CIVIL FORFEITURE PROCEEDINGS IN THE PHILIPPINES: THE LONG ROAD AHEAD*

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I. Introduction

In the heat of the verbal tussles between the contending lawyers in the impeachment trial of Chief Justice Renato Corona, it became clear that the prosecution team were invoking the provisions of the first civil forfeiture law in the Philippines – Republic Act No. 1379 (hereinafter "R.A. No. 1379"), to prove that the highest magistrate of the land acquired ill-gotten wealth.[1] However, even as impeachable officials like him can be removed from office upon conviction of culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust,[2] any judgment by the impeachment court extends no further than removal from office and disqualification to hold another public office, although the one convicted shall be liable to prosecution, trial, and punishment according to law.[3]

The limited jurisdiction vested in the Senate by the Constitution means that it cannot grant the relief of forfeiture. Nevertheless, the law provides that all public officials under investigation for ill-gotten wealth would be subject to the appropriate civil forfeiture proceedings and other remedial measures before the proper court. The proceeds of a crime may

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[1] Rep. Act No. 1379 (1955). This is entitled "An Act Declaring Forfeiture in Favor of the State Any Property Found to Have been Unlawfully Acquired by any Public Officer or Employee and Providing for the Proceedings Therefor."

[2] CONST. art XI, § 2.

[3] CONST. art XII, § 3(7).

also be forfeited in criminal cases, as an accessory penalty, once the judgment of the conviction of the accused becomes final.[4]

While intense public scrutiny is focused on government officials, private individuals who run afoul of the law may also find their ill-gotten wealth forfeited pursuant to Republic Act No. 9160, the Anti-Money Laundering Act of 2001, as amended by Republic Act No. 9194 (hereinafter "R.A. No. 9160, as amended").[5] R.A. No. 9160, as amended, took over from where R.A. No. 1379 left off, with the government itself initiating the civil forfeiture proceedings whether the respondent is a public official or employee, or a private individual.

When all is said and done, it all boils down to the worn-out adage that *crime does not pay*.

This paper intends to discuss the advantages of instituting civil forfeiture proceedings to forfeit ill-gotten property, as opposed to exclusively relying on criminal forfeiture. It aims to provide a series of recommendations to improve our pertinent laws on the matter, specifically, the broadening of the list of unlawful activities covered by the AMLA and plug its loopholes to minimize, if not completely eradicate and eliminate the menace and scourge of criminality and corruption.

To do this, it is necessary to go through the gamut of the forfeiture laws of the Philippines, which includes R. A. No. 1379; Executive Order No. 1 (hereinafter "E.O. No. 1"), Executive Order No. 2 (hereinafter "E.O. No. 2"), Executive Order No. 14 (hereinafter "E.O. No. 14"), and Executive Order No. 14-A (hereinafter "E.O. No. 14-A"); Section 15, Chapter IV, Title I, Book III, Executive Order No. 292; and R.A. No. 9160, as amended. Of these laws, only R.A. No. 9160, as amended, deals with the forfeiture of monetary instruments, property, or proceeds relating to, representing, or involving unlawful activities whether committed by a government functionary or a private individual, while the other laws enumerated above principally cover public officials and employees.

II. Historical Origins

Forfeiture is defined to be 'the incurring of a liability to pay a definite sum of money as the consequence of violating the provisions of

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[4] REV. PEN. CODE, art. 25.

[5] Rep. Act No. 9160 (2001), *as amended by* Rep. Act No. 9194 (2003).

some statute or refusal to comply with some requirement of law.' It may be said to be a penalty imposed for misconduct or breach of duty.[6] It is a divestiture of property without compensation, in consequence of a default or offense,[7] and is a method deemed necessary by the legislature to restrain the commission of the offense and to aid in its prevention.[8] It is an action against the *res*, the property itself,[9] and the effect of a forfeiture is to transfer the title to the specific thing from the owner to the sovereign power.[10] As a penalty, it "denotes punishment by way of a pecuniary (or material) exaction from the offender, collected through an action *in personam*, and imposed and enforced by the State for a crime or offense against its laws."[11]

The penalty originated from the English principle of *deodand*, *i.e.*, a thing given to God under religious law because it caused a death. The principle was applied principally in cases where animals caused human death, which were then *forfeited* to the English King or Queen (who represented God). The royal staff then sold the animal to distribute the proceeds to the poor. Although the principle never found its way into the American legal system, the concept of *in rem* proceedings against a "thing" for violating the law was adopted in US customs and admiralty laws. These procedures were written into the Supplemental Rules for Certain Admiralty and Maritime Claims applicable to civil forfeiture cases.[12]

Civil forfeiture, known in the US as "non-conviction based forfeiture,"[13] was introduced in the Philippines by R.A. No. 1379. Nonetheless, it was still characterized as criminal in nature, which means that the defendants are protected from self-incrimination.[14] However, in *Republic vs. Sandiganbayan*,[15] forfeiture proceedings were declared actions *in*

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[6] BLACK'S LAW DICTIONARY 778. (4th ed.)

State v. Cook 203 La 95, 13 So 2d 478 (1943); Arthur v. Trindel, 168 Neb 429, 96 NW2d 208 (1959). (*Moreover*, a clause of forfeiture provides for a punishment to be inflicted for a violation of some duty enjoined upon the party by law, while in an engagement between individuals, it is a matter of contract.)

[8] Cooper v. One White Model 1950 Motor Tractor, 225 La 190, 72 So 2d 474 (1953); Commonwealth v. Certain Motor Vehicle, 261 Mass 504, 159 NE, 61 ALR 548 (1928).

[9] Utah Liquor Control Commission v. Wooras, 97 Utah 351, 93 P2d 455 (1939).

[10] Commonwealth v. Avery, 77 Ky (14 Bush) 625 (1879); State v. Sponaugle, 45 W Va 415, 32 SE 283 (1898).

[11] Am. Jur., Vol. 36., at 612.

[12] Jean Weld, *Forfeiture Laws and Procedures in the United States of America*, *available at* http://www.unafei.or.jp/english/pdf/RS_No83/No83_06VE_Weld1.pdf (Date last visited: Feb. 3, 2012).

[13] *Id.*

[14] Cabal v. Kapunan, G.R. No. 19052, 6 SCRA 1059 (1962), *citing* 23 Am Jur 599.

[15] G.R. No. 90529, 200 SCRA 667, Aug. 16, 1991.

rem and therefore civil in nature. This seemingly irreconcilable contradiction was resolved in *Republic vs. Sandiganbayan,*[16] where it was held conclusively that forfeiture proceedings under R.A. 1379 are civil in nature.

III. Laws Applicable

1. R.A. No. 1379

Enacted on June 18, 1955,[17] R.A. No. 1379 authorized the filing of a civil case, *i.e.*, a petition for a writ commanding a public officer or employee to show cause why the property which appears to be manifestly out of proportion to the salary and other income of the public officer or employee, should not be declared property of the State. Under this law, a criminal conviction of the public officer or employee is not necessary before the properties are declared forfeited in favor of the State. In pursuit of this endeavor, the Solicitor General was tasked to institute forfeiture proceedings in court. In *Republic v. Sandiganbayan*, however, it was held that the authority to investigate and initiate the proper action for the recovery of ill-gotten and/or unexplained wealth amassed after February 25, 1986 is vested with the Ombudsman.[18] Consequently, the Solicitor General could only initiate civil forfeiture proceedings recovery of ill-gotten or unexplained wealth amassed up to February 15, 1986.[19]

How presumption of ill-gotten wealth arises

A public officer's or employee's ostentatious display of wealth is truly reprehensible, given the admonition in Section 1 of Article XI of the Constitution that they should lead *modest lives.* But to be able to prosecute the officer or employee for such wealth, a taxpayer must show that the public officer or employee amassed or accumulated during his incumbency an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income and the income from legitimately-acquired property.

