STATUTORY AND JURISPRUDENTIAL BARRIERS TO THE RECOVERY OF ILL-GOTTEN WEALTH*

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INTRODUCTION

The term "ill-gotten wealth" first entered the national consciousness after the fall of the late dictator Ferdinand Marcos in February 1986. It was employed by the charter of the Presidential Commission on Good Government (PCGG) to characterize the wealth amassed by the disgraced former president, his first lady, their immediate family, relatives and business associates. By December of 1986, the PCGG had filed its first case for recovery against the Marcoses.

Unfortunately, the recovery of ill-gotten wealth has been both slow and difficult. Much of the optimism that attended its potential for success in the beginning has now turned into frustration. Out of the 35 recovery cases filed against the Marcoses, two have been rendered moot and academic, two have been dismissed, four have been terminated due to compromise agreements and 27 are still pending.[1] Understandably, there is growing sentiment that the ill-gotten wealth may never be recovered. Recent events leading to and revelations made during the impeachment trial of former President Joseph Estrada have added to the apprehension. As if attempting to capture this sentiment, PCGG Commissioner Ruben Carranza recently warned: "If we cannot even punish old plunderers, we should stop pretending that we are out to punish the plunderers who came after them."[2]

Is the Philippines making it harder for itself to recover ill-gotten wealth? An initial survey of existing legislation and jurisprudence suggests an answer in the affirmative. There appears to have been erected by Congress and the Supreme Court unnecessary but significant barriers to the prompt and efficient recovery of such

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[1] Taken from the records of the Presidential Commission on Good Government as of October 9, 2001.

[2] PCGG Commissioner Ruben F. Carranza, Crime and Punishment: Paglilitis sa Plunder, Forum at the University of the Philippines-Diliman Faculty Center (Sept. 13, 2001), quoted at http://www.up.edu.ph/forum/2001/09/plunder.html (last visited Feb. 11, 2002).

wealth. A closer scrutiny of these laws and decisions readily expose convenient loopholes and nearly impermissible lapses in legal reasoning. A number of international law issues must also be confronted in recognition of the fact that, in many cases, a substantial portion of ill-gotten wealth is stashed and kept hidden abroad. Current treaty mechanisms that sanction international investigations conducted by Philippine authorities and under which Philippine judgments can be enforced are insufficient. Addressing such issues is indispensable to a reasonably comprehensive understanding of the process and problem of ill-gotten wealth recovery.

The recovery of ill-gotten wealth is not an impossible task. In an effort to contribute to the undertaking, specific recommendations are made in this paper with a view of minimizing, if not, completely eliminating, current statutory and jurisprudential obstacles that have unjustly deprived Filipinos the benefit of such wealth.

II. LAWS GOVERNING RECOVERY OF ILL-GOTTEN WEALTH

A. DEFINING ILL-GOTTEN WEALTH

As a consequence of the Philippines' continuing struggle against corruption, numerous laws have been passed seeking to regulate the conduct of public officials and employees as well as to facilitate the recovery of wealth acquired illegally. In these laws are found needless – because except in money laundering, they refer to the same thing – legal names for such wealth.

To illustrate, existing legislation on the matter seem to imply that the term "ill-gotten wealth" refers only to those specifically covered by the Charter of the PCGG[3] or the Plunder Law.[4] This is because the Forfeiture Law uses the term "unlawfully acquired property",[5] the Anti-Graft and Corrupt Practices Act uses "unexplained wealth",[6] and the Anti-Money Laundering Law uses "proceeds,"[7] all of which will, at times, pertain to the same thing: money or property derived or realized from an unlawful activity. The first legislative recognition of this dissonant terminology was the Ombudsman Act of 1989 where Congress authorized the Ombudsman to investigate and initiate actions for the recovery of both "ill-gotten and/or unexplained wealth." It is interesting to note that Congress, in passing the Plunder Law of 1991, deliberately avoided using the term "unlawfully acquired

[3] Exec. Order No. 1 (1986), sec. 2 (a).
[4] Rep. Act No. 7080 (1991), sec. 1 (d).
[5] Rep. Act No. 1379 (1955), sec. 1 (b).
[6] Rep. Act No. 3019 (1960), sec. 8.
[7] Rep. Act No. 9160 (2001), sec. 3 (f).

property" in order to avoid the applicability of the Forfeiture Law which provides for a prima facie presumption of unlawful acquisition.[8]

The unnecessary confusion caused by such varied terms is addressed when one realizes that the terms are not, in themselves, mutually exclusive. To the disappointment of Congress, the labeling of a particular amount as "ill-gotten" in describing wealth for purposes of plunder does not preclude the same amount from being characterized as "unlawfully acquired" for purposes of forfeiture. Therefore, a certain bank deposit may both be "unlawfully acquired property" under the Forfeiture Law, if manifestly out of proportion to a public officer's salary and other lawful income, and "ill-gotten" if received by reason of the office or position of the public officer and in connection with a government contract or project.

Under the Forfeiture Law

The Forfeiture Law,[9] also known as "An Act Declaring Forfeiture in Favor of the State Any Property Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceedings Therefor," enacted in 1955, defines the term "unlawfully acquired property" as those amounts acquired by a public officer or employee during incumbency which are manifestly out of proportion to his salary, other lawful income and income from legitimately acquired property. It defines "other legitimately acquired property" as:

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> (b) "Other legitimately acquired property" means any real or personal property, money or securities which the respondent has at any time acquired by inheritance and the income thereof, or by gift inter vivos before his becoming a public officer or employee, or any property (or income thereof) already pertaining to him when he qualified for public office or employment, or the fruits and income of the exclusive property of the respondent's spouse. It shall not include:
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> 1. Property unlawfully acquired by the respondent, but his ownership is concealed by its being recorded in the name of, or held by, the respondent's spouse, ascendants, descendants, relatives, or any other person;
> 2. Property unlawfully acquired by the respondent, but transferred by him to another person or persons after the effectivity of this Act;
> 3. Property donated to the respondent during his incumbency, unless he can prove to the satisfaction of the court that the donation is lawful.

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[8] Notes of the Joint Committees on Revision/Justice, May 24, 1990, 25-26.
[9] Rep. Act No. 1379 (1955).

Of particular significance is the *prima facie* presumption of unlawful acquisition[10] that this law creates against a public officer who, during his incumbency, acquires property manifestly out of proportion to his salary as such and to his other lawful income.

Under the Anti-Graft and Corrupt Practices Act

The Anti-Graft and Corrupt Practices Act,[11] on the other hand, while penalizing public officials and employees for unexplained wealth, clearly makes a specific reference to the provisions of the Forfeiture Law,[12] thus suggesting that "unexplained wealth" is synonymous with "unlawfully acquired property." Section 8 of the Anti-Graft and Corrupt Practices Act states:

> Dismissal due to unexplained wealth - If in accordance with the provisions of Republic Act Number One Thousand Three Hundred Seventy-Nine, a public official has been found to have acquired during his incumbency, whether in his name or in the name of other persons, an amount of property and/or money manifestly out of proportion to his salary and other lawful income, that fact shall be a ground for dismissal or removal. Properties in the name of the spouse and unmarried children of such public official may be taken into consideration, when their acquisition through legitimate means cannot be satisfactorily shown. Bank deposits shall be taken into consideration in the enforcement of this section, notwithstanding any provision of law to the contrary.

Under the Charter of the Presidential Commission on Good Government

Executive Order No. 1, issued in 1986 and which created the PCGG, uses yet another term: "ill-gotten wealth."[13] In the Rules and Regulations of the PCGG issued pursuant to the above-mentioned executive order, ill-gotten wealth is defined as any asset, property, business enterprise or material possession of persons within the purview of Executive Orders Nos. 1 and 2,[14] acquired by them directly or indirectly through dummies, nominees, agents, subordinates and/or business associates by any of the following means or schemes:

1. Through misappropriation, conversion, misuse or malversation of public funds or raids on the public treasury;
2. Through the receipt, directly or indirectly, of any commission, gift, share, percentage, kickbacks or any other form of pecuniary benefit from any

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[10] Rep. Act No. 1379 (1955), sec. 2.
[11] Rep. Act No. 3019 (1960).
[12] Rep. Act No. 3019 (1960), sec. 8.
[13] Exec. Order No. 1 (1986), sec. 2 (a).
[14] Exec. Order No. 2 (1986).

person and/or entity in connection with any government contract or project or by reason of the office or position of the official concerned;
3. By the illegal or fraudulent conveyance or disposition of assets belonging to the government or any of its subdivisions, agencies or instrumentalities or government-owned or controlled corporations;
4. By obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation in any business enterprise or undertaking;
5. Through the establishment of agricultural, industrial or commercial monopolies or other combination and/or by the issuance, promulgation and/or implementation of decrees and orders intended to benefit particular persons or special interests; and
6. By taking undue advantage of official position, authority, relationship or influence for personal gain or benefit.[15]

