

Gone Without a Trace: A Re-Examination of Bank Secrecy Laws and Anti-Money Laundering Laws in Light of the 2016 Bangladesh Bank Heist

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I. INTRODUCTION

The Bangladesh Bank Heist (BBH) last February 2016 sent shockwaves worldwide. The highly-organized heist was a wake-up call to the international community as it exposed gaps and vulnerabilities in the international banking system as well as in the Philippines' legal and regulatory systems. Through the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network, instructions to transfer US\$951 million from a Bangladesh Bank account at the Federal Reserve Bank of

New York were relayed by hackers through a series of 35 transactions.¹ Fortunately, only about US\$101 million representing five transactions were withdrawn due to the hackers' typographical error that effectively stopped what could have been the biggest bank heist in history.² Of the US\$101 million, US\$20 million ended up in Sri Lanka and has been subsequently recovered.³ Meanwhile, the other US\$81 million was tracked to the Philippines.⁴ So far, only US\$15.25 million has reportedly been recovered by Philippine authorities.⁵ A year after the BBH, the Philippines remains dubbed as a money laundering haven according to the 2017 International Narcotics Control Strategy Report of the United States Department of State.⁶

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1. Chrisee Dela Paz, *TIMELINE: Tracing the \$81-million stolen fund from Bangladesh Bank*, available at <http://www.rappler.com/business/industries/banking-and-financial-services/125999-timeline-money-laundering-bangladesh-bank> (last accessed Aug. 10, 2017).
2. Chris Smith, *A hacker's typo stopped the biggest bank heist in history*, available at <http://bgr.com/2016/03/10/hackers-1-billion-bank-heist-bangladesh> (last accessed Aug. 10, 2017).
3. Sajjadur Rahman, *Long battle ahead for BB to retrieve stolen funds*, DAILY STAR, Mar. 9, 2016, available at www.thedailystar.net/business/long-battle-ahead-bb-retrieve-stolen-funds-788512 (last accessed Aug. 10, 2017).
4. *The investigation into the Bangladesh bank heist continues*, ECONOMIST, Mar. 23, 2017, available at <https://www.economist.com/news/finance-and-economics/21719492-much-remains-unknown-sophistication-crime-clear> (last accessed Aug. 10, 2017).
5. Reuters, *Bangladesh hopes to recover \$30 million more from cyber heist*, available at <http://www.reuters.com/article/us-cyber-heist-bangladesh-idUSKBN1390JN> (last accessed Aug. 10, 2017).
6. Chrisee Dela Paz, *U.S. labels Philippines as major money laundering site again*, available at <http://www.rappler.com/business/163329-us-state-dept-philippines-major-money-laundering-countries> (last accessed Aug. 10, 2017) & Melissa Luz T. Lopez, *US tags PHL as 'major' dirty money site*, available at www.bworldonline.com/content.php?section=TopStory&title=us-tags-phl-as-major-dirty-money-site&id=141700 (last accessed Aug. 10, 2017).

As investigations still remain underway, legal experts in the Philippines have turned their attention to two sets of laws that have been thrust into the spotlight — the bank secrecy laws and the anti-money laundering laws.

This Article primarily seeks to analyze the Philippine government's response to the BBH and its subsequent legislative actions taken in relation to bank secrecy laws and anti-money laundering laws. It argues that the laws at that time were inadequate in allowing the government to efficiently investigate the heist, recover the laundered funds, and bring the perpetrators to justice. The Article provides a preliminary overview of bank secrecy laws and anti-money laundering laws. Thereafter, a timeline of events of the BBH is presented. Significant problems that were exposed by the BBH and the subsequent investigation in relation to both sets of laws are then discussed. Possible measures within the confines of the legal framework controlling at the time of the BBH and its subsequent investigation are presented, and, upon a showing that these measures under the said legal framework were unable to effectively combat this money laundering episode, the Article examines a recently enacted law and proposes measures moving forward.