The accumulation of property by a public officer or employee which is manifestly out of proportion to his legitimate income raises a *prima facie* presumption that he unlawfully acquired the property. In turn, the *prima facie* presumption will constitute a reasonable ground that the public officer or employee is probably guilty of violating R.A. No. 1379, and justify the initiation of forfeiture proceedings against the public officer

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[16] G.R. No. 152154, 416 SCRA 133, Nov. 18, 2003.

[17] NOEL VILLAROMAN, LAWS AND JURISPRUDENCE IN GRAFT AND CORRUPTION, A COMPENDIUM 181 (2005).

[18] Republic, 200 SCRA at 682.

[19] Republic, 200 SCRA at 683.

or employee shown to have amassed unexplained wealth during his incumbency.

One barometer that a public officer or employee may have amassed or accumulated during his incumbency ill-gotten wealth is his non-disclosure and concealment of vital facts in the Statement of Assets and Liabilities and Net Worth (hereinafter "SALN") required to be submitted under Section 7 of R.A. No. 3019 (hereinafter "R.A. No. 3019"). Appropriately, in *Ombudsman v. Valeroso*,[20] the Supreme Court held that "unexplained wealth" usually results from non-disclosure or concealment of vital facts in the SALN:

> Section 8 above, speaks of unlawful acquisition of wealth, the evil sought to be suppressed and avoided, and Section 7, which mandates full disclosure of wealth in the SALN, is a means of preventing said evil and is aimed particularly at curtailing and minimizing the opportunities for official corruption and maintaining a standard of honesty in the public service. **"Unexplained" matter normally results from "non-disclosure" or concealment of vital facts.** SALN, which all public officials and employees are mandated to file, are the means to achieve the policy of accountability of all public officers and employees in the government. By the SALN, the public are able to monitor movement in the fortune of a public official; it is a valid check and balance mechanism to verify undisclosed properties and wealth. (Emphasis supplied)

Note, however, that legitimately-acquired property[21] is beyond the purview of the law on forfeiture. Moreover, resignation, dismissal, or separation from the service is not a bar to the filing of a petition for civil

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[20] 520 SCRA 140, 149-50 (2007)(which was later cited with approval in Carabeo v. CA, 607 SCRA 394, 412 (2009)).

[21] Legitimately-acquired properties include 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 does not include: (1) Property unlawfully acquired by the respondent, but its 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 on or after the effectivity of R.A. No. 1379; and (3) Property *donated* to the respondent during his incumbency, unless he can prove to the satisfaction of the court that the donation is lawful. (Rep. Act No. 1379, § 1(b) (1955)).

forfeiture.[22] Instead of a trial, the law merely requires a hearing, during which time the respondent is given ample opportunity to explain to the satisfaction of the court how he acquired the property in question.[23] This means that the proceedings under R.A. No. 1379 are summary in nature[24] and the *onus* is on the respondent to show that the property in question was lawfully acquired. He must rebut the presumption that the property is ill-gotten. If the respondent is unable to show to the satisfaction of the court that he has lawfully acquired the property in question, then the court shall declare such property forfeited in favor of the State, and by virtue of such judgment, the property aforesaid shall become property of the State.[25]

Although the evidence asked of a person may tend to incriminate or subject him to prosecution, it is not an excuse for him to disobey the lawful orders of the forfeiture court. But such person may claim his privilege against self-incrimination as provided in the Constitution.[26] Be that as it may, any statement he makes in connection with the proceedings may be used against him for prosecution of the crime of perjury or false testimony or administrative proceedings.[27] Where a person's testimony is necessary to prove violation of R.A. No. 1379, he may be granted immunity if he testifies to the unlawful manner in which the respondent acquired the property in question.[28] It is therefore clear from the provisions of the law that the State is serious in its commitment (at least, on paper) to effect forfeiture of ill-gotten wealth.

Father time is not a valid defense and the defendant cannot invoke the laws concerning acquisitive prescription and limitation of actions in respect of any property unlawfully acquired by him.[29] This is supported by Article 1108(4) of the Civil Code, which provides that both acquisitive and extinctive prescription do not lie against the State and its subdivisions. Prior to the 1987 Constitution, there was uncertainty as to the applicability of the statute of limitations. R.A. No. 1379 provided that the right to file a petition for civil forfeiture prescribes after **four years** from the date of the resignation, dismissal, or separation or expiration of the term of office of the officer or employee concerned.[30] On the other hand, E.O. No. 14 provides that the time limitations under R.A. No. 1379 are not applicable

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[22] Rep. Act No. 1379, § 2 (1955).

[23] § 5.

[24] VILLAROMAN, *supra* note 17, at 194 (which Villaroman categorized as "summary judgment").

[25] § 6.

[26] CONST. art III, § 15.

[27] § 8.

[28] § 9.

[29] § 11.

[30] § 2.

to the forfeiture of alleged ill-gotten wealth of former President Marcos, his relatives and close associates.[31] This contradiction was finally resolved by the enactment of the 1987 Constitution, which expressly states that the right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel."[32]

The travails of a respondent facing civil forfeiture proceedings under R.A. No. 1379 may not only cost him an arm and a leg. Under Republic Act No. 3019, a public official shall be dismissed from the service if he has been found to have acquired during his incumbency, whether in his name or in the name of other persons, an amount of property or money or both manifestly out of proportion to his salary and to his other lawful income.[33] 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 also be taken into account, notwithstanding any provision of law to the contrary. The circumstances hereinabove mentioned shall constitute a valid ground for administrative suspension of the public official concerned for an indefinite period until the investigation of the unexplained wealth is completed.[34]

In this instance, a dilemma arises: can the forfeiture court impose the penalty of dismissal when it finds that the respondent 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 money manifestly out of proportion to his salary and to his other lawful income? From the nature of the proceedings of a civil forfeiture court, it would seem that meting out the penalty of dismissal is beyond its jurisdiction. The judgment contemplated in Section 6 of the forfeiture law covers only forfeiture of the unexplained wealth in favor of the State and the jurisdiction of the court hearing the civil forfeiture case does not extend to imposition of administrative penalties. An administrative case must be filed against the respondent after the judgment of forfeiture becomes final. This can be reasonably inferred from Section 9(b) of R.A. No. 3019, which punishes the violation of the kindred provision under Section 7 with removal or dismissal after "proper administrative proceedings" are conducted against the public official concerned.

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[31] Exec. Order No. 14, § 6 (1986).

[32] CONST. art. XVI, § 15.

[33] § 8 (1960). This is the Anti-Graft and Corrupt Practices Act.

[34] § 8.

What about the indefinite suspension of respondent "until the investigation of the unexplained wealth is completed"? The Ombudsman is only authorized to preventively suspend a public officer or employee for not more than six (6) months.[35] Agencies applying civil service rules, however, are authorized to impose preventive suspension upon a public officer or employee, when warranted, for not more than ninety (90) days.[36] Consequently, the "indefinite suspension" mentioned in R.A. No. 1379 is not really that indefinite.

2. E.O. No. 1, E.O. No. 2, E.O. No. 14, and E.O. No. 14-A

After the ouster of the late President Ferdinand Marcos, President Corazon Aquino, in her capacity as Chief Executive *cum* legislator issued:

1. E.O. No. 1 dated Feb. 28, 1986, which created the PCGG and provided for its functions.

2. E.O. No. 2 dated March 12, 1986, which froze all assets and properties in the Philippines of Marcos and his associates; prohibited the transfer, conveyance, encumbrance, depletion, and concealment of said properties; required persons holding such properties whether in the Philippines or abroad to make full disclosure of the same to the PCGG; and prohibited Marcos, his wife, relatives and associates from transferring, conveying, encumbering, concealing, or dissipating said assets or properties here or abroad.

