. Finally, he did not question the admissibility of the chat messages before the trial court. These circumstances show that he had very little regard for his right to privacy. His belated invocation of the violation of such right cannot benefit him at the expense of the State. Thus, the *ponente* is correct in ruling that petitioner waived his objection to the admissibility of the transcript of their chat on Facebook Messenger.[44]

It can also be said that the mother violated AAA's right to informational privacy. Nonetheless, parental guidance is crucial especially in the digital age, where innocent minors can easily be manipulated in exposing themselves. With the ease of sharing information, children can easily take photographs of their private parts and unwittingly share these online without fully understanding the consequences of their actions.

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41 *Ponencia*, p. 2.
42 Id. at 10.
43 *Zulueta v. Court of Appeals*, 324 Phil. 63, 68 (1996) [Per J. Mendoza, Second Division].
44 *Ponencia*, p. 10.

III

I do not agree with the *ponente* that the cybercrime of child pornography is *mala in se* just because it is immoral and disgusting.[45] Instead of relying on the inherent vileness of a crime in determining the character of the offense as either *mala in se* or *mala prohibitum*, we should characterize a crime based on the language of the law and the rationale behind its enactment. We should classify a crime that will give the greatest effect to what the law seeks to protect. Our characterization of a crime is relevant because of the importance of intent in *mala in se* crimes.

Contrary to Justice Alfredo Benjamin Caguioa's understanding, it is not the inherent immorality or vileness of an act that distinguishes *mala in se* from *mala prohibitum* crimes.[46] Rather, the distinction lies in the necessity of proving criminal intent in the prosecution of these crimes. In *ABS CBN v. Gozon*:[47]

> The general rule is that acts punished under a special law are malum prohibitum. "An act which is declared malum prohibitum, malice or criminal intent is completely immaterial."
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> In contrast, crimes mala in se concern inherently immoral acts:
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> > Not every criminal act, however, involves moral turpitude. It is for this reason that "as to what crime involves moral turpitude, is for the Supreme Court to determine". In resolving the foregoing question, the Court is guided by one of the general rules that crimes mala in se involve moral turpitude, while crimes *mala prohibita* do not, the rationale of which was set forth in "*Zari v. Flores*," to wit:
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> > > It (moral turpitude) implies something immoral in itself, regardless of the fact that it is punishable by law or not. It must not be merely mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute fixes the moral turpitude. Moral turpitude does not, however, include such acts as are not of themselves immoral but whose illegality lies in their being positively prohibited.
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> > [These] guidelines nonetheless proved short of providing a clear-cut solution, for in *International Rice Research Institute v. NLRC*, the Court admitted that it cannot always be ascertained whether moral turpitude does or does not exist by merely classifying a crime as *malum in se* or as *malum prohibitum*. There are crimes which are *mala in se*

[45] Id. at. 26–28.
[46] Dissenting Opinion of Justice Caguioa, p. 18.
[47] 755 Phil. 709 (2015) [Per J. Leonen, Second Division].

> and yet but rarely involve moral turpitude and there are crimes which involve moral turpitude and are *mala prohibita* only. In the final analysis, whether or not a crime involves moral turpitude is ultimately a question of fact and frequently depends on all the circumstances surrounding the violation of the statue.

"Implicit in the concept of mala in se is that of *mens rea*." *Mens rea* is defined as "the nonphysical element which, combined with the act of the accused, makes up the crime charged. Most frequently it is the criminal intent, or the guilty mind[.]"

Crimes *mala in se* presuppose that the person who did the felonious act had criminal intent to do so, while crimes *mala prohibita* do not require knowledge or criminal intent:

> In the case of *mala in se* it is necessary, to constitute a punishable offense, for the person doing the act to have knowledge of the nature of [their] act and to have a criminal intent; in the case of *mala prohibita*, unless such words as "knowingly" and "willfully" are contained in the statute, neither knowledge nor criminal intent is necessary. In other words, a person morally quite innocent and with every intention of being a law-abiding citizen becomes a criminal, and liable to criminal penalties, if [they do] an act prohibited by these statutes.