II. BANK SECRECY LAWS

A. *Swiss Origins of Bank Secrecy Laws*

In 1713, the Great Council of Geneva promulgated regulations requiring bankers to keep registers of clients but prohibited them from sharing the records with anyone, except if the City Council agreed to divulge such information.⁷ Since that time on, Swiss bank secrecy has been regulated by civil law.⁸ At the dawn of the 20th century, Switzerland saw its bank secrecy laws develop further.⁹ With Swiss banks unable to compete with the financial centers such as London, Paris, and Berlin, the Swiss needed to find a niche in order to thrive.¹⁰ Realizing that tax increases were becoming a common occurrence in their neighboring countries, the Swiss saw an opportunity to attract foreign capitalists who sought to avoid domestic tax

7. Bahamas: Related Information — Banking Confidentiality, *available at* www.lowtax.net/information/bahamas/bahamas-banking-confidentiality.html (last accessed Aug. 10, 2017).

8. Lee Ann Obringer, How Swiss Bank Accounts Work, *available at* <http://money.howstuffworks.com/personal-finance/banking/swiss-bank-account2.htm> (last accessed Aug. 10, 2017).

9. Matthew Wills, The Origins Of Secret Swiss Bank Accounts, *available at* <https://daily.jstor.org/origins-secret-swiss-bank-accounts> (last accessed Aug. 10, 2017).

10. *Id.* & Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 *BUS. HIST. REV.* 237, 241 (2000).

liability.¹¹ As early as 1910, Swiss banks were said to have helped the French evade their local taxes.¹² Eventually, Swiss banking institutions boasted about their country being a tax haven through widespread propaganda campaigns.¹³ Later on, the Depression significantly affected Swiss banks, and Germany and France wanted to stop capital inflows to Switzerland and tax evasion in their respective countries.¹⁴ These internal and external pressures, among others, led to the enactment of Switzerland's Banking Act of 1934,¹⁵ an Act meant to safeguard the Swiss' ability to hide money within their country without regard to the source of such funds.¹⁶ This Swiss federal law was criminal in nature as it punished any banker who disclosed a bank client's information with possible penalties in the form of fines and imprisonment.¹⁷ Since then, other countries have followed suit in integrating bank secrecy laws into their respective jurisdictions.¹⁸

B. Salient Features of Bank Secrecy Laws

1. Republic Act (R.A.) No. 1405

a. History and Purpose

The bank secrecy laws of the Philippines take their roots from R.A. No. 1405, which was enacted in 9 September 1955.¹⁹ R.A. No. 1405 was enacted 10 years after the end of the Second World War, at a time when the Philippine banking system was still in its infancy.²⁰ Lawmakers from both houses of Congress passed the said law in view of private hoarding of money and capital flight out of the country.²¹ With the intention of expanding

11. Wills, *supra* note 9 & Guex, *supra* note 10, at 241.

12. *Id.*

13. Guex, *supra* note 10, at 241.

14. Wills, *supra* note 9.

15. LOI FÉDÉRALE SUR LES BANQUES ET LES CAISSES D'ÉPARGNE [LB], FEDERAL LAW ON BANKS AND SAVINGS BANKS, Nov. 8, 1934, SR 952, RS 952 (Switz.).

16. Wills, *supra* note 9 & Guex, *supra* note 10, at 252.

17. LB art. 47 (1) & Guex, *supra* note 10, at 244.

18. These countries include Switzerland, Singapore, Luxemborg, Lebanon, and the Philippines. Tax Justice Network, Financial Secrecy Index — 2015 Results, *available at* www.financialsecrecyindex.com/introduction/fsi-2015-results (last accessed Aug. 10, 2017).

19. An Act Prohibiting Disclosure of or Inquiry into, Deposits with any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955).

20. Franz David Ong Lim, *Bank Secrecy Law: A Historical and Economic Analysis*, 77 PHIL. L.J. 208, 209 (2002).

21. *Id.* at 211.

capital markets and generating savings, both houses passed their own versions of the bill.²² Both bills explicitly stated the intention of the Legislature.²³ For instance, the Preamble of the House of Representative's version of the bill reads,

One of the major roadblocks on the path of our economic progress is [the] lack of capital and credit facilities. Banks and other credit institutions have been established by the government to expand the credit facilities in the country, and to private enterprise to establish banks and other credit institutions, but all these steps have not solved the problem of providing adequate capital to propel more speedily our economic development.²⁴

The essence of the preamble set forth in the aforementioned proposed bill is distilled in Section 1 of R.A. No. 1405, which provides the rationale of such enactment, to wit —

Section 1. It is hereby declared to be the policy of the Government to give encouragement to the people to deposit their money in banking institutions and to discourage private hoarding so that the same may be properly utilized by banks in authorized loans to assist in the economic development of the country.²⁵

R.A. No. 1405 expressly declares that bank deposits²⁶ and investments in government bonds²⁷ are absolutely confidential.²⁸ However, the use of the

22. *Id.* at 210.