3. E.O. No. 14 dated May 7, 1986, which empowered the PCGG, with the assistance of the Office of the Solicitor General (hereafter "OSG"), to file and prosecute cases investigated by it under E.O. No. 2, whether civil or criminal, before the Sandiganbayan.

4. E.O. No. 14-A dated August 18, 1986 which provided that the civil suits to recover unlawfully acquired property

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[35] Rep. Act No. 6770, § 24 (1989).

[36] Exec. Order No. 292, book V, tit. I, subtit. A, § 52 (1987). This is the Administrative Code of 1987; *See also* Beja, Sr. v. Court of Appeals, G.R. No. 97149, 207 SCRA 689, 695, Mar. 31, 1992, (which was favourably *cited in* RENAN E. RAMOS, THE ADMINISTRATIVE CODE OF 1987 ANNOTATED 1073 (2010)).

> under R.A. No. 1379, or for restitution, reparation of damages, or indemnification for consequential and other damages or any other civil actions under the Civil Code or other existing laws filed with the Sandiganbayan against Marcos, his relatives, and associates may proceed independently of any criminal proceedings and may be proved by preponderance of evidence. It also gave the PCGG authority to grant immunity from criminal prosecution to witnesses who provide information in any investigation conducted by the PCGG to establish the unlawful manner in which any respondent, defendant, or accused has acquired or accumulated the property or properties in question in any case where such information or testimony is necessary to ascertain or prove the latter's guilt or his civil liability.

All these issuances involving PCGG had legal cover, because under Article II, Section 1 of the Freedom Constitution, the President was able to exercise legislative power until a legislature was elected and convened pursuant to a new Constitution. Congress convened on July 26, 1987.[37] Before that date, President Aquino had legislative powers.[38]

PCGG powers and timelines

Albeit much criticized for many reasons, the PCGG has more than served its purpose. In its *Functional Transition Report*, the PCGG reported that the Arroyo Administration has recovered the amount of P65.248 Billion out of P85.640 Billion, representing more than seventy-six percent (76%) of the total recoveries from 1987-2009. Said recoveries were made possible by the *carte blanche* power given to the PCGG under Section 3 of EO No. 1 creating the PCGG. These included remedies leading to the forfeiture of ill-gotten wealth. Among others, the PCGG was given the power and authority to file cases for the reconveyance, reversion,

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[37] *See* Municipality of San Juan v. Court of Appeals, G.R. No. 125183, 279 SCRA 711, 717-18, Sep. 29, 1997.

[38] In fact, Exec. Order No. 292 or the Administrative Code of 1987 was issued on July 25, 1987, but it only took effect more than two years later on November 23, 1989. *See also* Proc. No. 495 (1989) (which changed the name of Bureau of Prisons to Bureau of Corrections and declared Proclamation No. 495 effective as of Nov. 23, 1989).

accounting, restitution, and damages against Marcos, his relatives, and associates.[39]

Apart from the PCGG's rule-making power under Section 3(h) of EO No. 1, Chief Justice Teehankee opined that the commission "exercises quasi-judicial functions," and that it is a co-equal body with Regional Trial Courts."[40] But Justice Feliciano, while concurring "with the great bulk of the majority opinion so vigorously written," pointed out that the PCGG is clearly not a court, albeit "it can be regarded as exercising quasi-judicial functions only in a loose and non-technical sense." Accordingly, the PCGG in issuing a sequestration or takeover orders is not properly regarded as determining private rights. All that the PCGG is really doing in issuing such orders is determining whether there exists a *prima facie* basis for filing the appropriate proceedings before the Sandiganbayan to seek the recovery or reconveyance, etc., of the sequestered assets probably belonging to the category of "ill-gotten wealth." According to Justice Feliciano, the PCGG is akin to a fiscal or public prosecutor.[41] Understandably, the PCGG has no authority to issue a search and seizure order since it is not a judge or such other responsible officer as may be authorized by law.[42]

Although the PCGG has the authority to file cases with the Sandiganbayan, including forfeiture proceedings pursuant to R.A. No. 1379, in relation to E.O. No. 1 and E.O. No. 2, pursuant to the 1987 Constitution, "the authority to issue sequestration or freeze orders under Proclamation No. 3 shall remain operative for not more than 18 months after the ratification of the 1987 Constitution, which was on February 2, 1987. For orders issued before the ratification of this Constitution, the corresponding judicial action or proceeding shall be filed within six (6) months from its ratification. For those issued after such ratification, the judicial action or proceeding shall be commenced within six (6) months

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[39] *As cited in* Republic of the Philippines v. Sandiganbayan, 255 SCRA 438, 478-80, *citing* Cojuangco, Jr. vs. PCGG, 190 SCRA 226, 249, the PCGG is also empowered to (1) Conduct an investigation including the preliminary investigation and prosecution of the ill-gotten wealth cases of former President Marcos, relatives and associates, and graft and corruption cases assigned by the President to it; (2) Issue sequestration orders in relation to property claimed to be ill-gotten; (3) Issue 'freeze orders' prohibiting persons in possession of property alleged to be ill-gotten from transferring or otherwise disposing of the same; (4) Issue provisional takeover orders of the said property; (5) Administer oaths and issue subpoenas in the conduct of investigation; and (6) Hold any person in direct or indirect contempt and impose the appropriate penalties as provided by the rules.

[40] PCGG v. Judge Peña, G.R. No. 77663, 159 SCRA 556, 564, Apr. 12, 1988 (which was penned by Chief Justice Teehankee).

[41] *Compare with* Judge Peña, 159 SCRA at 584.

[42] Republic, 255 SCRA at 483-84.

from the issuance thereof."[43] Hence, the issuance and service of the writ of sequestration cannot be made beyond the eighteen-month period from the ratification of the 1987 Constitution.[44]

Akin to the provisional remedies of preliminary attachment or receivership, PCGG sequestration and freeze orders were deemed valid as provisional measures to collect and conserve assets believed to be ill-gotten wealth. The Supreme Court characterized these forfeiture orders as not confiscatory, but only preservative in character. As such, they are not designed to effect a confiscation of, but only to conserve properties believed to be ill-gotten wealth of the ex-president, his family, and associates, and to prevent their concealment, dissipation, or transfer, pending the determination of their true ownership.[45] Even as its power ceased by Constitutional fiat, no tears were shed for the demise of the era of sequestration and freeze orders. As PCGG Chair Andres Bautista decried in a 2010 symposium, many fiscal agents of the PCGG have run the sequestered assets to the ground. This is due in a large part to the absence of an independent central asset management agency to maintain, conserve, and protect the sequestered and forfeited assets.

3. Section 15, Chapter IV, Title I, Book III, E.O. No. 292 – Power over Ill-Gotten Wealth

Section 15, Chapter IV, Title I, Book III, E.O. No. 292 provides:

> SEC. 15. *Power over Ill-gotten Wealth.* The President shall direct the Solicitor General to institute proceedings to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees.
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> Within the period fixed in, or any extension thereof authorized by, the Constitution, the President shall have the authority to recover ill-gotten properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets or accounts.

This provision deals with the authority of the Solicitor General to institute proceedings for the forfeiture of ill-gotten wealth at the instance of the President. However, even under Section 2 of R.A. No. 1379, it was

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[43] CONST. art XVIII, § 26.

[44] *See* PCGG vs. Sandiganbayan, G.R. No. 125788, Jun. 5, 1998 *compare with* CONST. art XVIII, § 26.