Under these Executive Orders, ill-gotten wealth is given an operational and fairly comprehensive characterization. And like the Forfeiture Law, a *prima facie* presumption is created such that "any accumulation of assets, properties and other material possessions of these persons covered by Executive Orders No. 1 and 2, whose value is out of proportion to their known lawful income is *prima facie* deemed ill-gotten wealth."[16] The unfortunate limitation, of course, is that they only cover ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his wife and former First Lady Imelda Romualdez Marcos, their immediate family, relatives, subordinates, close associates, dummies, agents and nominees.[17]

Under the Plunder Law

In order to address the said limitation, Congress utilized the same enumeration of acts in defining "ill-gotten wealth"[18] under the Plunder Law enacted in 1991. To constitute the crime of plunder, however, the public officer, by himself or in connivance with the members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, must amass, accumulate or acquire ill-gotten wealth through a combination or series of criminal acts in the aggregate amount of at least ₱50,000,000.00.[19] It is at this point that the current statutory regime governing ill-gotten wealth becomes insufficient. Arguably, a substantial number of corrupt transactions involve amounts less than ₱50,000,000.00. In such cases, only the definition provided in the Forfeiture Law for "unlawfully acquired property" and reiterated in the Anti-Graft Law as "unexplained wealth" can be used.

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[15] PCGG Rules and Regulations (1986), sec. 1 (A).
[16] PCGG Rules and Regulations (1986), sec. 9.
[17] Exec. Orders No. 1 and 2, (1986).
[18] Rep. Act No. 7080 (1991), sec. 1 (d).
[19] Rep. Act No. 7080 (1991), sec. 2.

When these laws are closely compared, however, a penumbra presents itself. The second clause in Section 1(d)(5)[20] of the Plunder Law simply provides that the implementation of decrees or orders intended to benefit particular persons or special interests is considered sufficient means for acquiring ill-gotten wealth. Unlike in the corresponding provision[21] found in the Anti-Graft and Corrupt Practices Act, there is no requirement in the Plunder Law for the unwarranted benefit, advantage or preference granted to be done with manifest partiality, evident bad faith or gross inexcusable neglect. Therefore, in cases where such benefit, not amounting to ₱50,000,000.00, is bestowed without any partiality being manifest, bad faith being evident or neglect being grossly inexcusable on the part of the public official, neither the Plunder Law nor the Anti-Graft and Corrupt Practices Act will apply. All that a public officer would need to do then is argue that the partiality was not manifest, or that the bad faith was not evident or that the neglect was not grossly inexcusable. He would then have to be excused from liability since the mere grant of a benefit or advantage to particular persons, for amounts below ₱50,000,000.00, without manifest partiality, evident bad faith or gross inexcusable neglect, is not illegal under the two laws.

Under the Anti-Money Laundering Act

In 2001, the Anti-Money Laundering Act was passed. It criminalized the modus operandi whereby proceeds of particular illegal activities are transacted in a manner making them appear to have originated from legitimate sources. This law employed another term for wealth acquired unlawfully - "proceeds" - defined as amounts derived or realized from an unlawful activity.[22] The law, however, limited the coverage of the term "unlawful activity" to only the following:

1. Kidnapping for ransom under Article 267 of Act 3815, otherwise known as the Revised Penal Code;
2. Sections 3, 4, 5, 7, 8 and 9 of Article II of Republic Act 6425, as amended, otherwise known as the Dangerous Drugs Act of 1972;
3. Section 3, paragraphs B, C, E, G, H and I of Republic Act 3019, otherwise known as the Anti-Graft and Corrupt Practices Act;
4. Plunder under Republic Act 7080, as amended;

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[20] Rep. Act No. 7080 (1991), sec. 1(d)(5): "By establishing agricultural, industrial or commercial monopolies or other combinations and/or the implementation of decrees and orders intended to benefit particular persons or special interests."

[21] Rep. Act No. 3019 (1960), sec. 3 (e).

[22] Rep. Act No. 9160 (2001), sec 3 (f).

5. Robbery and extortion under Articles 294, 295, 296, 299, 300, 301 and 302 of Act 3815, otherwise known as the Revised Penal Code;
6. Jueteng and masiao punished as illegal gambling under Presidential Decree 1602;
7. Piracy on the high seas under the Revised Penal Code, as amended, and Presidential Decree No. 532;
8. Qualified theft under Article 310 of the Revised Penal Code;
9. Swindling under Article 315 of the Revised Penal Code;
10. Smuggling under Republic Act Nos. 455 and 1937;
11. Violations under Republic Act No. 8792, otherwise known as the Electronic Commerce Act of 2001;
12. Hijacking and other violations of Republic Act No. 6235; destructive arson and murder as defined in the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets;
13. Fraudulent Practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000;
14. Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.

The authors are of the opinion that it is only in the case of money laundering that a different terminology is justified. Under this statute, it is possible that the offenders are not public officers or employees or in conspiracy with such individuals. Money launderers could simply be gambling lords, drug dealers or smugglers who may not be public officials at the same time. The distinction, therefore, is correctly made since the wealth these criminals acquire, though illegal, are certainly not ill-gotten, if the term is strictly construed. And while ultimately, forfeiture in favor of the Government may result, separate rules must govern different kinds of criminal proceeds as well as different kinds of offenders.

At this point, it must also be mentioned that the proposed Rules and Regulations Implementing the Anti-Money Laundering Act give a broader and, perhaps, more effective definition of proceeds. It includes:

> [A]ll material results, profits, effects and any amount realized from an unlawful activity; all monetary, financial or economic means, devices, documents, papers or things used in or having any relation to an unlawful activity; and all moneys, expenditures, payments, disbursements, costs, outlays,

> charges, accounts, refunds and other similar items for the financing, operations and maintenance of any unlawful activity."[23]

As of this writing however, these rules have yet to be approved by the Congressional Oversight Committee created by the Anti-Money Laundering Act.

B. RECOVERING ILL-GOTTEN WEALTH

Ill-gotten wealth is recovered either: (1) directly, when a judgment is rendered against the public officer or employee in a civil forfeiture case; or (2) indirectly, as an incident to a criminal conviction that includes an order for the restitution of criminal proceeds.

A civil forfeiture case is considered direct because the only objective of the action is recovery of the property unlawfully acquired by the public officer or employee. The procedure for such recovery is governed by both the Forfeiture Law and the Rules of Court.[24] Restitution, on the other hand, is considered indirect because the primary purpose of the criminal action is to punish the erring public official or employee. Recovery of the illegally obtained wealth is merely secondary, and is always contingent upon a finding of guilt. This type of recovery is controlled by the Revised Penal Code[25] and other special penal laws.

By the Solicitor General

Under the Forfeiture Law, it is the Solicitor General, in behalf of the Republic of the Philippines, who files before the Regional Trial Court in the city or province where the public officer resides or holds office, a petition for a writ commanding the said public officer or employee to show cause why the subject property, or any part thereof, should not be declared property of the State. It is required, however, that the Solicitor General does so only upon complaint by any taxpayer to the city or provincial fiscal who shall conduct an inquiry similar to preliminary investigations in criminal cases and who shall certify to the Solicitor General that there is reasonable ground to believe that there has been a violation of the Forfeiture Law and that the respondent is probably guilty thereof.[26] As the general counsel of the State, the authority of the Solicitor General to prosecute cases of unlawfully acquired wealth is also recognized in the PCGG Charter and the Anti-Money Laundering Act of 2001. These provisions imply that the Office of the

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[23] Rules and Regulations Implementing the Anti-Money Laundering Act (2001), Rule 3f.
[24] RULES OF COURT, Rule 91.
[25] Act. No. 3815 (1932), art. 38.
[26] Rep. Act No. 1379 (1955), sec. 2.

Ombudsman and the Office of the Solicitor General possess overlapping prosecutorial power in the recovery of ill-gotten wealth.

By the Ombudsman

The Ombudsman Act of 1989 likewise grants the Ombudsman authority to "investigate and initiate the proper action for the recovery of ill-gotten and/or unexplained wealth amassed after February 25, 1986 and the prosecution of parties involved therein."[27] He is also granted the broad power to investigate on his own, or on complaint of any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient.[28]

For ill-gotten wealth acquired prior to February 25, 1986 belonging to former President Ferdinand E. Marcos, his wife and former First Lady Imelda Romualdez Marcos, their immediate family, relatives, subordinates, close associates, dummies, agents and nominees, the Charter of the PCGG applies. There appears to be a gap, however, in the law since neither the PCGG nor the Ombudsman is granted the authority to investigate and initiate the proper action for recovery in cases where the wealth was acquired prior to February 25, 1986 by individuals not connected in any way to the Marcoses. The authors believe that under such circumstances, the power is vested with the Solicitor General.