23. *Id.*

24. *Id.* (citing H.B. No. 3977, pmb., 3d Cong., 2d Reg. Sess. (1955)).

25. Republic Act No. 1405, § 1.

26. According to the legal primer of the Bangko Sentral ng Pilipinas (BSP),

[Deposits] refer to money or funds placed with a bank that can be withdrawn on the depositor's order or demand, such as deposit accounts in the form of savings, current[,] and time deposits. Deposits are characterized as being in the nature of a simple loan. The placing of deposits in a bank creates a creditor-debtor relationship between the depositor and the bank. As such, the bank, being the debtor, has the obligation to pay a certain sum of money to the depositor, being the creditor.

BANGKO SENTRAL NG PILIPINAS — OFFICE OF THE GENERAL COUNSEL AND LEGAL SERVICES, *BANKING LAWS OF THE PHILIPPINES, THE LAWS ON SECRECY OF BANK DEPOSITS: A LEGAL PRIMER* 3 (2013) (citing THOMAS P. FITCH, *DICTIONARY OF BANKING TERMS* 141 (5th ed. 2006); Department of Justice, Opinion No. 005, Series of 1982 (Jan. 8, 1982); & Guingona, Jr. v. The City Fiscal of Manila, 128 SCRA 577 (1984)) [hereinafter *BSP PRIMER*].

27. The legal primer of the BSP provides the definition, viz —

[i]nvestments in Government Bonds refer to investments in bonds issued by the Government of the Philippines, its political subdivisions[,] and its instrumentalities. Government bonds are debt

word “absolute” is misleading given that Section 2 of the law itself provides exceptions to the supposedly absolute rule. The said Section states that these deposits and government bond investments

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.²⁹

b. Persons Liable and Corresponding Liability

Meanwhile, the following persons are deemed liable for violation of R.A. No. 1405:

- (a) Any person or government official who, or any government bureau or office that, examines, inquires[,] or looks into a bank deposit or government bond investment in any of the instances not allowed in Section 2 [of R.A. No. 1405];³⁰ [and]
- (b) Any official or employee of a banking institution who makes a disclosure concerning bank deposits to another in any instance not allowed by law[.]³¹

The law punishes convicted offenders with a penalty of imprisonment for a maximum of five years or a maximum fine of ₳20,000, or both, subject to the discretion of the court.³²

securities which are unconditional obligations of the State, and backed by its full taxing power. Government bonds include treasury bills, treasury notes, retail treasury bonds, dollar linked peso notes, and other risk-free bonds.

BSP PRIMER, *supra* note 26, at 3.

28. Republic Act No. 1405, § 2.

29. *Id.*

30. BSP PRIMER, *supra* note 26, at 4 (citing Republic Act No. 1405, § 2). Section 2 of Republic Act No. 1405 provides for instances where an inspection of a bank deposit or government bond investment may be had, to wit — “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.” Republic Act No. 1405, § 2.

31. BSP PRIMER, *supra* note 26, at 4 (citing Republic Act No. 1405, § 3).

32. Republic Act No. 1405, § 5.

2. Presidential Decree (P.D.) No. 1792 and R.A. No. 7653

In 1981, R.A. No. 1405 was amended by P.D. No. 1792, which expanded the exceptions to the absolute confidentiality rule to include instances when the Monetary Board examines a bank upon showing of a reasonable ground of the presence of bank fraud or serious irregularity, and, when an independent auditor is hired by the bank strictly for audit-purposes only and the results of the auditor's report are for the bank's exclusive use.³³ P.D. No. 1792 likewise made the said independent auditor liable when he or she discloses information to any other person other than those mentioned in Section 2 of R.A. No. 1405, as amended.³⁴ However, P.D. No. 1792 was later expressly repealed by Section 135 of R.A. No. 7653, otherwise known as "The New Central Bank Act," effectively reinstating the version of R.A. No. 1405 prior to P.D. No. 1792.³⁵ In addition, The New Central Bank Act introduced a new provision on bank secrecy as contained in Section 26 which contemplates a specific kind of borrower who is required by the lending bank to waive the secrecy of his or her deposits, under particular circumstances relating to his or her bank, its subsidiary relationship, or its shareholdings.³⁶