[45] Baseco v. PCGG, G.R. No. 75885, 150 SCRA 181, May 27, 1987.

the Solicitor General who was authorized to initiate forfeiture proceedings before the then Courts of First Instance. P.D. No. 1486 later vested the Sandiganbayan with jurisdiction over R.A. No. 1379 forfeiture proceedings. On the other hand, Sec. 12 of P.D. No. 1486 gave the Chief Special Prosecutor the authority to file and prosecute forfeiture cases. The Supreme Court in *Garcia v. Sandiganbayan*[46] took this as an implied repeal by P.D. No. 1486 of the jurisdiction of the former Courts of First Instance and the authority of the Solicitor General to file a petition for forfeiture under Sec. 2 of R.A. No. 1379 by transferring said jurisdiction to the Sandiganbayan and the authority to file and prosecute to the Chief Special Prosecutor. Curiously, there is no discussion in *Garcia* as to how Section 15, Chapter IV, Title I, Book III of the Administrative Code figures in the equation, considering that E.O. No. 292 took effect on November 23, 1989, while R.A. No. 6770[47] took effect on December 7, 1989.

The answer to this dilemma lies in Section 15(11) of R.A. No. 6770, which provides that the Office of the Ombudsman shall "investigate and initiate the proper action for the recovery or ill-gotten and/or unexplained wealth amassed after February 25, 1986 and the prosecution of the parties involved therein." Harmonizing it with the provisions of the Administrative Code, the same conclusion reached by the Supreme Court will be reached. Thus, the OSG may still file a civil forfeiture case if the public officer amassed the ill-gotten or unexplained wealth on or before February 25, 1986.[48] As regards the issuance of sequestration or freeze orders under Proclamation No. 3 dated March 25, 1986 in relation to the recovery of ill-gotten wealth, it remained operative for not more than eighteen months after the ratification of the 1987 Constitution,[49]after which no more extension was granted by the Congress.

4. R.A. No. 9160 – The Anti-Money Laundering Act of 2001[50]

R.A. No. 9160, the Anti-Money Laundering Act of 2001 (hereinafter "AMLA"), criminalized money laundering in the Philippines and enumerated the unlawful activities covered by it, authorizing in the

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[46] *See* Garcia v. Sandiganbayan (hereinafter "Garcia"), G.R. No. 165835, 492 SCRA 600, 632, Jun. 22, 2005.

[47] Rep. Act No. 6770, § 15(11) (1989). This is the Ombudsman Act of 1989. (which conferred upon the Ombudsman the power 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 the parties involved therein."

[48] Garcia 492 SCRA at 637.

[49] CONST. art. XVIII, § 26.

[50] *As amended by* Rep. Act No. 9194 (2003).

process the filing of a civil forfeiture case over the monetary instrument or property wholly or partially, directly or indirectly related to covered unlawful activity[51] or money laundering offense.[52] While not exactly superseding R.A. No. 1379, the AMLA added more punch to the moribund forfeiture laws of the country.

Money laundering is defined as a crime whereby the proceeds of an unlawful activity[53] are transacted, thereby making them appear to have originated from legitimate sources. It is committed by the following: (a) Any person knowing that any monetary instrument or property represents, involves, or relates to, the proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property; (b) Any person knowing that any monetary instrument or property involves the proceeds of any unlawful activity, performs or fails to perform any act as a result of which he facilitates the offense of money laundering referred to in paragraph (a) above; and (c) Any person knowing that any monetary instrument or property is required under this Act to be disclosed and reported to the Anti-Money Laundering Council (hereinafter "AMLC"), fails to do so.[54]

Civil forfeiture proceedings proceed independently of the prosecution for unlawful activities provided under the law.[55] Moreover, a prior charge or conviction for any predicate crime[56] or money laundering offense[57] is not required. No prejudicial question can therefore arise, considering that the civil and criminal actions can proceed independently of each other.[58]

The Anti-Money Laundering Council (AMLC)

The AMLC which is composed of the Governor of the *Bangko Sentral ng Pilipinas* as chairman, the Commissioner of the Insurance

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[51] Rep. Act No. 9160, § 3(i) (2001).

[52] § 4.

[53] *See* Rep. Act No. 9160, § 3(i) (2001); *See also* Revised Implementing Rules and Regulations of Rep. Act No. 9160 (hereinafter "RIRR of Rep. Act No. 9160") Rule 3.i.

[54] § 4.

[55] RULE OF PROCEDURE IN CIVIL FORFEITURE, § 27-28.

[56] Rep. Act No. 9160, § 3(i).

[57] § 4.

[58] Samson v. Daway, G.R. No. 160054 -55, 434 SCRA 612, 620, Jul. 21, 2004; *See also* cases cited in JOSE VITUG, ET AL., A SUMMARY OF NOTES AND VIEWS ON THE RULE OF PROCEDURE IN CASES OF CIVIL FORFEITURE, ASSET PRESERVATION AND FREEZING OF MONETARY INSTRUMENT, PROPERTY, OR PROCEEDS REPRESENTING, INVOLVING, OR RELATING TO AN UNLAWFUL ACTIVITY OR MONEY LAUNDERING OFFENSE UNDER R.A. NO. 9160, AS AMENDED 64 (Vitug, et al., eds., 2006).

Commission and the Chairman of the Securities and Exchange Commission as members, shall act unanimously in the discharge of the functions vested in them by law.[59]

In practice, it is the AMLC Secretariat which conducts the investigations pursuant to the Internal Rules of Procedure Governing Investigations by the Anti-Money Laundering Council Secretariat, which was approved by BSP Resolution No. 60-07.

The process is initiated upon submission of a covered or suspicious transaction report to the AMLC, on the basis of which and other evidence before it, there is reasonable ground to believe that probable cause exists. The Republic of the Philippines through the AMLC represented by the Office of the Solicitor General then files an *ex parte* application for a freeze order with the Court of Appeals.[60] During the period of the freeze order, the AMLC files a petition for a bank inquiry with the Regional Trial Court (hereinafter "RTC").[61] Lastly, the AMLC

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[59] § 7.

[60] § 10.

[61] § 11; RIRR of Rep. Act No. 9160, Rule 11.1 (These Functions include (1) requiring and receiving covered or suspicious transaction reports from covered institutions; (2) issuing orders addressed to the appropriate Supervising Authority or the covered institutions to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious 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) instituting civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General; (4) causing the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses; (5) investigating suspicious transactions and covered transactions deemed suspicious after an investigation by AMLC, money laundering activities and other violations of this Act; (6) applying before the Court of Appeals,*ex parte,* for the freezing of any monetary instrument or property alleged to be the proceeds of any unlawful activity as defined in Section 3(i) of R.A. No. 9160, as amended; (7) implementing such measures as may be necessary and justified under this Act to counteract money laundering; (8) receiving and taking action in respect of, any request from foreign states for assistance in their own anti-money laundering operations provided in this Act; (9) developing educational programs on the pernicious effects of money laundering, the methods and techniques used in the money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders; (10) enlisting 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; and (11) imposing administrative

institutes an action for civil forfeiture with an application for an asset preservation order before the same trial court.[62]

The Republic of the Philippines, through the AMLC, represented by the Office of the Solicitor General, files the petition for a freeze order before the Court of Appeals.[63] This petition is filed *ex parte* and must be verified.[64] Before the amendment of R.A. No. 9160 by R.A. No. 9194, the AMLC was empowered to issue freeze orders. Thus, the original text of Section 10 of R.A. No. 9160 authorized a fifteen (15)-day freeze order by the AMLC, which could be extended upon order of the court. The pendency of the court's decision to extend the period tolled the fifteen (15)-day period. During that time, no court could issue a temporary restraining order or writ of injunction against any freeze order issued by the AMLC except the Court of Appeals or the Supreme Court.