By the Presidential Commission on Good Government

Under the executive order[29] issued by then President Corazon Aquino defining the jurisdiction of the PCGG over cases involving the Marcos ill-gotten wealth, the Commission, with the assistance of the Solicitor General, was empowered to file and prosecute all cases investigated by it under Executive Orders No. 1 and 2. Executive Order No. 14 further provided that:

> [C]ivil suits for restitution, reparation of [sic] damages, or indemnification for consequential damages, forfeiture proceedings under Republic Act No. 1379, or any other civil actions [sic] under the Civil Code or other existing laws, in connection with Executive Order No. 1 and Executive Order No. 2 may be filed separately from and proceed independently of any criminal proceedings [sic] and may be proved by a mere preponderance of evidence.[30]

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[27] Rep. Act No. 6770 (1989), sec. 15 (11).
[28] CONST. art. XI, sec. 12 (1).
[29] Exec. Order No. 14 (1986), sec. 1.
[30] Exec. Order No. 14 (1986), sec. 3.

The PCGG may also issue a writ of sequestration or a freeze or hold order upon the authority of at least two Commissioners, based on the affirmation or complaint of an interested party or *motu proprio*, when the Commission has reasonable grounds to believe that the issuance thereof is warranted.[31]

Under its Charter, the PCGG has the following powers:

(1) To conduct investigation as may be necessary in order to accomplish and carry out the purposes of this order;
(2) To sequester or place or cause to be placed under its control or possession any building or office wherein any ill-gotten wealth or properties may be found, and any records pertaining thereto, in order to prevent their destruction, concealment or disappearance which would frustrate or hamper the investigation or otherwise prevent the Commission from accomplishing its task;
(3) To provisionally take over in the public interest or to prevent its disposal or dissipation, business enterprises and properties taken over by the government of the Marcos Administration or by entities or persons close to former President Marcos, until the transactions leading to such acquisition by the latter can be disposed of by the appropriate authorities;
(4) To enjoin or restrain any actual or threatened commission of facts by any person or entity that may render moot and academic, or frustrate, or otherwise make ineffectual the efforts of the Commission to carry out its tasks under this order;
(5) To administer oaths, and issue subpoena requiring the attendance and testimony of witnesses and/or the production of such books, papers, contracts, records, statement of accounts and other documents as may be material to the investigation conducted by the Commission;
(6) To hold any person in direct or indirect contempt and impose the appropriate penalties, following the same procedures and penalties provided in the Rules of Court;
(7) To seek and secure the assistance of any office, agency or instrumentality of the government;
(8) To promulgate such rules and regulations as may be necessary to carry out the purpose of this order.[32]

By the Anti-Money Laundering Council

The Anti-Money Laundering Council (AMLC) is mandated to perform a significant role in the recovery of ill-gotten wealth amassed subsequent to the law's passage. This is so in the light of the fact that money illegally acquired by public officers is often laundered to make it appear that its source or sources were legitimate. As the principal government entity tasked to combat money laundering, the AMLC was given the following functions:

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[31] Rules and Regulations of the PCGG (1986), sec. 3.
[32] Exec. Order No. 1 (1986), sec.3.

(1) To require and receive covered transaction reports from covered institutions;
(2) To issue orders addressed to the appropriate Supervising Authority of the covered institution to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction report or request for assistance from a foreign State, or believed by the council, on the basis of substantial evidence to be, in whole or in part, wherever located, representing, involving, or related to, directly or indirectly, in any manner or by any means, the proceeds of an unlawful activity;
(3) To institute civil forfeiture proceedings and all other remedial proceedings through the office or the Solicitor General;
(4) To cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses;
(5) To initiate investigations of covered transactions, money laundering activities and other violations of this Act;
(6) To freeze any monetary instrument or property alleged to be the proceeds of an unlawful activity
(7) To implement such measures as may be necessary and justified under this Act to counteract money laundering;
(8) To receive and take action in respect of, any request from foreign states for assistance in their own anti-money laundering operations provided in this Act;
(9) To develop educational programs on the pernicious effects of money laundering, the methods and techniques used in money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders; and
(10) To enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned and controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection and investigation of money laundering offenses and prosecution of offenders.[33]

Prior to the institution of criminal proceedings or during the course of such proceeding for the prosecution of money laundering offenses, the AMLC may also freeze any account or any monetary instrument or property which is the subject of such offense upon its determination of the existence of probable cause. The AMLC is also given the power to inquire into bank accounts of suspected money launderers provided that a court order is obtained.

[33] Rep. Act No. 9160 (2001), sec. 7 (1-6).

III. BARRIERS IN THE RECOVERY OF ILL-GOTTEN WEALTH

A. STATUTORY BARRIERS

Ineffective Banking and Finance Laws

The laws discussed hereunder govern existing banking and financial practices in the Philippines which the authors believe provide convenient shelter to those concealing ill-gotten wealth. Without corresponding amendments to these pieces of legislation, the task of recovering such wealth will be protracted and difficult.

Of particular significance are the provisions of the Anti-Money Laundering Act of 2001 and their impact on what international observers have claimed as the "excessive secrecy provisions"[34] of the country. A more detailed analysis of this law is important because ill-gotten wealth is often laundered through the banking system, in much the same way as proceeds of other illegal activities. Inadequate anti-money laundering legislation, coupled with unreasonably rigid bank secrecy policies, thus raise substantial legal barriers to the recovery of ill-gotten wealth.

1. The Anti-Money Laundering Act

On September 29, 2001, the Philippine Congress enacted the Anti-Money Laundering Act (AMLA)[35] in response to the pressure exerted by the Financial Action Task Force (FATF), an inter-governmental body established in 1989 by the G-7 Paris Summit to combat money laundering. The said law declared the State policy of ensuring "that the Philippines shall not be used a money laundering site for the proceeds of any unlawful activity."[36]

There are, however, serious deficiencies in the law that contradict the purpose for which it was passed. Unless these deficiencies are addressed, the new law will be ineffectual both in combating money laundering and consequently, in the investigation and recovery of ill-gotten wealth.

The first deficiency involves the "threshold amount" that will render a single, series or combination of transactions subject to the law. The law states that amounts in excess of P4,000,000.00 or an equivalent amount in foreign currency based on the prevailing exchange rate are covered.[37] It should be noted that anti-

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[34] Financial Action Task Force, *Second Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2001), *at* http://www1.oecd.org/pdf/NCCT2001_en.pdf (last visited Feb. 11, 2002).

[35] Rep. Act No. 9160 (2001).

[36] Rep. Act No. 9160 (2001), sec. 2.

[37] Rep. Act No. 9160 (2001), sec. 3 (b).

money laundering legislation of the United States provides for a much lower threshold amount of $10,000.00,[38] which is roughly eight times lower than that provided under Philippine law. The authors believe that providing for a similar threshold will be necessary to effectively monitor potential money laundering transactions, which are often employed to conceal ill-gotten wealth.

The limited enumeration constituting the predicate offenses for money laundering is the second deficiency in the AMLA. Under the said law, only the following activities are considered "unlawful"[39] for purposes of money laundering:

a. Kidnapping for ransom under Article 267 of Act 3815, otherwise known as the Revised Penal Code;
b. Sections 3, 4, 5, 7, 8 and 9 of Article II of Republic Act 6425, as amended, otherwise known as the Dangerous Drugs Act of 1972;[40]
c. Section 3, paragraphs B, C, E, G, H and I of Republic Act 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act[41]
d. Plunder under Republic Act 7080, as amended;
e. Robbery and extortion under Articles 294, 295, 296, 299, 300, 301 and 302 of Act 3815, otherwise known as the Revised Penal Code;
f. Jueteng and masiao punished as illegal gambling under Presidential Decree 1602;[42]
g. Piracy on the high seas under the Revised Penal Code,[43] as amended, and Presidential Decree No. 532;[44]
h. Qualified theft under Article 310 of the Revised Penal Code, as amended;

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[38] US Code, Title 18, Part I, Chapter 95, sec. 1956 b (2).

[39] Rep. Act No. 9160 (2001), sec. 3 (i).

[40] These refer to the importation, sale, administration, delivery, distribution, transportation, manufacture and possession of prohibited drugs, the maintenance of a den, dive or resort for prohibited drug users and the cultivation of plants which are sources of prohibited drugs. Noticeably absent from the provision are offenses relating to regulated but not prohibited drugs.