Hence, "[i]ntent to commit the crime and intent to perpetrate the act must be distinguished. A person may not have consciously intended to commit a crime; but [they] did intend to commit an act, and that act is, by the very nature of things, the crime itself[.]" When an act is prohibited by a special law, it is considered injurious to public welfare, and the performance of the prohibited act is the crime itself.

Volition, or intent to commit the act, is different from criminal intent. Volition or voluntariness refers to knowledge of the act being done. On the other hand, criminal intent—which is different from motive, or the moving power for the commission of the crime—refers to the state of mind beyond voluntariness. It is this intent that is being punished by crimes mala in se. [48]

On the other hand, intent to commit the crime is not required in *mala prohibitum* crimes. Thus, good faith is not a defense since intent is not necessary to sustain a conviction.[49] We defer to the Congress in enacting criminal laws that do not require criminal intent as an element of the offense:

> The law is clear. Inasmuch as there is wisdom in prioritizing the flow and exchange of ideas as opposed to rewarding the creator, it is the plain reading of the law in conjunction with the actions of the legislature to which we defer. We have continuously "recognized the power of the legislature . . . to forbid certain acts in a limited class of cases and to make

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[48] Id. at 763–765.

[49] *Tan v. Ballena*, 579 Phil. 503 (2008) [Per J. Chico-Nazario, Third Division].

> their commission criminal without regard to the intent of the doer. Such legislative enactments are based on the experience that repressive measures which depend for their efficiency upon proof of the dealer's knowledge or of [their] intent are of little use and rarely accomplish their purposes."[50]

Traditionally, we distinguish *mala prohibitum* and *mala in se* based on where they are found, whether in special penal laws or in the Revised Penal Code.[51] This view was updated in *Estrada v. Sandiganbayan*,[52] where plunder, criminalized under a special law, was considered a *mala in se* based on this Court's reading of legislative declaration from the text of the law.

Aside from the inherent immorality of crimes, immoral and vile acts are penalized for public policy considerations. It is possible that Congress removed the intent requirement in criminalizing such inherently vile acts. In my view, it is not our personal notions of morality that should govern in classifying crimes as either *mala in se* or *mala prohibitum*. Whether criminal intent is required to be proven should be discerned from the text of the law. Our classification of an offense must be consistent with our duty to interpret laws in accordance with their spirit or intent.[53] Thus, our reading of whether a law should be *mala in se* or *mala prohibitum* should not defeat what the law is trying to protect. In my view, classifying the cybercrime of child pornography as *malum prohibitum* is most consistent with the language of the law and its rationale.

Here, Cadajas is convicted of the cybercrime of child pornography in relation to Section 4(a) of Republic Act No. 9775. Under this section, the criminal act is to "hire, employ, use, persuade, induce[,] or coerce a child to perform in the creation or production of any form of child pornography."[54] Child pornography is defined as "any representation, whether visual, audio[,] or written combination thereof, by electronic, mechanical, digital, optical, magnetic[,] or any other means, of a child engaged or involved in real or simulated explicit sexual activities."[55] Explicit sexual activity includes actual or simulated "lascivious exhibition of the genitals, buttocks, breasts, pubic area[,] and/or anus."[56] When a computer system is used to commit child pornography, it is a cybercrime offense and punishable under Section 4(c)(2) of Republic Act No. 10175.[57]

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50 *ABS CBN v. Gozon*, 755 Phil. 709, 770 (2015) [Per J. Leonen, Second Division].
51 *Garcia v. Court of Appeals*, 519 Phil. 591, 596 (2006) [Per J. Quisumbing, Third Division].
52 421 Phil. 290 (2001) [Per J. Bellosillo, En Banc].
53 *Alonzo v. Intermediate Appellate Court*, 234 Phil. 267 (1987) [Per J. Cruz, En Banc].
54 Republic Act No. 9775 (2009), sec. 4(a).
55 Republic Act No. 9775 (2009), sec. 3(b).
56 Republic Act No. 9775 (2009), sec. 3(c)(5).
57 Republic Act No. 10175 (2012), sec. 4 (c)(2) states:
SECTION 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act:

. . . .