33. Section 1 of Presidential Decree No. 1792, amending Section 2 of Republic Act No. 1405, added two exceptions to the absolute confidentiality rule, to wit —

when the examination is made in the course of a special or general examination of a bank and is specifically authorized by the Monetary Board after being satisfied that there is reasonable ground to believe that a bank fraud or serious irregularity has been or is being committed and that it is necessary to look into the deposit to establish such fraud or irregularity, or when the examination is made by an independent auditor hired by the bank to conduct its regular audit[,] provided that the examination is for audit purposes only and the results thereof shall be for the exclusive use of the bank[.]

Amending Republic Act No. 1405, Presidential Decree No. 1792, § 1 (1981) (repealed 1993).

34. *Id.* § 2.

35. The New Central Bank Act, Republic Act No. 7653, § 135 (1993).

36. Section 26 of the New Central Bank Act provides —

[Section] 26. *Bank Deposits and Investments.* — Any director, officer[,] or stockholder who, together with his [or her] related interest, contracts a loan or any form of financial accommodation from: (1) his [or her] bank; or (2) from a bank (a) which is a subsidiary of a bank holding company of which both his [or her] bank and the lending bank are subsidiaries or (b) in which a controlling proportion of the shares is owned by the same interest that owns a controlling proportion of the shares of his [or her] bank, in excess of five percent (5%) of the capital and surplus of the bank, or in the maximum amount permitted

In addition, the exceptions to the “absolute” confidentiality rule with regard to domestic bank deposits and investments in government bonds have been expanded by other laws and have gone through numerous jurisprudential refinements.³⁷

3. R.A. No. 6426

a. History and Purpose

While R.A. No. 1405 was concerned with peso deposits, Congress in 1974 passed R.A. No. 6426, otherwise known as the “Foreign Currency Deposit Act of the Philippines” (FCDA), which covered foreign currency deposits.³⁸ Prior to that time, there was no statute covering foreign currency deposits, given that Philippine banking institutions were not allowed to receive these kinds of deposits.³⁹ P.D. Nos. 1035,⁴⁰ 1246,⁴¹ and 1453⁴² further amended R.A. No. 6426. Notably, P.D. No. 1246 was the amendment that granted absolute confidentiality to the foreign currency deposits under the FCDA,⁴³ as amended, and those under P.D. No 1034.⁴⁴ Consequently, Section 8 of

by law, whichever is lower, shall be required by the lending bank to waive the secrecy of his [or her] deposits of whatever nature in all banks in the Philippines. Any information obtained from an examination of his [or her] deposits shall be held strictly confidential and may be used by the examiners only in connection with their supervisory and examination responsibility or by the [BSP] in an appropriate legal action it has initiated involving the deposit account.

Id. § 26.

37. See BSP PRIMER, *supra* note 26, at 4-10.

38. An Act Instituting a Foreign Currency Deposit System in the Philippines, and for Other Purposes [Foreign Currency Deposit Act], Republic Act No. 6426 (1972) (as amended).

39. Gabriel C. Singson, *Law and Jurisprudence on Secrecy of Bank Deposits*, 46 ATENEO L.J. 670, 675 (2001).

40. Expanding The Authority of Certain Depository Banks Under R.A. No. 6426 and for Other Purposes, Presidential Decree No. 1035 (1976).

41. Further Amending Certain Provisions of Republic Act Numbered Sixty-Four Hundred and Twenty-Six, As Amended by Presidential Decree Numbered One Thousand Thirty-Five, Presidential Decree No. 1246 (1977).