[41] These refer to the offenses committed by public officials such as the requesting or receiving of gifts for material benefit in connection with transactions they are required to intervene in under law or licenses or permits they are to grant, the causing of undue injury through manifest partiality, evident bad faith or gross inexcusable negligence, the entering into contracts manifestly or grossly disadvantageous to the Government, the possession of financial interest in transactions they officially intervene or participate in, or in those transactions requiring the approval of entities they are members of, even though they vote against or do not participate in the action.

[42] Pres. Decree No. 1602 (1978), sec 1.

[43] REV. PEN. CODE, arts. 122 and 123.

[44] Pres. Decree No. 532 (1974), sec 2 (d).

i. Swindling under Article 315 of the Revised Penal Code, as amended;
j. Smuggling under Republic Act Nos. 455 and 1937;
k. Violations under Republic Act No. 8792, otherwise known as the Electronic Commerce Act of 2001;
l. Hijacking and other violations[45] of Republic Act No. 6235; destructive arson[46] and murder as defined in the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets;
m. Fraudulent Practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000; and
n. Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.

Other jurisdictions are far stricter. Anti-money laundering legislation in the United States, for instance, provides for at least 70 predicate offenses[47] as well as wiretap authority in the investigation of money laundering offenses. In Japan, there is a new law[48] that provides for a catalogue of predicate offenses covering "all criminal offenses of fundamental significance" and "a suspicious transactions reporting system." The same law established a Financial Intelligence Unit that evaluates the suspicious transaction reports and passes them on via official channels to appropriate law enforcement agencies. Singaporean law[49] criminalizes the laundering of the proceeds of a wide range of "serious" offenses and uses the lower standard of "reasonable grounds to believe" in the prosecution of offenses relating to corruption and other serious crimes, including money laundering. It also requires all persons to report transactions if they have reasonable grounds to believe it involves proceeds from a serious offense.

Under the present AMLA, there exists doubt as to whether juridical persons can be held liable for money laundering. This is the law's third deficiency. Due to the inadvertent placement of the section on the liability of artificial persons under the provision punishing malicious reporting, it would appear that corporations, partnerships and the like cannot be held liable for the three other acts penalized

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[45] These refer to acts compelling a change in the course or destination of an aircraft of Philippine registry or the seizing or usurping of control thereof while in flight. It also covers the unauthorized shipping, loading or carrying of explosive, flammable, corrosive or poisonous substances.

[46] REV. PEN. CODE, art 320.

[47] US Code, Title 18, Part I, Chapter 95, sec. 1956 c (7).

[48] Anti-Organized Crime Law of Japan (2000), *available at* http://www.fsa.go.jp/fiu/fiue/fme001.html (last visited Feb. 11, 2002).

[49] Corruption, Drug-Trafficking and Other Serious Crimes (Confiscation of Benefits) Act of Singapore, as amended (1999), *available at* http://statutes.agc.gov.sg (last visited Feb. 11, 2002).

under the AMLA, namely: (1) the crime of money laundering itself, (2) failure to keep records and (3) breach of confidentiality. This grave oversight creates a loophole in the law that may allow such juridical persons to escape liability for money laundering. It then becomes awfully convenient for those hiding ill-gotten wealth to launder money through the organization of bogus corporations or in connivance with unscrupulous banks.

The fourth, and perhaps, most serious deficiency in the AMLA is the limited authority granted to AMLC to investigate and freeze suspicious bank deposits. Under the present set-up, the AMLC is only allowed to freeze deposit accounts for a period not exceeding 15 days. To extend such a freeze order[50] or inquire into particular bank deposits or investments,[51] a court order is required. The law also provides for an automatic dissolution of the freeze order in cases of failure of the AMLC, within 72 hours, to dispose of a depositor's explanation as to why the freeze order should be lifted.[52] By requiring such a court order and supplying an automatic dissolution provision, opposition thereto may be raised before the court, thus causing delay and giving the wrong-doer an opportunity to close the subject accounts and transfer the same to a different bank. Time is of the essence when it comes to such investigations given the relative ease in transferring and moving wealth across banking institutions.

2. The Foreign Currency Deposit Act

There are three unique privileges enjoyed by foreign currency deposits under the Foreign Currency Deposit Act (FCDA)[53] that pose as barriers to the speedy and efficient recovery of ill-gotten wealth: the grant of absolute confidentiality,[54] the approval of numbered accounts[55] and the exemption from court order or process. Intended as a measure to increase the international reserves of the country, the said law is now being used as a convenient tool for masking ill-gotten wealth.

Section 3 of FCDA provides that "authorized banks may adopt a numbered account system for recording and servicing deposits." It further states under Section 8 that "[a] foreign currency deposit cannot be examined, inquired or looked into by any person or office, whether public or private, judicial, administrative or legislative, except upon written permission of the depositor." The same section further states that "[f]oreign currency deposits are exempt from attachment, garnishment, or any

[50] Rep. Act No. 9160 (2001), sec. 10.
[51] Rep. Act No. 9160 (2001), sec. 11.
[52] Rep. Act No. 9160 (2001), sec. 10.
[53] Rep. Act No. 6426 (1972).
[54] Rep. Act No. 6426 (1972).
[55] Rep. Act No. 6426 (1972), sec. 3.

other order or process of any court, legislative body, government agency or any administrative body whatsoever." The only other exception to this confidentiality privilege is found in *Salvacion v. Central Bank of the Philippines*[56] involving the dollar deposits of a foreign transient, arrested for rape, who escaped from prison.

3. The Bank Secrecy Law

Like the FCDA, the current Bank Secrecy Law (BSL)[57] considers all deposits of whatever nature with banks or banking institutions in the Philippines as "absolutely confidential (in) nature."[58] Apart from those provided under the AMLA, the only recognized exceptions in the BSL are: (1) when there is a written permission from the depositor; (2) in cases of impeachment; (3) upon order of a competent court in cases of bribery or dereliction of duty of public officials; (4) in cases where the money deposited or invested is the subject matter of litigation;[59] (5) in cases of inquiry by the Commissioner of Internal Revenue into deposits of a decedent for the purpose of determining his gross estate of such decedent or the deposits of a taxpayer who has filed an application for compromise of his tax liability;[60] and (6) disclosures, to the Treasurer of the Philippines, of certain information about bank deposits which have been dormant for at least ten years, made in a sworn statement and a copy of which is posted in the bank premises.[61] While it is conceded that the legislative policy to "encourage people to deposit their money in banking institutions"[62] is praiseworthy, an unbridled confidentiality privilege granted to bank deposits is both unnecessary and dangerous.

B. JURISPRUDENTIAL BARRIERS

Crippling the Investigatory Powers of the Ombudsman: *Marquez v. Desierto*

The Supreme Court decision in the case of *Marquez v. Desierto*[63] raised an unnecessary but very serious barrier to the recovery of ill-gotten wealth. The controversy in the case arose from Union Bank's refusal to provide bank records and documents requested by the Office of the Ombudsman in connection with a case pending with the latter against a certain Amado Lagdameo. In resolving the dispute, the Supreme Court *en banc*, speaking through Justice Bernardo Pardo, ruled that "before an in camera inspection [of bank accounts upon order of the Ombudsman]

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[56] G.R. No. 94723, 278 SCRA 27 (1997).
[57] Rep. Act No. 1405 (1955).
[58] Rep. Act No. 1405 (1955), sec. 2.
[59] Rep. Act No. 1405 (1955), sec. 2.
[60] Rep. Act No. 8424 (1997), sec. 3 [sec. 6(F)].
[61] Pres. Decree No. 679 (1975), sec.1.
[62] Rep. Act No. 1405 (1955), sec. 1.
[63] G.R. No. 135882 (2001).

may be allowed, there must be a pending case before a court of competent jurisdiction." It further required that "the account must be clearly identified [and] the inspection limited to the subject matter of the pending case before the court of competent jurisdiction. The bank personnel and the account holder must be notified to be present during the inspection and such inspection may cover only the account identified in the pending case."[64]

This decision not only disregarded the express provisions of the Ombudsman Act but also failed to consider the purpose for which the Office of the Ombudsman was created.