(c) Content-related Offenses:

. . . .

Based on the foregoing, the cybercrime of inducement or coercion to create or produce child pornography is committed when all the following elements are present, namely, (1) the victim is a child below 18 years of age; (2) there is a representation of a child engaged in or involved in explicit sexual activity; (3) there was inducement or coercion of a child to create or produce such representation; and (4) the act is committed through a computer system.

While there is no question that child pornography is inherently immoral, it is not the only controlling factor. Aside from being injurious to public welfare, child pornography is criminalized based on the constitutional imperative for the State to afford special protection against "all forms of neglect, abuse, cruelty, exploitation[,] and other conditions prejudicial to their development."[58] In addition, the best interest of a child should be the primary consideration in all actions concerning them.[59] These state policies are enacted in Republic Act No. 9775 in criminalizing child pornography.[60] Eventually, Republic Act No. 10175 has expanded this protection to cover cyberspace.[61]

In classifying the cybercrime of child pornography as a *mala in se* offense, the *ponente* is in effect requiring the prosecution to prove an additional element of intent. However, intent is not an element of the offense. Thus, such characterization defeats the declaration of policy in Republic Act No. 9775 and the special protection of a child.

More than classifying the cybercrime of child pornography as *malum prohibitum*, we should be vigilant in our duty to ensure the primacy of the

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(2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

58 CONST., art. 15, sec. 3 (2).

59 Convention on the Rights of the Child, January 26, 1990 (entered into force on September 2, 1990). Article 3 of the Convention provides:
ARTICLE 3. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

60 Republic Act No. 9775 (2009), sec. 2 provides:
SECTION 2. Declaration of Policy. — The State recognizes the vital role of the youth in nation building and shall promote and protect their physical, moral, spiritual, intellectual, emotional, psychological and social well-being. Towards this end, the State shall:
(a) Guarantee the fundamental rights of every child from all forms of neglect, cruelty and other conditions prejudicial to his/her development;
(b) Protect every child from all forms of exploitation and abuse including, but not limited to:
(1) the use of a child in pornographic performances and materials; and
(2) the inducement or coercion of a child to engage or be involved in pornography through whatever means; and
(c) Comply with international treaties to which the Philippines is a signatory or a State party concerning the rights of children which include, but not limited to, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the International Labor Organization (ILO) Convention No. 182 on the Elimination of the Worst Forms of Child Labor and the Convention Against Transnational Organized Crime.

61 *Disini v. Secretary of Justice*, 727 Phil. 28 (2014) [Per J. Abad, En Banc].

interest of a child and be conscious of how we can afford special protection to them. Here, we should protect children from engaging in romantic relationships with adults who try to abuse their innocence. Children are easily susceptible to coercion of adults. Thus, a child is incapable of giving consent to any lascivious act or sexual intercourse:

> The sweetheart theory applies in acts of lasciviousness and rape, felonies committed against or without the consent of the victim. It operates on the theory that the sexual act was consensual. It requires proof that the accused and the victim were lovers and that she consented to the sexual relations.
>
> For purposes of sexual intercourse and lascivious conduct in child abuse cases under RA 7610, the sweetheart defense is unacceptable. A child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse with another person.
>
> The language of the law is clear: it seeks to punish [t]hose who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse.
>
> Unlike rape, therefore, consent is immaterial in cases involving violation of Section 5, Article III of RA 7610. The mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense. It is a *malum prohibitum*, an evil that is proscribed.
>
> *A child cannot give consent to a contract under our civil laws. This is on the rationale that [they] can easily be the victim of fraud as [they are] not capable of fully understanding or knowing the nature or import of [their] actions. The State, as parens patriae, is under the obligation to minimize the risk of harm to those who, because of their minority, are as yet unable to take care of themselves fully. Those of tender years deserve its protection.*
>
> The harm which results from a child's bad decision in a sexual encounter may be infinitely more damaging to [them] than a bad business deal. Thus, the law should protect [them] from the harmful consequences of [their] attempts at adult sexual behavior. *For this reason, a child should not be deemed to have validly consented to adult sexual activity and to surrender [themselves] in the act of ultimate physical intimacy under a law which seeks to afford [them] special protection against abuse, exploitation and discrimination.* (Otherwise, sexual predators like petitioner will be justified, or even unwittingly tempted by the law, to view her as fair game and vulnerable prey.) *In other words, a child is presumed by law to be incapable of giving rational consent to any lascivious act or sexual intercourse.*
>
> This must be so if we are to be true to the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual[,] and social wellbeing of the youth. This is consistent with the declared policy of the State
>
> > [t]o 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.

as well as

> to intervene on behalf of the child when the parents, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation, and discrimination or when such acts against the child are committed by the said parent, guardian, teacher[,] or person having care and custody of the same.

This is also in harmony with the foremost consideration of the child's best interests in all actions concerning [them].

> The best interest of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principles of First Call for Children as enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.[62] (Emphasis supplied, citations omitted)

In his dissenting opinion, Justice Caguioa is of the view that Christian should have been acquitted because there was no evidence that AAA was induced in sending lascivious photos. He is of the view that these were sent in the context of "a candid, intimate[,] and private conversation between two people in a relationship."[63] In effect, he agrees that the sweetheart defense is available in child pornography. Justice Gaerlan shares this view, finding no evidence of inducement. He concludes that the exchange between Cadajas and AAA is "akin to the banter employed by couples before undertaking the highest expression of human intimacy and passion."[64]

I vehemently disagree.

In *Bangayan v. People*,[65] the majority was wrong in its determination of the capacity of a mere 12-year-old to consent to sexual relations with her brother-in-law, who was fifteen years her senior. Both Justice Caguioa and Justice Gaerlan forget that the victim here is a child. While they offer progressive views on women's sexual choices, such cannot easily be

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62 *People v. Udang*, 823 Phil. 411, 431–433 (2018) [Per J. Leonen, Third Division], citing *Malto v. People*, 560 Phil. 119 (2007) [Per J. Corona, First Division].

63 Dissenting Opinion of Justice Caguioa, p. 7.

64 Separate Opinion of Justice Gaerlan, p. 6.

65 G.R. No. 235610, September 16, 2020 <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66612> [Per J. Carandang, Third Division].

concluded for a child in a romantic relationship. Like the majority in *Bangayan*, they fail to consider the complexities of consenting to a sexual act and the capacity of a child to understand the implications of a sexual act:

> [S]exual intercourse is a complex act which is not only physical or sensual. Beyond that, it comes with the complexity of intimacy, relationship, and reproductive consequences.
>
> Sexual intimacy may be primarily done for procreation or solely for pleasure. How sexuality and intimacy is expressed, what constitutes sex, and with whom to be intimate with is a person's choice.
>
> Therefore, consent to sex does not only cover the physical act. Sex does not only involve the body, but it necessarily involves the mind as well. It embraces the moral and psychological dispositions of the persons engaged in the act, along with the socio-cultural expectation and baggage that comes with the act. For instance, there are observed differences in sexual expectations and behaviors among different genders, and more so, among individuals. The wide range of sexual desire and behavior are not only shaped by biology, but by culture and prevailing norms as well. Full and genuine consent to sex, therefore, is "preceded by a number of conditions which must exist in order for act of consent to be performed."
>
> Part and parcel of a valid consent is the ability to have the intellectual resources and capacity to make a choice that reflects [their] judgments and values. For someone to give sexual consent, [their] must have reached a certain level of maturity.
>
> This observation becomes more apparent in determining the validity of sexual consent given by adults compared to children. Sexual consent is not a switch, but a spectrum. As a child grows into adolescence, and later to adulthood, the measure of sexual consent shifts from capacity to voluntariness. Under the law, sexual consent from a child is immaterial, because [their] is deemed incapable of giving an intelligent consent. However, this presumption is relaxed as the child matures. In our jurisdiction, the gradual scale begins when the child reaches the age of 12 years old. From this age, the law may admit voluntariness on the part of the child.
>
> Nevertheless, voluntariness or informed sexual consent of a child must be determined cautiously. Cases involving younger victims must be resolved through more stringent criteria. Several factors, such as the age of the child, [their] psychological state, intellectual capability, relationship with the accused, their age difference, and other signs of coercion or manipulation must be taken into account in order to protect the child. [66]