Section 10 as amended by R.A. No. 9194 removed that power of the AMLC and authorized the Court of Appeals – upon application *ex parte* by the AMLC and after the court's determination that probable cause[65] exists that any monetary instrument or property is in any way related to an unlawful activity as defined in Section 3(i) of R.A. No. 9160, as amended – to issue within twenty-four hours of the filing of the petition,[66] a freeze

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sanctions for the violation of laws, rules, regulations, and orders and resolutions issued pursuant thereto.)

[62] § 12 (a).

[63] Republic v. Cabrini Green & Ross, Inc., G.R. No. 155554, 489 SCRA 645, May 5, 2006. *See also* Supreme Court Admin. Matter No. 5-11-04-SC, § 44 (2005). This is the Rule of Procedure in cases of civil forfeiture, asset preservation, and freezing of monetary instrument, or property, or proceeds representing, involving, or relating to an unlawful activity or money laundering offense under R.A.. No. 9160, as amended (hereinafter "RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE"). (*However,* Justice Vitug refrains from calling an application for a freeze order a provisional remedy. The Rule also provides that after the post-issuance hearing, the case is remanded to the RTC and the records consolidated with that of the civil forfeiture case. The Court of Appeals case does not result in the forfeiture of the frozen monetary instrument, property, or proceeds). *See also* Republic v. Eugenio, Jr., G.R. No. 174629, 545 SCRA 384, 403, Feb. 14, 2008 (wherein Justice Tinga, writing for the majority of the court, categorized the freeze and bank inquiry orders as "provisional remedies.").

[64] Rep. Act No. 9160, § 10 (2001); RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 44-45.

[65] "Rule 10.2. Probable cause includes such facts and circumstances which would lead reasonably discreet, prudent or cautious man to believe that an unlawful activity and/or a money laundering offense is about to be, is being or has been committed and that the account or any monetary instrument or property subject thereof sought to be frozen is in any way related to said unlawful activity and/or money laundering offense." RIRR of Rep. Act No. 9160

[66] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 51.

order which shall be effective immediately. The freeze order lasts for twenty (20) days unless extended by the court.

Upon motion of the AMLC filed before the expiration of the twenty-day period, during which time the respondent is given a chance to oppose,[67] the Court of Appeals may for good cause extend its effectivity for a period not exceeding six (6) months.[68] Here, the *onus* is on the respondent to show that the Republic is not entitled to the extension of the freeze order.

The freeze order covers any monetary instrument, property, or proceeds relating to or involving an unlawful activity as defined under Section 3(i) of Republic Act No. 9160, as amended by Republic Act No. 9194,[69] as well as related web of accounts,[70] whereby upon receipt of the freeze order, the respondent, covered institution, or government agency is mandated to immediately desist from and not allow any transaction, withdrawal, deposit, transfer, removal, conversion, other movement or concealment of the account representing, involving or relating to the subject monetary instrument, property, proceeds, or its related web of accounts.[71] Since a freeze order is only provisional in nature, the Court of Appeals will remand the case and transmit the records to the RTC for consolidation with the civil forfeiture case pending before the latter.[72] However, a party aggrieved by the decision of the Court of Appeals may elevate it to the Supreme Court by way of a petition for review on certiorari under Rule 45 of the Rules of Court but the appeal shall not stay the enforcement of the decision unless the Supreme Court directs otherwise.[73]

During the pendency of the freeze order, the AMLC usually files before the RTC a petition for bank inquiry, with notice to the respondent, to look into or examine any of his particular deposits or investments with

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[67] § 53.

[68] RIRR of Rep. Act No. 9160, Rule 10.5a (2003). See also Republic v. Cabrini Green & Ross, Inc., 489 SCRA at 649.

[69] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 44.

[70] RIRR of Rep. Act No. 9160, Rule 10.4, par. 2 (2003); Related web of accounts pertaining to the money instrument or property subject of the freeze order is defined under Rule 10.4, par. 1. of the Implementing Rules as "those accounts, the funds and sources of which originated from and/or are materially linked to the monetary instrument(s) or property(ies) subject of the freeze order(s)."

[71] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 55.

[72] § 53(a), 56.

[73] § 57.

any banking institution or non-bank financial institution.[74] If there is probable cause that the deposits or investments are related to an unlawful activity as defined in Section 3(i) of R.A. No. 9160, as amended, or a money laundering offense under Section 4 of the law, the RTC shall grant the petition. However, the AMLC may inquire into bank accounts without having to obtain a judicial order in cases where there is probable cause that the deposits or investments are related to kidnapping for ransom, certain violations of the Comprehensive Dangerous Drugs Act of 2002, hijacking and other violations under R.A. No. 6235, destructive arson, and murder.[75]

After the bank inquiry, the AMLC may thereafter file a petition for civil forfeiture. The action is filed before any RTC of the judicial region where the monetary instrument, property, or proceeds representing, involving, or relating to an unlawful activity or a money laundering offense are located. Where all or any portion of the monetary instrument, property, or proceeds is located outside the Philippines, the petition may be filed at the RTC in Manila, or at the RTC of the judicial region where any portion of the monetary instrument, property, or proceeds is located, at the option of the petitioner.[76] The executive judge of the RTC or, in his absence, the vice-executive judge or, in their absence, any judge of the RTC of the same station shall act on the petition within twenty-four hours after its filing.[77]

Unlike in ordinary civil actions, the respondent in a civil forfeiture case is notified of the petition through a notice, instead of a summons. However, the contents of the notice are substantially the same as that of a summons, with the exception that, instead of ordering the defendant should answer within the time fixed by the Rules of Court,[78] the notice contains a proviso that, if no comment or opposition is filed within the reglementary period, the court shall hear the case *ex parte* and render such judgment as may be warranted by the facts alleged in the petition and its supporting evidence.[79] In certain cases, it may be necessary to effect service of summons by publication where the respondent is designated as an unknown owner, or his whereabouts are unknown and cannot be ascertained by diligent inquiry. In that case, service may, by leave of court, be effected upon him by publication of the notice of the petition in a

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[74] Rep. Act No.9160, § 11 (2001) (which refers to a competent court, *i.e.,* the RTC which is a court where actions incapable of pecuniary estimation are filed.).

[75] Republic v. Eugenio, Jr., G.R. No. 174629, 545 SCRA 384, 405, Feb. 14, 2008; RIRR of Rep. Act No. 9160, Rule 11.1

[76] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 3.

[77] § 5.

[78] RULES OF COURT, Rule 14, § 2.

[79] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 8.

newspaper of general circulation in such places and for such time as the RTC may order.[80]

In observance of the due process requirement,[81] the respondent is given the opportunity to file a verified comment or opposition, not a motion to dismiss the petition, within fifteen days from service of notice or within thirty days from publication in case service of notice was by publication.[82] In the event of the failure of the respondent to file the Comment or Opposition, the court shall hear the case *ex parte* and render such judgment as may be warranted by the facts alleged in the petition and its supporting evidence.[83]

Pre-trial is also mandatory in civil forfeiture proceedings. If a comment on, or an opposition to the civil forfeiture petition is filed, the court, without any need of motion, shall forthwith send notice of pre-trial conference to the parties.[84] The pre-trial proceeds in the same way as in ordinary civil actions.[85] But the RTC is not allowed to consider suspending the proceedings or tackling the possibility of amicable settlement, mediation, and other alternative modes of dispute resolution,[86] unlike in regular proceedings before said court. However, just like in an ordinary civil action, failure on the part of the petitioner to appear during the pre-trial will cause the dismissal with prejudice of the petition, unless otherwise ordered by the court.[87] Failure on the part of respondent to appear during the pre-trial has the same effect as failure to file his comment or opposition to the petition and the court will allow the petitioner to present its evidence *ex parte* and render judgment on the basis thereof,[88] as if respondent failed to file his verified comment on, or opposition to, the civil forfeiture petition.[89]

Even before the pre-trial, i.e., within twenty-four hours from the filing of the civil forfeiture petition, the RTC may issue *ex parte* a provisional asset preservation order (PAPO), enforceable anywhere in the

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[80] § 8(b).