42. Further Amending Republic Act Numbered 6426, As Amended, Otherwise Known as the Foreign Currency Deposit Act of the Philippines, Presidential Decree No. 1453 (1978).

43. Presidential Decree No. 1246, § 2.

44. Authorizing the Establishment of an Offshore Banking System in the Philippines, Presidential Decree No. 1034 (1976).

the FCDA, as amended, provides for the confidentiality of foreign currency deposits.⁴⁵

Unlike R.A. No. 1405, the FCDA is stricter given that foreign currency deposits are of an “absolutely confidential nature,” and the only exception provided by the FCDA is when a written permission of the depositor evincing his or her consent is first obtained.⁴⁶ Moreover, in contrast to jurisprudence interpreting and carving out more exceptions to peso deposits covered under R.A. No. 1405, the FCDA expressly exempts foreign currency deposits from “attachment, garnishment, or any other order or process of any court, legislative body, government agency[,] or any administrative body whatsoever.”⁴⁷ Over time, Congress has qualified the absolute confidentiality of foreign deposits through subsequent enactments.⁴⁸

b. Persons Liable and Corresponding Penalties

The following persons are liable for violation of the FCDA:

- (a) Any person or government official who, or any government bureau or office that, examines, inquires[,] or looks into a foreign currency deposit without the written permission of the depositor;⁴⁹

45. Section 8 of the Foreign Currency Deposit Act of the Philippines, as amended, provides —

Section 8. *Secrecy of foreign currency deposits.* — All foreign currency deposits authorized under this Act, as amended by [Presidential Decree] No. 1035, as well as foreign currency deposits authorized under [Presidential Decree] No. 1034, are hereby declared as and considered of an absolutely confidential nature and, except upon the written permission of the depositor, in no instance shall foreign currency deposits be examined, inquired[,] or looked into by any person, government official, bureau[,] or office whether judicial or administrative or legislative, or any other entity whether public or private; *Provided*[,] *however*[,] That said foreign currency deposits shall be exempt from attachment, garnishment, or any other order or process of any court, legislative body, government agency[,] or any administrative body whatsoever.

Foreign Currency Deposit Act, § 8.

46. *Id.*

47. *Id.*

48. An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160, §§ 9 & 11 (2001) (as amended).

49. BSP PRIMER, *supra* note 26, at 12 (citing Foreign Currency Deposit Act, § 8).

- (b) Any official or employee of a banking institution who makes a disclosure concerning foreign currency deposits to another, in any instance not allowed by law;⁵⁰
- (c) Anyone who shall attach, garnish, or subject the foreign currency deposit to any other order or process of any court, legislative body, government agency[,] or any other administrative body;⁵¹ and,
- (d) Any person who commits a willful violation of any of the provisions of R.A. No. 6426 or regulation issued by the Monetary Board pursuant to the said law.⁵²

Any person violating R.A. No. 6426 shall be penalized with imprisonment for at least one year to a maximum of five years, a fine of at least ₳5,000 to a maximum of ₳25,000, or both, subject to the court's discretion.⁵³

III. ANTI-MONEY LAUNDERING LAWS

A. *The Concept of Money Laundering*

1. Definition

Conceptually, money laundering is defined as

a process by which the origins and ownership of money, generated as a result of criminal activity, can be concealed. In effect, the money is 'cleaned' or 'laundered' through legitimate means and, as a result, the proceeds lose their existing criminal identity and appear to have originated from a legitimate source.⁵⁴

A majority of countries have subscribed to the definition of money laundering in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the United Nations Convention Against Transnational Organized Crime (2000):

- (a) The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offense or offenses or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the

50. BSP PRIMER, *supra* note 26, at 12 (citing Foreign Currency Deposit Act, § 10).

51. BSP PRIMER, *supra* note 26, at 13 (citing Foreign Currency Deposit Act, § 8).

52. BSP PRIMER, *supra* note 26, at 13 (citing Foreign Currency Deposit Act, § 10).

53. *Id.*

54. Anti-Money Laundering Forum, Money Laundering, *available at* https://www.anti-moneylaundering.org/money_laundering.aspx (last accessed Aug. 10, 2017).

commission of such an offense or offenses to evade the legal consequences of his [or her] actions;