Contrary to Justice Caguoia's conclusion, *Bangayan* did not reverse the pronouncement in *Malto v. People*.[67] Engaging in a romantic relationship does not remove the special protection of a child. This is especially true in the digital age and space, where a child's interaction with others easily evades

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[66] J. Leonen, Dissenting Opinion in *Bangayan v. People*, G.R. No. 235610, September 16, 2020 <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66612> [Per J. Carandang, Third Division].

[67] *Malto v. People*, 560 Phil. 119 (2007) [Per J. Corona, First Division]. See Justice Caguioa Dissenting Opinion, p. 14.

supervision. We must remain wary of adult relationships. We should not be careless in concluding that the same dynamics apply between an adult and a child. This is what Justice Caguioa missed in his dissent. In this day and age, we must remain vigilant in our duty as *parens patriae* to protect a child from any form of abuse.

It is for this reason that we cannot allow the sweetheart defense in child pornography. It is common, distasteful, and much abused in cases of acts of lasciviousness and rape, aiming to establish that fact that the sexual act was consensual.[68] Under the pretense of a romantic relationship, it is not unimaginable that a child will be easily induced or coerced to engage in explicit sexual acts. Inducement requires some exertion of influence defined as "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective."[69] A reading of the transcript of their chat messages reeks of how Cadajas induced AAA to send intimate photos under the guise of their relationship:

K: Baliw hubad na lahat
C: Picturan uh (sic) pasa muh (sic) xkin (sic) bi
K: Lah gagi bi wag
Ayoko
C: Uh ayaw muh (sic) pala sa mga treep (sic) KO (sic) ei (sic)

. . . .

C: Tayo lang naman makakakita ie (sic)
K: Hahahaha baka pagkalat mo
Dede lang
C: Ako din bi PSA (sic) mna (sic)
HahAt (sic) bi
K: Magpasa ka din hahaha
Lah (sic) bat lahat

. . . .

C: Hahaha hnde (sic) aman (sic) bi
Lahat bi gusto ko
Uo nga nkKaumay (sic) bi nslibugan (sic) ako
K: Gagi ayoko nga yung pepe

. . . .

C: Buka muh (sic) nga kunti (sic) bi kunti (sic) lang tutok muh (sic)
Hah (sic)
K: Ayoko na.
Haha Christian haha OK nay an
C: She (sic) nah (sic) gsto (sic) KO (sic) mkita (sic) bi (Emphasis supplied)[70]

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[68] Id. at 411.
[69] *Caballo v. People*, 710 Phil. 792, 805 (2013) [Per J. Perlas-Bernabe, Second Division].
[70] *Ponencia*, pp. 10–11.