Section 15(8) of Republic Act No. 6770, otherwise known as the Ombudsman Act of 1987, clearly grants the Ombudsman the power to "administer oaths, issue subpoena and subpoena *duces tecum* and take testimony in any investigation or inquiry, including the power to examine and have access to bank accounts and records."[65] It is not difficult to understand why this constitutional office was granted such a power. "In theory, the Ombudsman is to act as some kind of Watchman over the law's Watchmen."[66] He serves as "guardian of the people's right to seek government assistance for redress of grievances and as a vehicle to promote high standards of integrity and efficiency in government."[67] He has also been called "the eyes and ears of the people, the super lawyer-for-free of the oppressed and the downtrodden."[68] The Ombudsman is "an official critic, a mobilizer, a watchdog and a protector. He is an intercessor for and guardian of the rights of the downtrodden, as against the government."[69]

By requiring that there must be a pending case first before such inquiry can take place, the Court effectively clipped the investigatory authority of the Ombudsman and contradicted the constitutional and legislative intent in creating the office. Without such a power, it becomes extremely difficult for the Ombudsman to obtain financial records belonging to public officials that may serve as evidence of their wrongdoing. Moreover, the risk of double jeopardy attaching is increased by the filing of a criminal information based on investigation without supporting bank accounts or records.

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[64] Marquez v. Desierto, G.R. No. 135882 (2001).

[65] Rep. Act No. 6770 (1987), sec. 15 (8).

[66] Salvador T. Carlota, *The Ombudsman: Its Effectivity and Visibility Amidst Bureaucratic Abuse and Irregularity*, 65 PHIL. L.J. 13 (1990).

[67] *Id.* at 23.

[68] 2 RECORD OF THE CONSTITUTIONAL COMMISSION 267 (July 26, 1986). This is part of the sponsorship remarks given by Commissioner Nolledo on the proposal to create the Office of the Ombudsman under the Constitution.

[69] 4 RECORD OF THE CONSTITUTIONAL COMMISSION 206 (Sept. 3, 1986).

While the decision mentioned that the Ombudsman Act was a later legislation when it quoted the order of the Ombudsman, it did not address the issue of whether or not Republic Act No. 6770 constituted another exception to the Bank Secrecy Law. Citing the case of *Union Bank of the Philippines v. Court of Appeals*,[70] the Supreme Court ruling merely reiterated the exceptions already provided under the Bank Secrecy Law and declared that zones of privacy are recognized and protected in our laws by citing provisions in the Civil Code and the Revised Penal Code.

It was also unfortunate that the Court's decision did not discuss the nature of the case filed before the Ombudsman which was then subject of the investigation. It was only mentioned that P272.1 million worth of Managers Checks were purchased and that checks amounting to P70.6 million were deposited in Union Bank. The nature of the case was relevant because if it were an investigation for either unexplained wealth, bribery or dereliction of duty, the general rule in the Bank Secrecy Law would no longer apply. The Supreme Court has categorically stated in a previous case that "[c]ases of unexplained wealth are similar to cases of bribery or dereliction of duty and no reason is seen why these two classes of cases cannot be excepted from the rule making bank deposits confidential."[71]

Over-extending the Attorney-Client Privilege: *Regala v. Sandiganbayan*

Another equally unfortunate obstacle to the recovery of ill-gotten wealth was erected by the Supreme Court in deciding the case of *Regala v. Sandiganbayan*.[72] Petitioners in the case were partners of the law firm Angara Abello Concepcion Regala and Cruz Law Offices (ACCRA) who allegedly performed legal services for their clients, such as the formation, acquisition and organization of business associations or organizations, using ill-gotten wealth. The PCGG refused to exclude the petitioners as defendants in a recovery case it filed before the Sandiganbayan unless the following conditions were met: (1) disclosure by the said ACCRA lawyers of the identity of their clients; (2) submission of documents substantiating the attorney-client relationship; and (3) submission of the deeds of assignment executed by the petitioners in favor of their clients covering their respective shareholdings.

The Supreme Court *en banc* annulled the resolutions of the respondent Sandiganbayan denying the motion of the petitioners to be excluded as parties-defendants in the complaint for recovery of the alleged ill-gotten wealth.

The majority opinion, speaking through Justice Kapunan, ruled that:

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[70] Union Bank of the Philippines v. Court of Appeals, G.R. No. 134699, 321 SCRA 563 (1999).
[71] Philippine National Bank v. Gancayco, G.R. L-18343, 15 SCRA 91, 96 (1965).
[72] Regala v. Sandiganbayan, G.R. No. 105938, 262 SCRA 122 (1996).

> We find that the condition precedent required by the respondent PCGG of the petitioners for their exclusion as parties-defendants in PCGG Case No. 33 violates the lawyer-client confidentiality privilege. The condition also constitutes a transgression by respondents Sandiganbayan and PCGG of the equal protection clause of the Constitution. Moreover, the PCGG's demand not only touches upon the question of the identity of their clients but also on documents related to the suspected transactions, not only in violation of the attorney-client privilege but also of the constitutional right against self-incrimination. Whichever way one looks at it, this is a fishing expedition, a free ride at the expense of such rights.[73]

The Supreme Court also averred that "while we are aware of the respondent PCGG's legal mandate to recover ill-gotten wealth, we will not sanction acts which violate the equal protection guarantee and the right against self-incrimination and subvert the lawyer-client confidentiality privilege."[74]

While recognizing the general rule that the attorney-client privilege does not apply to the identity of clients for reasons of public policy, the Court nevertheless pointed out that there are a number of acknowledged exceptions to this rule. These include instances where: (1) a strong probability exists that revealing the client's name would implicate that client in the very activity for which he sought the lawyer's advice; (2) disclosure would open the client to civil liability; (3) the government's lawyers have no case against an attorney's client unless, by revealing the client's name, the said name would furnish the only link that would form the chain of testimony necessary to convict an individual of a crime; and (4) the nature of the attorney-client relationship has been previously disclosed and it is the identity which is intended to be confidential. In summary, "information relating to the identity of a client may fall within the ambit of the privilege when the client's name itself has an independent significance, such that disclosure would then reveal client confidences."[75]

The Supreme Court concluded that disclosure of the identity of the petitioners' clients would fall under these exceptions and was thus protected by the attorney-client privilege. However, as argued by Justice Hilario Davide in his dissenting opinion, these exceptions contemplate that the attorneys in such circumstances merely represent or advocate the causes of their clients. They do not contemplate a case wherein the attorneys are co-defendants of their alleged clients.[76]

The *Regala* ruling is a major setback in the government's efforts to recover ill-gotten wealth. It misapplied the attorney-client privilege embodied in the Rules of

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[73] *Id.* at 157.
[74] *Id.* at 158.
[75] *Id.* at 147-8 (citations omitted).
[76] *Id.* at 165.

Court,[77] which provides that an attorney cannot, without the consent of his client, be examined as to any communication made the client to him, or his advise given thereon in the course of, or with a view to, professional employment.[78] The identity of a lawyer's client or clients cannot, by any stretch of the imagination, be considered as a communication made by the latter to the former or an advice given in the course of, or with a view to, professional employment.

Justice Davide, dissenting further, insisted that:

> *The rule of confidentiality under the lawyer-client relationship is not cause to exclude a party. It is merely a ground for disqualification of a witness* (§24, Rule 130, Rules of Court) *and may only be invoked at the appropriate time, i.e.,* when a lawyer is under compulsion to answer as witness, as when, having taken the witness stand, he is questioned as to such confidential communication or advice, or is being otherwise judicially coerced to produce, through *subpoenae duces tecum* or otherwise, letters or other documents containing the same privileged matter. But none of the lawyers in this case is being *required to testify about or otherwise reveal* "any [confidential] communication made by the client to him, or his advice given thereon in the course of, or with a view to, professional employment." What they are being asked to do, in line with their claim that they had done the acts ascribed to them in pursuance of their professional relation to their clients, is to identify the latter to the PCGG and the Court; but this, *only if they so choose* in order to be dropped from the complaint, such identification being the condition under which the PCGG expressed willingness to exclude them from the action. The revelation is entirely optional, discretionary, on their part. The attorney-client privilege is not therefor applicable.[79]

According to him, the privilege cannot protect the petitioners as they were sued as principal defendants in the case allegedly for conspiring with their clients in the commission of acts to accumulate and subsequently conceal ill-gotten wealth. These lawyers were included as parties-defendants in the case because there was evidence proving that ACCRA or the members thereof, through its investment arm ACCRA Investments Corporation, owned and controlled 15 million shares of stock of the United Coconut Planters Bank (UCPB). It was also shown in the corporate books that Edgardo J. Angara, one of the ACCRA partners, held 3,744 shares of stock of UCPB. Other members of the firm were also listed in the books of various alleged coconut levy funded corporations under investigation, as holders of shares of stock thereof.

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[77] RULES OF COURT, Rule 130, sec. 24 (b).
[78] RULES OF COURT, Rule 130, sec. 24 (b).
[79] Regala v. Sandiganbayan, G.R. No. 105938, 262 SCRA 122, 163 (1996).