- (b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses or from an act of participation in such an offense or offenses[; and,]
- (c) The acquisition, possession[,] or use of property, knowing at the time of receipt that such property was derived from an offense or offenses or from an act of participation in such offense ... or offenses.⁵⁵

2. Purpose of Anti-Money Laundering

On the other hand, the Financial Action Task Force on Money Laundering (FATF) — an intergovernmental organization aimed at promoting policies to protect the global financial system from money laundering and terrorist financing⁵⁶ — briefly describes the essential purpose of money laundering, which is “to generate a profit for the individual or group that carries out the act. [It] is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardizing their source.”⁵⁷ Essentially, the basic goal of anti-money laundering laws of a State is to deter money launderers from designating a particular State as a haven to legitimize the funds obtained.⁵⁸ More importantly, the object of an effective anti-money laundering regime is to “strike at the economic power of criminal or terrorist organizations (or individuals) and weaken their operations by precluding them from using or benefiting from the illegal proceeds of their criminal activities.”⁵⁹

55. PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM I-2 & I-3 (2d ed. 2006) (citing Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Dec. 20, 1988, U.N.T.S. 1582 (entered into force Nov. 11, 1990) & Convention against Transnational Organized Crime, G.A. Res. 55/25 (Nov. 15, 2005)).

56. FINANCIAL ACTION TASK FORCE AND ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FATF GUIDANCE: ANTI-MONEY LAUNDERING AND TERRORIST FINANCING SCHEMES AND FINANCIAL INCLUSION 2 (2011).

57. Financial Action Task Force, What is Money Laundering?, *available at* <http://www.fatf-gafi.org/faq/moneylaundering> (last accessed Aug. 10, 2017).

58. Mary Jude V. Cantorias, *Anti-Money Laundering/Combating Financing of Terrorism: A Philippine Perspective on a Donor-Driven Initiative*, ARELLANO L. & POL’Y REV. 42, 49 (2009).

59. *Id.*

3. Stages of Money Laundering

There are three stages involved in money laundering: placement, layering, and integration.⁶⁰ Placement, the initial stage, contemplates the deposit of illegally-procured funds into the financial system (e.g., depositing the money in a bank account).⁶¹ This stage may involve breaking down large amounts of funds into smaller ones, currency exchanges, conversion into various financial instruments, or even the purchase of securities.⁶² After the entry of the illicit funds into the financial system, the second stage — layering — occurs when the funds, securities, contracts, or whatever form the illegally-obtained funds are converted into are moved to various institutions in order to obscure the funds' criminal origins⁶³ and to make the funds appear "clean."⁶⁴ Finally, in integration, the third and final stage, the funds are used to purchase legitimate assets, resulting to the integration of funds into the economy.⁶⁵ These three stages show the "[transformation of] illegal inputs into supposedly legitimate outputs."⁶⁶

4. Terrorist Financing Typologies

The different techniques to commit money laundering are known as methods or typologies.⁶⁷ Given unique circumstances for each country or region, these typologies usually differ.⁶⁸ In any event, international organizations such as the FATF have endeavored to produce reports and lists of typologies for regions and countries on a regular basis in order to duly inform governments, financial institutions, and the private sectors of new schemes and threats to the economic system.⁶⁹

In the Philippines, most money laundering activities are characterized by the use of regulated financial and banking sectors with the corresponding

60. SCHOTT, *supra* note 55, at I-7-I-9 & JONATHAN E. TURNER, MONEY LAUNDERING PREVENTION: DETERRING, DETECTING, AND RESOLVING FINANCIAL FRAUD 8 (2011).

61. SCHOTT, *supra* note 55, at I-7 & TURNER, *supra* note 60, at 8-9.

62. *Id.*

63. SCHOTT, *supra* note 55, at I-8-I-9 & TURNER, *supra* note 60, at 9.

64. DENNIS COX, HANDBOOK OF ANTI-MONEY LAUNDERING 17 (1st ed. 2014).

65. SCHOTT, *supra* note 55, at I-9 & TURNER, *supra* note 60, at 9-10.

66. Paul Ashin, Dirty Money, Real Pain, *available at* www.imf.org/external/pubs/ft/fandd/2012/06/ashin.htm (last accessed Aug. 10, 2017).