Justice Caguoia points out that AAA was already naked and even asked for nude photos from Cadajas. From these, he concludes that AAA was willing to send her nude photos to Cadajas sans inducement or coercion.[71] A holistic reading of the transcript shows AAA's reluctance in what Cadajas was asking her to do. She refused several times and even tried to establish boundaries. Cadajas wanted more but AAA was not comfortable with that. This is confirmed in AAA's testimony, which the *ponente* quoted as follows:

> Q: What about those pictures? Can you tell us about those pictures that you are referring to?
> A: Because he instructed me to send a picture to him of my breast and vagina, so I send him pictures, Sir.
>
> Q: Okay, you send pictures of your breast and you [sic] vagina. What did you use in order to send him those pictures?
> A: Cell phone, Sir.
>
> Q: How did the accused convince you to do that?
> A: He said magsend daw po ako ng picture.
>
> Q: Was there a promise?
> A: None, Sir.
>
> Q: Just the accused merely telling you or commanding you to produce or take pictures of your private parts?
> A: Yes, Sir.
>
> Q: Why did you allow yourself to do that?
> A: Napilitan lang po akong magsend ng ganun.
>
> [. . .]
>
> Q: Paanong napilitan kung hindi ka pinuwersa or hindi ka tinakot? Paano mo nasabing napilitan lang? Alam mong mali iyon at hindi naman pinayagan na ganun, bakit mo sinned (sic) pa rin kung hindi ka naman niya pinilit o tinakot? Ano talgal (sic) ang nagtulak sayong magsend ng ganun? Ano ba ang pumasok sa isip mo, pumasok sa katawan mo nung ginawa mo iyon? Just be candid.
> A: Hindi ko po alam.
>
> Q: Hindi moa lam (sic) kasi?
> A: Naaano lang po ako sa sinabi niya, sa message po niya sakin na puro please magsend kana sige na puro ganun po.
>
> Q: Sa pagkukumbinsi niya? Panay ang please?
> A: Hindi po niya ako tinigilan nun e.
>
> Q: Hindi siya tumitigil?
> A: Hindi po.[72]

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[71] Dissenting Opinion of Associate Justice Caguioa, p. 7.
[72] *Ponencia*, p. 15.

From the foregoing, we cannot conclude this conversation as "a candid, intimate[,] and private conversation between two people in a relationship."[73] We cannot turn a blind eye to the numerous objections of AAA. Through continued inducement, Cadajas took advantage of her vulnerability to send more photos exposing herself to him. From a mere transcript, Justice Caguioa was quick to ignore the possibility that the child was forced to give in to what Cadajas wanted in the context of a romantic relationship.

As the *ponente* quoted:

> Q: In fact, there is in this statement that you even type these words *kuya nalilibugan ako hahaha* is it true that? Did you type this?
> A: Yes Sir, I typed that but that is not true, it is just a trip lang sa kanya.
>
> Q: In that trip, in line with it is a four (4) smiley crying while laughing, smiley with tears meaning you are laughing?
> Court:
> You are just joking ganun ba?
> Witness:
> Yes, your Honor.[74]

Being older with more than 10 years' worth of experience than AAA places Cadajas in a stronger and more dominant position.[75] He had intimate needs that a child is not capable of understanding. He even insinuated that AAA did not have the same interests that he had and could not keep up with him in their relationship. All these factors allowed him to induce AAA to engage in explicit sexual activity using her mother's mobile phone.

While it is not disputed that Cadajas was AAA's boyfriend at the time of the incident, this Court cannot sanction their romantic relationship and excuse Cadajas' criminal act. This is especially true since the lascivious photos were taken in the context of such relationship, where Cadajas abused AAA's affection and trust to satisfy his lust.

All the elements of the cybercrime of child pornography under Republic Act No. 10175 have been established beyond reasonable doubt. Thus, I agree with the *ponente* that Christian's guilt must be sustained.

ACCORDINGLY, I vote to **DENY** the Petition.

MARVIC M.V.F. LEONEN
Associate Justice

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[73] Dissenting Opinion of Justice Caguioa, p. 7.
[74] *Ponencia*, p. 15.
[75] *Fianza v. People*, 815 Phil. 379 (2017) [Per J. Perlas-Bernabe, First Division].