This unfortunate ruling disregarded an established exception to the attorney client privilege, in that the privilege may not be used as a shield to perpetrate a criminal offense. This should have been more seriously considered by the Court, since the lawyers in this case were accused not merely of protecting the illegal activities of their clients, but of actually conspiring with them in the acquisition of ill-gotten wealth. By needlessly expanding the scope of the attorney-client privilege, the Court created a distressing incentive for those engaged in the practice of law governing public officers. As a consequence, more and more lawyers might be tempted to camouflage such corrupt activities, or even get involved themselves, knowing that this decision may provide a convenient escape from liability.

Taking Good Faith Too Far: *Tabuena v. Sandiganbayan*

In this case, Luis A. Tabuena and Adolfo M. Peralta were found guilty of malversation under Article 217 of the Revised Penal Code by the respondent Sandiganbayan. The respondent Court found that Tabuena, who was at that time the General Manager of the Manila International Airport Authority (MIAA), with the aid of Adolfo Peralta, Acting Manager of the Financial Services Department of MIAA, caused the release of ₱55,000,000.00 from the MIAA funds pursuant to irregular verbal and written instructions by then President Ferdinand Marcos.

Tabuena and Peralta challenged the decision of the Sandiganbayan before the Supreme Court. While admitting that the disbursements were "out of the ordinary," and "not based on the normal procedure," in that they were made in cash and lacked the necessary vouchers, Tabuena and Peralta, among other defenses, claimed that they acted in "good faith." Tabuena argued that they were merely complying with the verbal order and the memorandum from President Marcos directing him to forward to the Office of the President ₱55,000,000.00 in cash as partial payment for what MIAA allegedly owed the Philippine National Construction Corporation (PNCC). The Marcos Memorandum referred to another memorandum by Minister of Finance Roberto V. Ongpin recommending the payment of ₱34,500,000.00 out of existing MIAA Project funds.

The Supreme Court, speaking through Justice Francisco, sustained the good faith defense of Tabuena and Peralta, saying that it was a valid defense in a prosecution for malversation for it would negate criminal intent on the part of the accused. It further ruled that:

> The accused may thus always introduce evidence to show he acted in good faith and that he had no intention to convert. And to this, to our mind, Tabuena and Peralta had meritoriously shown.

> In so far as Tabuena is concerned, with the due presentation in evidence of the MARCOS Memorandum, we are swayed to give credit to his claim of having caused the disbursement of the P55 Million solely by reason of such memorandum.[80]

According to the Court, the defendants were likewise entitled to the justifying circumstance of obedience to an order issued for some lawful purpose. The Revised Penal Code provides that, "[a]ny person who acts in obedience to an order issued by a superior for some lawful purpose"[81] does not incur any criminal liability. In order for this justifying circumstance to apply, the following must be present: (1) that an *order* has been issued by a *superior*; (2) that such order must be for some *lawful purpose*; and (3) that the *means* used by the subordinate to carry out said order is *lawful*.[82] [Italics supplied.] In absolving Tabuena, the Supreme Court declared:

> Tabuena had no other choice but to make the withdrawals, for that was what the MARCOS Memorandum required him to do. He could not be faulted if he had to obey and strictly comply with the presidential directive, and to argue otherwise is something easier said than done. Marcos was undeniably Tabuena's superior – the former being then the President of the Republic who unquestionably exercised control over government agencies such as the MIAA and PNCC. In other words, Marcos had a say in matters involving inter-government agency affairs and transactions, such as for instance, directing payment of liability of one entity to another and the manner in which it should be carried out. And as a recipient of such kind of a directive coming from the highest official of the land no less, good faith should be read on Tabuena's compliance, without hesitation nor any question, with the MARCOS Memorandum. Tabuena therefore is entitled to the justifying circumstance of *"Any person who acts in obedience to an order issued by a superior for some lawful purpose."* The subordinate-superior relationship between Tabuena and Marcos is clear. And so too, is the lawfulness of the order contained in the MACOS Memorandum, as it has for its purpose partial payment of the liability of one government agency (MIAA) to another, (PNCC).[83]

The application of the justifying circumstance of obedience to a lawful order was erroneous. The Court failed to appreciate that while Tabuena was a subordinate of the late dictator and was under the latter's control and supervision, the other two requisites for the application of the justifying circumstance were not satisfied under the circumstances of the case. The second and third requisites necessitate that the order be for a *lawful purpose* and that the *means* of carrying out the order also be *lawful*.

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[80] Tabuena v. Sandiganbayan, G.R. No. 103501-03, 268 SCRA 332, 365-7 (1997).

[81] REV. PEN. CODE, art. 11 (6).

[82] 1 LUIS B. REYES, THE REVISED PENAL CODE 201 (14th ed. 1998).

[83] Tabuena v. Sandiganbayan, G.R. No. 103501-03, 268 SCRA 332, 357-8 (1997).

A closer scrutiny of the facts would have revealed that the instructions written in the Marcos Memorandum should have raised important concerns, on the part of Tabuena, regarding the lawfulness of its purpose. The sum ordered by former President Marcos to be delivered as alleged payment for the obligations of MIAA to PNCC was disproportionately larger than the amount that was recommended by the Minister of Finance, Roberto Ongpin, to be taken from the MIAA Project funds, which was allegedly the basis of such memorandum in the first place.

The Supreme Court further said that, "even if the order is illegal, if it is patently legal and the subordinate is not aware of its illegality, the subordinate is not liable, for then there would only be a mistake of fact committed in good faith."[84] However, this defense is unavailable if the defendant should have known or would have had grounds to believe that the order might not be lawful. Far from the order being patently legal, there was in fact every reason to believe that the order could not have been lawful. The following facts should have alerted Tabuena: (1) the amount was disproportionately larger than the supposed unpaid balance; (2) the payment was to be made in cash; and (3) there were no vouchers that authorized the disbursement. Thus, even if he had no knowledge of the illegal purpose of the order, he should be held criminally liable for malversation by negligence. It was his negligence, at the very least, that allowed the funds to be misappropriated.

As regards the third requisite, the means employed to carry out the order by Tabuena and Peralta cannot be considered as lawful. Both admitted that they caused these disbursements without complying with the settled procedure for such transactions. They delivered cash instead of checks, in violation of the Basic Guidelines for Internal Control issued by the Commission on Audit at that time. There were no vouchers to authorize the said disbursements. Nonetheless, the Supreme Court said that such omissions should, at most, expose Tabuena to civil or administrative, and not criminal, liability.

C. INTERNATIONAL BARRIERS

According to PCGG Commissioner Victoria Avena, there are also major international barriers to the recovery of ill-gotten wealth.[85] These include complications posed by the Government's inability to acquire jurisdiction over ill-gotten wealth located abroad and the insufficiency of international law agreements entered into by the Philippines that provide for recovery remedies.

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[84] *Id.* at 360.

[85] Interview with Victoria A. Avena, Commissioner of the Presidential Commission on Good Government, in Mandaluyong City (Oct. 9, 2001).

Because a state may exercise its inherent powers of sovereignty only within its territorial jurisdiction, Philippine laws, processes and jurisprudence are only enforceable within the Philippines. To begin with, it will be difficult to identify suspected ill-gotten properties and their owners if the wealth is located or siphoned off to a foreign country. Assuming that this has been achieved, and there is a Philippine order for the recovery or forfeiture of ill-gotten wealth, such a judgment may only be enforced through the legal processes of the state where the said properties are found. Unfortunately, the government neither has the personnel nor the resources that will enable it to avail of such a remedy, particularly when one takes into account the number of ill-gotten assets and properties scattered in various jurisdictions all over the world.

There is also the absence of international remedies in cases where foreign entities such as banks, after admitting that they maintain or administer ill-gotten wealth, renege on their commitments to turn over documents covering the said assets. In one such instance,[86] six Swiss Banks, namely Schweizerischer Bankverein, Basel; Armand Von Ernst & Cie AG, Bern; Schweizerische Volksbank, also in Bern; Banque Gutzwiller, Kurz, Bungener SA, Geneva; Chemical Bank (Suisse) SA, also in Geneva; and Hong Kong & Shanghai Banking Corp., HK, Zurich, continue to hold back documents from the Philippine Government violating an earlier agreement that they would cooperate with the Philippines. This, despite the Swiss Federal Banking Commission's confirmation in 1986, that 13 Swiss banks were maintaining or administering assets of the Marcos family, persons close to them and their companies.