67. SCHOTT, *supra* note 55, at I-10.

68. *Id.*

69. FINANCIAL ACTION TASK FORCE AND ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ANNUAL REPORT 2015-2016 19 (2017).

services these sectors provide.⁷⁰ The schemes range from the use of fake names and forged documents to the exploitation of fund transfer systems.⁷¹ A majority of the laundered funds are from sources within the Philippines, while others are obtained overseas.⁷²

5. Consequences of Money Laundering

The absence or weakness of the enforcement of anti-money laundering laws in a State encourages criminals to operate their clandestine and illicit operations in such a jurisdiction.⁷³ Developing countries suffer the most on economic, legal, and social levels⁷⁴ due to money laundering activities.⁷⁵ The financial markets in these countries are usually small and fragile, making them easily disrupted by money laundering activities.⁷⁶

Weak money laundering laws and poor enforcement thereof pose serious implications.⁷⁷ For instance, economically, money laundering results in tax evasion which in turn results in the country involved being deprived of revenues.⁷⁸ Likewise, given the slim possibility of being apprehended for such illicit activities, money launderers are incentivized to conduct more operations in the country. This leads to the weakening of investors' confidence in the financial system and, eventually, the overall confidence of the public.⁷⁹ From a legal perspective, a vicious cycle is formed as money launderers evade arrests for conducting predicate crimes that become the

70. ASIA/PACIFIC GROUP ON MONEY LAUNDERING & THE WORLD BANK, MUTUAL EVALUATION REPORT, ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: REPUBLIC OF THE PHILIPPINES 24 (2009).

71. *Id.*

72. *Id.*

73. SCHOTT, *supra* note 55, at II-2.

74. Santosh Ejanthkar & Leepa Mohanty, The Growing Threat of Money Laundering (A Paper on the Evolution of Money Laundering and Common Money Laundering Tactics around the World) at 11-12, *available at* https://www.nl.capgemini.com/resource-file-access/resource/pdf/The_Growing_Threat_of_Money_Laundering.pdf (last accessed Aug. 10, 2017) & SCHOTT, *supra* note 55, at II-1.

75. SCHOTT, *supra* note 55, at II-1.

76. *Id.*

77. Ejanthkar & Mohanty, *supra* note 74. *See also* Brent L. Bartlett, Negative Effects of Money Laundering on Economic Development (An Economic Research Report Prepared for the Asian Development Bank), *available at* <https://www.adb.org/sites/default/files/publication/27932/countering-money-laundering.pdf> (last accessed Aug. 10, 2017).

78. Ejanthkar & Mohanty, *supra* note 74, at 11.

79. *Id.*

sources of the funds to be eventually laundered.⁸⁰ These crimes become more rampant because the money launderers are encouraged by the country's weak anti-money laundering laws to continue and expand their operations.⁸¹ Moreover, as a result of increased crime, money laundering brings with it negative social impacts such as widespread corruption and drug addiction.⁸² In addition, criminals become empowered as they are able to procure firearms and other contraband to extend the scope of their illegal activities.⁸³ Conversely, a strong set of anti-money laundering laws is able to deter crime and corruption,⁸⁴ promote stability of financial institutions,⁸⁵ and encourage economic progress.⁸⁶

B. Salient Features of the Anti-Money Laundering Law

1. AMLA and the AMLC

The enactment of an anti-money laundering law was mainly a response to international pressure, specifically to the possibility of the imposition of sanctions on the Philippines.⁸⁷ The Philippines was one of the countries part

80. *Id.*

81. *Id.*

82. *Id.* at 12.

83. *Id.*

84. SCHOTT, *supra* note 55, at II-7.

85. *Id.* at II-8.

86. *Id.* at II-8-II-9.