[81] *See* CONST. art. III, § 1 (which provides that "No person shall be deprived of life, liberty, or property without due process of law.").

[82] RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 9.

[83] § 10.

[84] § 22.

[85] § 22(b); *Compare with* RULES OF COURT, Rule 18.

[86] This is because amicable settlement, mediation, or any other alternative mode of dispute resoluition is not allowed. *See* RULES OF PROCEDURE IN CASES OF CIVIL FORFEITURE, § 26.

[87] § 24.

[88] *Id.*

[89] § 10.

Philippines, when probable cause exists that the monetary instrument, property, or proceeds subject of the petition are in any way related to an unlawful activity as defined in Section 3(i) of R.A. No. 9160, as amended by R.A. No. 9194. It is effective immediately, and shall be valid for twenty-days.[90] Within this period, the court shall determine whether the PAPO should be modified or lifted, or an asset preservation order (APO) should be issues.[91] This means that even without the petitioner filing a motion for extension of the freeze order, the court must conduct a summary hearing to ascertain fate of the PAPO. Basically, a PAPO or APO forbids any transaction, withdrawal, deposit, transfer, removal, conversion, concealment, or other disposition of the subject monetary instrument, property, or proceeds. A PAPO or APO may be lifted if it was improperly or irregularly issued or enforced; any of the material allegations in the petition, or any of the contents of any attachment to the petition thereto, or its verification, is false; and the specific personal or real property ordered preserved is not in any manner connected with the alleged unlawful activity as defined in Section 3(i) of Republic Act No. 9160, as amended.[92]

The trial in a civil forfeiture case proceeds in accordance with Rule 30 of the Rules of Court.[93] In case of an adverse judgment, the respondent may appeal to the Court of Appeals within fifteen (15) days from notice of the decision,[94] whereby the parties are required to file their respective memoranda instead of briefs within a non-extendible thirty-day period.[95] After judgment by the civil forfeiture court, if a person who has not been impleaded and has not intervened claims an interest in the forfeited property, he can file a verified petition for a declaration that the same legitimately belongs to him and for segregation or exclusion of the monetary instrument or property corresponding thereto.[96] The verified petition shall be filed with the court which rendered the order of forfeiture within fifteen (15) days from the date of finality of the order of forfeiture, in default of which the order shall be executory and bar all other claims.[97] This reveals the *in rem* nature of civil forfeiture proceedings: they are binding against the whole world. After fifteen (15) days from the finality of the forfeiture order, no more claims shall be entertained concerning monetary instrument or property. However, if the claim is filed within the

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[90] § 11, 14.
[91] § 12.
[92] § 17.
[93] § 29.
[94] § 34(a).
[95] § 34(b).
[96] § 35.
[97] § 35.

reglementary period, the petitioner shall be required to comment on the claim; otherwise, the court may dismiss the claim outright if it is not sufficient in form and substance and is manifestly filed for delay.[98] A decision granting or denying the claim may be appealed in the same manner as a judgment in the civil forfeiture case.[99] In both instances, the Rule of Procedure does not provide for an appeal to the Supreme Court from the judgment of the Court of Appeals. Nevertheless, the Rules of Court providing for an appeal from the Court of Appeals to the Supreme Court by way of Rule 45 applies suppletorily, in the same manner that the grant or denial of the application for a freeze order by the Court of Appeals may be appealed to the Supreme Court by way of a petition for review on certiorari.[100]

IV. Loopholes in the law

The Case of Major General Carlos Garcia

The criminal cases before the Sandiganbayan Second Division against Major General Carlos F. Garcia and his family for plunder[101] and violation of the Anti-Money Laundering Law[102] highlighted a problem in the AMLA. In the plunder case, General Garcia and his co-accused were alleged to have accumulated a total amount of P303,272,005.99 in ill-gotten wealth.

After the prosecution ended presenting evidence in the bail hearings in the plunder case to prove that the evidence of guilt against General Garcia is strong, the Sandiganbayan Second Division issued a Resolution on January 7, 2010 which denied General Garcia's application for bail and declared that "the conglomeration of evidence presented by the prosecution is viewed by the Court to be of strong character that militates against the grant of bail." In an undated Plea Bargaining Agreement, however, General Garcia and the Office of the Special Prosecutor of the Office of the Ombudsman consented to General Garcia's change of plea to *indirect bribery* under Article 211, par. 1 of the RPC and *facilitation of money laundering* under Section 4(b) of R.A. No. 9160, as amended. Acting Deputy Special Prosecutor Wendell E. Barreras-Sulit signed off on the Plea Bargaining Agreement and recommended its approval *in behalf of the Republic of the Philippines*, together with Special

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[98] § 37.
[99] § 42.
[100] § 57.
[101] Sandiganbayan Case No. No. 28107.
[102] Sandiganbayan Case No. SB-09-CRM-0194.

Prosecutors Kallos, Micael, Balmeo, Jr., and Capistrano. The Plea Bargaining Agreement was approved by then Tanodbayan Merceditas Gutierrez with the barcode indicating the date of February 25, 2010. It invoked the ruling in *People v. Kayanan*[103] where it was held that "the rules allow such a plea only when the prosecution does not have sufficient evidence to establish the guilt of the crime (sic) charged."

On May 4, 2010, the Sandiganbayan approved the plea bargain agreement, as indicated in the *fallo* of the Resolution of said date, and directed General Garcia "to execute immediately the appropriate deeds of conveyance in order to transfer, convey, cede, surrender, and relinquish to the Republic of the Philippines his ownership and any all interests which he may personally have over the real properties in his own name, and in the names of spouse Clarita Depakakibo Garcia, children Ian Carl D. Garcia, Juan Paul D. Garcia, and Timothy Mark D. Garcia, as well as all the personal properties itemized and identified in the inventory of properties in the Plea Bargaining Agreement belonging to him, his spouse, and three children ...."[104] The real and personal properties which General Garcia agreed to transfer to the Republic of the Philippines amounted to a total value of P135,433,387.84.[105]

The Sandiganbayan gave the green light to the Plea Bargaining Agreement between General Garcia and the Office of the Ombudsman in the criminal cases before it subject to the "actual cession or transfer of ownership in favor of the Republic of the Philippines" of the subject properties."[106] This appears to be a universal agreement, inasmuch as the restitution covered the properties "which are the subject of the cases for

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[103] 83 SCRA 437, 450(1978)

[104] As an interesting sidelight, Gen. Garcia filed an Urgent Motion to Post Bail dated December 16, 2010. Someone from the OSP inscribed the note "no objection" also dated December 16, 2010 on the Urgent Motion. With alacrity, the Sandiganbayan granted the Urgent Motion to Post Bail on the same date, although it allowed Gen. Garcia to plead guilty to the lesser offenses of indirect bribery under Article 211(1) of the Revised Penal Code and facilitation of money laundering under Section 4(b) of R.A. No. 9160, as amended. The furor over this plea bargaining agreement prompted a congressional investigation over the matter. Although the Sandiganbayan rebuked the Office of the Solicitor General (OSG) for filing the motion to annul the plea bargaining agreement, the OSG later on filed a motion for the reconsideration of the denial of its motion. Meanwhile, former Defense Secretary Angelo Reyes, who was supposed to be a mere witness in the congressional investigations, committed suicide after being subjected to intense grilling by some senators.