IV. RECOMMENDATIONS FOR FACILITATING THE RECOVERY OF ILL-GOTTEN WEALTH

A. STATUTORY RECOMMENDATIONS

Amend the Forfeiture Law and the Code of Conduct and Ethical Standards for Public Officials and Employees[87]

Because these two laws are almost always used in the process of regaining ill-gotten wealth, improvements in them will greatly facilitate recovery. Except in cases of restitution of the proceeds ordered upon a criminal conviction, the only other existing method of recovering ill-gotten wealth involves a civil forfeiture proceeding that uses Statements of Assets and Liabilities (SAL)[88] required to be filed

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[86] Donna S. Cueto, *Six Swiss Banks Continue to Hide Marcos Accounts*, PHIL. DAILY INQUIRER, Dec. 27, 2001, at 1.

[87] Rep. Act No. 6713 (1989).

[88] Rep. Act No. 6713 (1989), sec. 8(A).

under Code and the "unlawfully acquired" *prima facie* presumption[89] in the Forfeiture Law. The following amendments are proposed:

a. Require that all public officials and employees grant the Ombudsman authority to obtain from all banks and financial institutions such documents as may show their assets, liabilities, net worth, business interests and financial connections. This is similar to the authority already granted to the Ombudsman to obtain such information from all appropriate government agencies, including the Bureau of Internal Revenue[90] under the present Code.

b. Provide for a limited but immediate sequestration and freeze authority, upon order of a competent court, in cases whenever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to his salary as such and to his other lawful income and the income from legitimately acquired property.

c. Exempt such sequestered or frozen property from attachment, garnishment, or any other order or process by any court, body or agency except those issued by the Supreme Court.

It is also recommended that, pending possible amendment to the banking laws hereinafter discussed, the rarely-invoked last sentence of Section 8 of the Anti-Graft and Corrupt Practices Act be used as authority for the Ombudsman or the PCGG to inquire into the bank deposits of individuals suspected to have amassed ill-gotten wealth. In fact, the Supreme Court has categorically declared, citing the testimony of Senator Arturo M. Tolentino, author of the Anti-Graft and Corrupt Practices Act, that "by enacting section 8 of the Anti-Graft and Corrupt Practices Act, Congress clearly intended to provide an additional ground for the examination of bank deposits. Without such provision, ... prosecutors would be hampered if not altogether frustrated in the prosecution of those charged with having acquired unexplained wealth in public office."[91] The Court, referring to the Bank Secrecy Law and the Anti-Graft and Corrupt Practices Act, ruled further that, "The truth is that these laws are so repugnant to each other that no reconciliation is possible. ... The only conclusion possible is that section 8 of the Anti-Graft Law is intended to amend section 2 of Republic Act No. 1405 by providing an additional exception to the rule against the disclosure of bank deposits."[92]

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[89] Rep. Act No. 1379 (1955), sec 2.
[90] Rep. Act No. 6713 (1989), sec. 8(A).
[91] Philippine National Bank v. Gancayco, G.R. L-18343, 15 SCRA 91, 94 (1965).
[92] *Id.* at 95.

Amend the Anti-Money Laundering Act, the Foreign Currency Deposit Act and the Bank Secrecy Law

In view of the analysis made on these three Philippine banking laws, the following amendments are suggested:

a. Lower the threshold amount provided in the AMLA to ₱500,000.00.

b. Expand the enumeration of predicate crimes under the AMLA to cover all crimes and offenses wherein financial or pecuniary gain is derived.

c. Provide for a separate section on the liability of juridical persons for all acts punished under the AMLA.

d. Extend the effectivity period of an immediate freeze order to 90 days without prejudice to any extension which may be granted by a competent court.

e. Remove the court order requirement in cases where inquiry upon bank accounts is to be made based on probable cause

f. Allow investigations for ill-gotten wealth cases undertaken by the AMLC, PCGG, the Solicitor General or the Ombudsman as exceptions to the confidentiality privilege granted by the FCDA and the BSL.

The authors in making these recommendations, however, are by no means suggesting that due process, equal protection and other constitutional rights be disregarded. Rather, it is argued that privileges granted by statute – intended as incentives for the public to deposit their money with banks – should be balanced with the need to protect public interest in cases of prosecution for and recovery of ill-gotten wealth.

The covered transaction amount[93] in the AMLA must be lowered so as not to create a "threshold differential" making it more attractive to deposit illegally acquired money in the Philippine banking system vis-à-vis other jurisdictions. The list of predicate crimes and offenses must be expanded to avoid the possibility of wrongly rewarding criminals and offenders who conceal such wealth through money laundering. Corporations, partnerships and other juridical persons must be made liable for all acts punished under the AMLA. Otherwise, a moral hazard will be created which, in some instances, may encourage banks to assist in the masking of ill-

[93] Rep. Act No. 9160 (2001), sec 3 (b).

gotten wealth in exchange for substantial deposits. Even without a court order or in the absence of a pending case before a competent court, examinations and freezing of bank records and accounts, as a result of suspicious transactions, should be allowed if probable cause exists as determined by either the AMLC or the Ombudsman.

B. JURISPRUDENTIAL RECOMMENDATIONS

Restore the Reasonably Comprehensive Investigatory Powers of the Ombudsman: Correct the Marquez *v.* Desierto Ruling

The power of the Ombudsman to examine and have access to bank accounts and records must be restored. The *en banc* ruling of the Supreme Court in *Marquez v. Desierto* must be abandoned.

The Ombudsman Act of 1987 clearly intended to give the Ombudsman the power to "administer oaths, issue subpoena and subpoena *duces tecum* and take testimony in any investigation and inquiry, including the power to examine and have access to bank accounts and records."[94] It is a power necessary so that the Ombudsman may be able to effectively carry out his responsibilities under the law.

The Court suggested in its decision that the Ombudsman was in effect engaging in a fishing expedition to look for evidence in the case but did not elaborate further. Presumably, the Court was wary of the potential for abuse in the exercise of such a power and thereby imposed restrictions similar to that provided for under the Bank Secrecy Law.

However, the possibility of a fishing expedition could have been eliminated without having to maim the Ombudsman. The Court could have declared that while it is clear that the law expressly conferred the power to examine bank records and accounts, the exercise of such was nevertheless subject to the standard of probable cause. Only upon compliance with the probable cause requirement would such an intrusion be permitted under the due process clause of the Constitution. Proceeding from this ratiocination, the Court would have been able to invalidate the order requiring Union Bank to produce the bank records without having to require that such power be exercised only when there is a pending case before a court of competent jurisdiction. It is precisely through such an order that the Ombudsman seeks to determine in the first place whether or not a case should be filed in court.

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[94] Rep. Act No. 6770 (1987), sec. 15 (8).

As a matter of public policy, the reasonably comprehensive investigatory powers of the Ombudsman should be respected and upheld. The potential for abuse is not sufficient reason for striking down the power itself – especially when the power is not only expressly granted by law but also essential to the accomplishment of the purposes for which the law was enacted. Moreover, it has been shown that appropriate jurisprudential safeguards are available as ways of minimizing the potential for abuse without having to contradict a clear legislative grant of authority.

Uphold the Correct Application of the Attorney-Client Privilege: Abandon the Regala *v.* Sandiganbayan Doctrine

The attorney-client privilege[95] protects communication not individuals.

While the privilege must be respected, the *Regala* doctrine should be abandoned so as not to unreasonably expand the scope of its protection. Justice Davide was correct in pointing out that the exceptions to the privilege should apply only in cases where the lawyers themselves are not accused of committing illegal activities. More importantly, the rule of confidentiality under the lawyer-client relationship has never been nor should it ever be a ground to exclude a party. It is merely a cause for disqualification of a witness and may only be invoked in particular instances, such as: (1) when a lawyer is under compulsion to answer as witness, after having taken the witness stand, he is questioned as to such confidential communication or advice; or (2) when the lawyer is being judicially coerced to produce, through subpoenae *duces tecum* or otherwise, letters or other documents containing the same privileged matter.

Disallow the Defense of Good Faith: Correct the Tabuena *v.* Sandiganbayan Decision

Good faith should no longer be considered a defense in a prosecution for malversation and other similar crimes committed by public officers.

Justice Artemio Panganiban, disagreeing with the majority in the Tabuena case, argued:

> In the Nuremberg trials, the defendants were *military officers* of the Third Reich who were *duty-bound* to obey direct orders on pain of court martial and death at a time when their country was *at war*. Nonetheless, they were meted out death sentences by hanging or long-term imprisonment. In the present case, the accused are *civilian officials* purportedly complying with a memorandum of the Chief Executive when *martial law had already been lifted* and

[95] RULES OF COURT, Rule 130, sec. 24 (b).