[105] Undated Plea Bargaining Agreement in Crim. Case Nos. 28107 & SB-09-CR-0194 at 5.

[106] Resolution dated May 4, 2010 in Crim. Case Nos. 28107 & SB-09-CR-0194 at 10.

plunder and for violation of the Anti-Money Laundering Act."[107] What this underscores, unfortunately, is a weakness which is also considered a strength of the AMLA as it is now worded. Because the civil forfeiture case proceeds independently of the criminal case, a criminal court having jurisdiction over the criminal cases can unwittingly throw a monkey wrench on the civil forfeiture proceedings by approving a plea bargain agreement covering the proceeds of the unlawful activity but involving only a portion of the properties subject of the civil forfeiture proceedings. Or the criminal court may acquit the accused who is also subject of civil forfeiture proceedings, and declare that said accused has no ill-gotten properties. Both of these scenarios can result in the dismissal of the civil forfeiture case against the accused. This can frequently happen because criminal court may be unaware of what is happening in the civil forfeiture court, unless the latter court gives leave for information to be released to the criminal court. At the same time, the OSG handles the civil forfeiture cases while the prosecutor handles the criminal cases. There may not be a room for information sharing in view of the confidentiality provisions in the AMLA and its Rule of Procedure.

What is needed, therefore, is an amendment in the AMLA making it mandatory for the civil forfeiture court to continue with its proceedings, notwithstanding the acquittal of the accused based on reasonable doubt, or any plea bargaining agreement involving the forfeiture of some of the properties of the accused. Otherwise stated, the civil forfeiture court should grant the relief of forfeiture if the Republic is able to discharge the *onus probandi*, that is, by adducing a preponderance of evidence, regardless of whether the same properties are subject to forfeiture in the criminal case. This is only being consistent with Section 6 of R.A. No. 9160, which provides that "(a)ny proceeding relating to the unlawful activity shall be given precedence over the prosecution of any offense or violation under this Act without prejudice to the freezing and other remedies provided."

It is also necessary to broaden the scope of the AMLA. There are felonies which ought to be included among the unlawful activities enumerated in the law.[108] For one, carnapping is not included among them. Although the Republic may argue that it is essentially the robbery or theft

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[107] *Id.*

[108] It has been reported that the Philippine Congress will pass amendments to the AMLA this year, including the addition of more predicate crimes such as trafficking in persons, bribery, counterfeiting, fraud and other illegal exactions, malversation, forgery, environmental crimes, and terrorism and its financing. *See* Butch Fernandez, Senators vow action on AMLA Amendments, Mar. 20, 2012 *available at* http://businessmirror.com.ph/home/top-news/24830-senators-vow-action-on-amla-amendments- (date last visited: Apr. 4, 2012).

of a motorized vehicle,[109] the concept of unlawful taking in theft, robbery and carnapping being the same,[110] a defendant in a civil forfeiture case involving carnapped vehicles may contend that the offense of carnapping not being mentioned as an unlawful activity in the AMLA should be excluded, following the *expressio unius est exclusio alterius* principle.[111] For another, it may also be necessary to include the offense of failure to file a true statement of assets and liabilities by a public officer under Section 7 of R.A. No. 3019, in relation to Section 9(b) of the same law. If the public official cannot explain the discrepancies concerning his lawful income compared with his assets and liabilities, then the unreported wealth may be declared forfeited in favor of the State, as if the property were subject to the forfeiture provision in R.A. No. 1379. There are other white collar crimes which should be included among the predicate offenses, like violation of the Anti-Dummy Law and the Labor Code.

The AMLC should also be allowed by law to conduct an *ex parte* bank inquiry for all types of unlawful activities, without need of securing court approval. At present, an *ex parte* examination is only allowed in cases where there is probable cause that the deposits or investments are related to kidnapping for ransom, certain violations of the Comprehensive Dangerous Drugs Act of 2002, hijacking and other violations under R.A. No. 6235, destructive arson, and murder, as stated above. If the initial freeze order or the provisional asset preservation order can be issued *ex parte*, there is no logical reason why a bank inquiry, which is less restrictive to the account holder, may not be allowed even without a court order. In the event that Section 11 of the AMLA is further amended to authorize *ex parte* bank inquiries for all types of unlawful activities, then the AMLC can examine first the bank accounts of the respondent and strengthen its case, before filing an application for a freeze order with the Court of Appeals.

Congress may also deem it fit to allow an automatic *ex parte* bank inquiry by the AMLC on the accounts of all public officials and employees as well as those aspiring to elective and appointive public office, even in the absence of probable cause that they committed an unlawful activity, in view of the constitutional principle that "public office is a public trust."[112] The data bank gathered from such examination will eschew later charges of public officials skimming off public funds or enriching themselves while in

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[109] People v. Lobitania, G.R. No. 142380, 388 SCRA 417, 432, Sep. 4, 2002.

[110] People v. Fernandez, G.R. No. 132788, 414 SCRA 84, 99, Oct. 23, 2003; People v. Sia, G.R. No. 137457, 370 SCRA 123, 134, Nov. 21, 2001; People v. Santos, G.R. No. 127500, 333 SCRA 319, 334, Jun. 8, 2000; People v. Bustinera, G.R. No. 148233, 431 SCRA 284, 292, Jun. 8, 2004.

[111] The expression of one thing is the exclusion of another.

[112] CONST. art. XI, § 1.

public office. It may also discourage civil servants from committing such effrontery in the first place. In this regard, all that is needed is political will and a sincere desire on the part of the legislators to effect positive changes on the political and economic landscape of the country.

Although right to privacy considerations prompted the Supreme Court in *Republic v. Eugenio, Jr.*,[113] to declare that Section 11 of R.A. No. 9160 does not specifically authorize *ex parte* bank inquiry order as a general rule, *Eugenio, Jr.* acknowledged the ruling in *US vs. Miller*[114] that there was no legitimate expectation of privacy as to the bank records of a depositor.[115] Unperturbed, the Supreme Court invoked Section 2 of R.A. No. 1405, the Bank Secrecy Act of 1955, which provides:

> SECTION 2. All deposits of whatever nature with banks or banking institutions in the Philippines including investments in bonds issued by the Government of the Philippines, its political subdivisions and its instrumentalities, are hereby considered as of an absolutely confidential nature and may not be examined, inquired or looked into by any person, government official, bureau or office, except upon written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public officials, or in cases where the money deposited or invested is the subject matter of the litigation.[116]

In any event, Section 11 of the AMLA specifically authorizes the Bangko Sentral ng Pilipinas to "inquire into or examine any deposit or investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP." There is no reason why the same power cannot be granted to the AMLC by Congress, even without need of a court order.

The Pros and Cons of Civil Forfeiture

The AMLA has proven to be an effective tool at forfeiting ill-gotten wealth, much more successful than the original forfeiture law, R.A.

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[113] 545 SCRA at 412-15.

[114] 425 US 435(1976).

[115] Eugenio, Jr , 545 SCRA at 413.

[116] *Id.* at 414.

No. 1379. This is probably because R.A. No. 1379 required that a taxpayer should file the complaint first before a fiscal against a public official or employee who acquired property manifestly out of proportion to his lawful income,[117] although this small detail did not prevent the PCGG from applying the old forfeiture law in filing through the OSG civil forfeiture cases against former President Marcos, his relatives, and associates pursuant to E.O. No. 14-A. Upon other hand, the government itself initiates the complaint under R.A. No. 9160, as amended. In retrospect, the legislative proscription in the AMLA was necessary, especially with the inclusion of the Philippines in the Financial Action Task Force's list of non-cooperative countries and territories in the fight against money laundering.[118] The AMLA does not only go after government officials and employees who pillage the public treasury, it also targets monetary instruments, property, or proceeds amassed by private individuals which represent, relate to, or involve unlawful activities mentioned in the law, as well as money laundering activities punished therein.