> the nation was in fact just about to vote in the "snap" presidential election in 1986. The Sandiganbayan did not impose death but only imprisonment ranging from seventeen years and one day to twenty years. *Certainly, a moral choice was not only possible. It was in fact available to the accused. They could have opted to defy the illegal order, with no risk of court martial or death. Or they could have resigned.* They knew or should have known that the P55 million was to be paid for a debt that was dubious and in a manner that was irregular. That the money was to be remitted in cold cash and delivered to the private secretary of the President, and not by the normal crossed check to the alleged creditor, gave them a moral choice to refuse. That they opted to cooperate compounded their guilt to a blatant conspiracy to defraud the public treasury.[96]

The authors take the position that good faith, independent of any justifying circumstance, is immaterial to, and therefore, should not be a defense against a prosecution for malversation and other similar crimes committed by public officers. They are at all times accountable to the people[97] and should consequently be made to observe a higher standard of diligence. The criminal intent that is presumed to exist because a crime has been committed should not be negated by simply raising a defense as easily invoked as good faith.

Good faith has been defined by the Supreme Court as "the honesty of intention" and "the honest lawful intent."[98] It implies "a freedom from knowledge and circumstances which ought to put a person on inquiry... .Good faith, or the want of it, is not a visible, tangible fact that can be seen or touched, but rather a state or condition of mind which can only be judged of by actual or fancied tokens or signs."[99]

Admittedly, the crime of malversation can be committed through negligence.[100] However, the absence of knowledge constitutes an element of both the good faith defense and crime itself if committed through negligence. A public officer cannot, therefore, use this same absence of knowledge to excuse himself from liability since it amounts to the same felony perpetrated merely in a different manner. Moreover, a "state of mind" like good faith, is irrelevant in cases of negligent commission of a crime. Negligence connotes "want of care required by the circumstances." More precisely, it refers to "the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury."[101] Consequently, it is not enough for a public officer to claim that he did not

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[96] Tabuena v. Sandiganbayan, G.R. No. 103501-03, 268 SCRA 332, 439-40 (1997).
[97] CONST. art. XI, sec. 1.
[98] Leung Yee v. Frank L. Strong Machinery Company, 37 Phil. 644, 651 (1918).
[99] *Id.* at 651-2.
[100] REV. PEN. CODE, art. 217.
[101] U.S. v. Juanillo, 23 Phil. 212, 223 (1912), *quoting* Judge Cooley, in his work on Torts (3d ed.), § 1324.

know. Rather, he must prove that it was impossible for him to have known. If the said public officer knew about the act's unlawfulness, the good faith defense must fail and the rules governing the intentional commission of the crime should apply.

Instead, what should be material is the presence or absence of intent. Only in the absence of such intent should it then be determined whether or not there was negligence. In both instances, the concept of good faith occupies no role.

V. OTHER RECOMMENDATIONS

In order to further facilitate the process of recovering ill-gotten wealth, a number of international law options may be taken by the Philippines. Two particular international agreements deserve mention: the United Nations Convention Against Transnational Organized Crime (UNCATOC)[102] and the European Convention on Mutual Assistance in Criminal Matters (ECMACM).[103]

A. RATIFY THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNCATOC)

While the Philippines is already a signatory to the Convention, ratification of the UNCATOC by the Philippine Senate at the soonest possible time will help expedite the recovery of ill-gotten wealth mainly because the Convention requires that "States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention."[104] The offenses covered are participation in an organized criminal group,[105] laundering of criminal proceeds,[106] corruption,[107] obstruction of justice, [108] and any "serious crime." The Convention defines "serious crime" as conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

Concretely, the agreement provides a number of tools that governments can employ to track down and recover ill-gotten wealth. Article 13 establishes a procedure for "international cooperation for purposes of confiscation."[109] The

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[102] Convention Against Transnational Organized Crime, December 15, 2001, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

[103] European Convention of Mutual Assistance in Criminal Matters, April 20, 1959, Europ. T. S. No. 30.

[104] Convention Against Transnational Organized Crime, art. 18, December 15, 2001, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

[105] *Id.*, art. 5.

[106] *Id.*, art. 6.

[107] *Id.*, art. 8.

[108] *Id.*, art. 23.

[109] *Id.*, art. 13.

Convention also allows a mechanism for joint investigations[110] and permits the use of special investigative techniques[111] in order to effectively combat the covered crimes.

B. ACCEDE TO THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS (ECMACM)

Like the UNCATOC, the ECMACM also provides international law remedies that the Philippines can avail of in its efforts to recover ill-gotten wealth. It imposes a mutual legal assistance obligation on all States Parties and covers all criminal matters except political and military offenses[112] and permits non-member States (of the European Union) to accede to the Second Additional Protocol after it has entered into force.[113] Such Protocol also allows covert investigations[114] and joint investigation teams. In addition, mutual legal assistance under the Protocol applies even to "proceedings brought before administrative authorities."[115]

Of particular importance in the process of recovering ill-gotten wealth is Article 12 of the Protocol providing for the direct restitution of articles obtained from criminal means to their rightful owners. It states:

> Article 12 – Restitution
>
> 1. At the request of the requesting Party and without prejudice to the rights of bona fide third parties, the requested Party may place articles obtained by criminal means at the disposal of the requesting Party with a view to their return to their rightful owners.
>
> 2. In applying Articles 3 and 6 of the Convention, the requested Party may waive the return of articles either before or after handing them over to the requesting Party if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.
>
> 3. In the event of a waiver before handing over the articles to the requesting Party, the requested Party shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles.

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[110] *Id.*, art. 19.

[111] *Id.*, art. 20.

[112] European Convention of Mutual Assistance in Criminal Matters, arts. 1 and 2, April 20, 1959, Europ. T. S. No. 30.

[113] Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, art. 31, August 11, 2001, Europ. T. S. No. 182.

[114] *Id.*, art. 19.

[115] *Id.*, art. 1(3).

> 4. A waiver as referred to in paragraph 2 shall be without prejudice to the right of the requested Party to collect taxes or duties from the rightful owner.

Immediate recovery of ill-gotten wealth from a country party to the Protocol is thus possible. According to former PCGG Chair Jovito Salonga, "Article 12 of the Protocol allows direct restitution of the ill-gotten wealth by the requested State (Switzerland) with a view to its return to the rightful owners (in this case, the Philippines)."[116]

VI. CONCLUSIONS

Earlier, the principal question raised was: Is the Philippines making it harder for itself to recover ill-gotten wealth?

It appears to be so. Beginning with a finding of confused terminology ranging from "unlawfully acquired property" to "ill-gotten wealth", the discussions above have also shown that there are serious statutory and jurisprudential barriers to the recovery of ill-gotten wealth. Four government offices, each tasked to recover unlawfully acquired wealth in its various forms, have been granted sometimes overlapping jurisdiction over recovery cases. Under the Forfeiture Law and the PCGG Charter, both the Solicitor General and the Commission are empowered to initiate actions for the recovery of ill-gotten wealth acquired prior to February 25, 1986. Similar concurrent jurisdiction, this time under the Forfeiture Law and the Ombudsman Act, is granted to the Solicitor General and the Ombudsman for recovering ill-gotten wealth amassed after February 25, 1986. To complicate matters even further, should the wealth thereafter be laundered, authority to initiate civil recovery proceedings will also be vested with the Anti-Money Laundering Council.

Overly secretive banking laws also constitute effective barriers to the investigation and recovery of ill-gotten wealth. The grant of confidentiality privileges to bank deposits serve both as an incentive to corrupt public officers and a hindrance to the effective investigation of wrongdoing. Watered-down legislation intended to combat money laundering, as earlier pointed out, may even allow launderers to escape liability.

Equally distressing obstacles are fairly recent Supreme Court decisions which have both clipped the investigatory powers of government and expanded the scope of protection granted in favor of public officers and their lawyers.

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[116] Volt Contreras & Donna S. Cueto, *Ex-PCGG Chair Bares New Way to Get Marcos Money*, PHIL. DAILY INQUIRER, Feb. 4, 2002, at A18.

Unless these barriers are removed by appropriate legislative and judicial action, the process of recovering ill-gotten wealth will remain slow and tedious. If the government fails to do so, then it might as well stop pretending that effective recovery will ever be achieved.

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ABSTRACT:

LMCs IN THE PHILIPPINES: ISSUES AND PROSPECTS

In this paper, Atty. Lorenzo Ziga discusses labor-management cooperation (LMC) in the Philippines. Though labor-management cooperation has gained popularity in the Philippine workplace, a lot of ground remains to be covered not only by the government agencies and NGOs advocating such arrangement, but also by the major stakeholders themselves — the workers and managers. Apart from merely describing the extent of LMC in the Philippines, the paper delves into the character of the stakeholders, the dynamics of their relation, and the issues and resources that must be addressed for LMC's further development.