One advantage of a civil forfeiture proceeding is that it requires merely a preponderance of evidence.[119] The evidence should be of greater weight or more convincing than that adduced by the other side.[120]

Another is that the AMLA adopted the reverse burden rule. Once the AMLC established probable cause, the burden of evidence shifted to the owner or possessor to prove that the monetary instrument, property, or proceeds do not represent, relate to, or involve any money laundering activity or unlawful activity. Hence, the twenty-day provisional asset preservation order (PAPO) is issued once the court has determined within twenty-four hours of the filing of the petition for civil forfeiture,[121] that probable cause exists on the basis of the allegations of the verified petition which is sufficient in form and substance, that the monetary instrument, property, or proceeds subject of the petition represent, relate to, or involve any money laundering activity or unlawful activity.[122] During the twenty-day period, the respondent must show cause why the provisional asset preservation order should be modified or lifted.[123] In the same manner, the application for a freeze order before the Court of Appeals should allege the

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[117] Rep. Act No. 1379, § 2 (1955).

[118] Eugenio, Jr., 545 SCRA at 402, *citing* J.M.B. TIROL, THE ANTI-MONEY LAUNDERING LAW OF THE PHILIPPINES ANNOTATED 3 (2nd ed. 2007).

[119] RULE OF PROCEDURE ON CIVIL FORFEITURE, § 32.

[120] Duarte v. Duran, G.R. No. 173038, Sep. 14, 2011; Republic v. De Guzman, G.R. No. 175021, Jun. 15, 2011; Tamani v. Salvador, 647 SCRA 132, 151 (2011); Metropolitan Bank and Trust Co. v. Custodio, 645 SCRA 697, 712 (2011).

[121] RULE OF PROCEDURE ON CIVIL FORFEITURE, § 5.

[122] § 11.

[123] § 12.

ground relied upon and the supporting evidence showing that the subject monetary instrument, property, or proceeds are in any way related to or involved in an unlawful activity as defined in the AMLA.[124] Upon a showing of probable cause, a twenty-day freeze order is issued within twenty-four hours from the filing of the application.[125] Within the twenty-day period, a post-issuance hearing is held where respondent is burdened to show by preponderance of evidence that petitioner is not entitled to an extension of the freeze order.[126]

Civil forfeiture proceedings here are kept on a loose leash, unlike in the United States, which in 2000 enacted the Civil Asset Forfeiture Reform Act (hereinafter CAFRA) after the defense bar made its voice heard in the political arena. CAFRA did away with the reverse burden provision, increasing the difficulty for obtaining forfeitures under US law. The liability imposed by CAFRA on the US government for an owner's attorney's fees if the owner won the release of property in a civil forfeiture case also had a dampening effect on the institution of forfeiture cases.[127]

It does not require the indictment of the respondent, or the pendency of a criminal case against him, or his conviction, before the asset is forfeited. However, the verified petition for civil forfeiture must allege the acts or omissions prohibited by, and the specific provisions of the AMLA, which are the grounds relied upon for the forfeiture of the monetary instrument, property, or proceeds.[128]

Prescription, laches, or estoppel also do not lie with regard to the right of the State to recover the ill-gotten wealth of public officials or employees.[129]

Other than those mentioned above, there are provisional remedies in civil forfeiture proceedings under the AMLA, *i.e.,* freeze, asset preservation, and bank inquiry orders are available to prevent a dissipation of the asset sought to be forfeited.[130]

Upon the other hand, in criminal forfeiture, forfeiture or confiscation of the instruments and proceeds of the offense is part of the

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[124] § 46.

[125] § 51, 53.

[126] § 53.

[127] Weld, *supra* note 12, at 2.

[128] § 4.

[129] CONST. art. XI, § 15.

[130] Rep. Act No. 9160, § 10-11; RULE OF PROCEDURE ON CIVIL FORFEITURE, § 11-12, 44, 52-53, 55; *See also* Eugenio, Jr., 545 SCRA at 403.

criminal proceedings, saving an enormous amount of prosecutorial and judicial resources.[131] However, in case of acquittal, the proceeds of the alleged crime would not be forfeited, because the accessory penalty cannot be imposed.[132]

Prescinding, civil forfeiture proceedings are not a silver bullet for every offense in the statute books. Only those listed as unlawful activities in the AMLA may be subject to forfeiture proceedings under that law. Forfeitures may also be meted out in administrative proceedings. For example, the Department of Environment and Natural Resources Secretary and his duly-authorized representatives are given the authority to confiscate and forfeit forest products illegally cut, gathered, removed, or possessed or abandoned, and all conveyances used either by land, water, or air in the commission of the offense, and to dispose of the same.[133] This administrative remedy is totally separate and distinct from criminal proceedings.[134] The Collector of Customs is likewise authorized to institute forfeiture proceedings and lawfully assume jurisdiction to forfeit in favor of the government, smuggled goods,[135] and the trial court cannot replevin property which is subject of seizure and forfeiture proceedings for violation of the Tariff and Customs Code,[136] because the Collector of Customs has exclusive jurisdiction over said proceedings.[137]

A parting shot

The long and short of it is that civil forfeiture proceedings under the AMLA should be the preferred mode in recovering monetary instruments, property, or proceeds relating to, representing, or involving an unlawful activity or a money laundering offense, because they are summary in nature and offer provisional remedies that immediately preserve those properties for the duration of the litigation, a feature which is not available in criminal proceedings. While provisional remedies are also available in criminal actions insofar as they are applicable, they are not issued with the

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[131] REV. PEN. CODE, art. 25.

[132] REV. PEN. CODE, arts. 25, 46.

[133] Pres. Dec. No. 705, § 68 (1975), *cited in* Paat v. Court of Appeals, G.R. No. 111107, 266 SCRA 167, 180, Jan. 10, 1997.

[134] Paat, 266 SCRA 167.

[135] Vierneza v. Commissioner of Customs, G.R. No. 24348, 24 SCRA 394, 399, Jul. 30, 1968.

[136] *See* Pacis v. Averia, G.R. No. 22526, 18 SCRA 907, 917, Nov. 20, 1966.

[137] Zuño v. Cabredo, A.M. No. RTJ-03-1779, 402 SCRA 75, 82, Apr. 30, 2003.

same efficiency and dispatch [138] unlike in civil forfeiture proceedings pursuant to R.A. No. 9160, as amended.

Having said that, what the country presently needs is a central asset management authority which will maintain, preserve, and protect seized and forfeited monetary instruments, property, or proceeds. As proposed by American authorities, the authority will work hand and in hand with the courts in conserving assets in *custodia legis*, and managing assets already forfeited to the State. The creation of a central asset management authority will help prevent recovered assets from being purloined or spirited away by miscreants.

The road to a graft and crime-free Philippines is long and arduous. But the government must begin from somewhere. Consequently, the congressional initiative to amend the Anti-Money Laundering Act of 2001, as well other laws including the Revised Penal Code, is a step towards the *promised land.*

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[138] RULES OF COURT, Rule 127, § 1. For example, when the civil action is properly instituted in the criminal action, Rule 127, § 2 provides that "the offended party may have the property of the accused attached as security for the satisfaction of any judgment that may be recovered from the accused in the following cases: (a) when the accused is about to abscond from the Philippines; (b) when the criminal action is based on a claim for money or property embezzled or fraudulently misapplied or converted to the use of the accused who is a public officer, officer of a corporation, attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for a willful violation of duty; (c) when the accused has concealed, removed, or disposed of his property, or is about to do so; and (d) when the accused resides outside the Philippines."