87. See generally Bing Baltazar C. Brillo, *The Politics of the Anti-Money Laundering Act of the Philippines: An Assessment of the Republic Act 9160 and 9194*, 6 ASIAN SOC. SCI. 109 (2010). As Bing Baltazar C. Brillo observes,

[t]he policymaking process that produced the AMLA is atypical, as the enactment of the policy exhibited a peculiar pattern. Republic Act 9160 and its amendment, Republic Act 9194, as a financial regulatory policy was principally exogenously driven and was enacted mainly by virtue of external pressure. The involvement of the international organization [— the Financial Action Task Force (FATF) —] was the decisive factor in setting the agenda, and in the enactment and the amendment of the AMLA. The law was enacted to satisfy the FATF demand— to conform to the global standard, to beat the deadline, to avoid the imposition of countermeasures, and to be removed from the [Non-Cooperative Countries and Territories (NCCT)] blacklist. Bending to such demand, the Philippine government made extraordinary efforts to ensure compliance[.] ... The steps taken spoke of the tremendous influence an international organization can have on the institutional actors and the policymaking process, as the absence of serious effort among the policy actors was offset by the resoluteness of the FATF. This condition was made possible primarily by the

of the first list of Non-Cooperative Countries and Territories (NCCT) published in a report by the FATF on 22 June 2000.⁸⁸ In the report, the FATF stated that

[t]he [Philippines] lacks a basic set of anti-money laundering regulations ... Bank records have been under excessive secrecy provisions. It does not have any specific legislation to criminali[z]e money laundering per se. Furthermore, a suspicious transaction reporting system does not exist in the country.

...

During the past few years, the government has been seeking unsuccessfully for the Congress to pass several anti-money laundering Bills. The Government of the Philippines urgently needs to enact an anti-money laundering Bill during the current session of the Congress (June 2000 to May 2001), to criminali[z]e money laundering, require customer identification as well as record keeping, introduce [a] suspicious transaction reporting system[,] and relax the bank secrecy provisions.⁸⁹

In the FATF's report a year later, the Philippines remained in the FATF's NCCT list.⁹⁰ The FATF recommended that countermeasures be imposed on the Philippines, among other countries, if no anti-money laundering legislation is passed by 30 September 2001 that conforms to FATF-identified money laundering concerns which primarily involve "the criminalisation of money laundering[,] the mandatory creation of a suspicious transaction reporting regime[,] the establishment of [] proper customer identification requirements[,] the elimination of excessive bank secrecy[,] and international co-operation."⁹¹ If countermeasures are to be

utilization of the threat of sanctions. The effort to avoid sanctions was the moving force from the beginning to the end of the policymaking process.

Id. at 123.

88. Cantorias, *supra* note 58, at 42-43 (citing Financial Action Task Force on Money Laundering, Review to Identify Non-Cooperative Countries or Territories: Increasing The Worldwide Effectiveness of Anti-Money Laundering Measures — 22 June 2000, available at www.fatf-gafi.org/media/fatf/documents/reports/1999%202000%20NCCT%20ENG.pdf (last accessed Aug. 10, 2017)).
89. Financial Action Task Force on Money Laundering, *supra* note 88 (last accessed Aug. 10, 2017).
90. Financial Action Task Force on Money Laundering, Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures — 22 June 2001, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/2000%202001%20NCCT%20ENG.pdf> (last accessed Aug. 10, 2017)).
91. *Id.*

imposed, the financial transactions of the country concerned would be subject to strict scrutiny and examination in order to determine the lawfulness of the said transactions.⁹² In response to such potential sanctions, the legislature had to speedtrack the passage of an anti-money laundering law.⁹³ Beating the 30 September 2001 deadline set by the FATF, Congress passed R.A. No. 9160, otherwise known as the Anti-Money Laundering Act of 2001 (AMLA), on 18 September 2001 and the said law took effect on 17 October that same year.⁹⁴ From 2001 up to the time that the BBH took place, R.A. No. 9160 has been amended thrice⁹⁵ in keeping with the Philippines' commitment to comply with standards set by the FATF.⁹⁶

92. Brillo, *supra* note 87, at 114-17.

93. *Id.*

94. *Id.* at 42-43 & An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001) (as amended).

95. Muhammad Cohen, Bangladesh Bank Heist Exposes Laundering Links In Philippine Casinos, *available at* <https://www.forbes.com/sites/MuhammadCohen/2016/04/12/philippine-flaws-exposed-in-bangladesh-bank-heist-casino-connection/#2f7557606c6b> (last accessed Aug. 10, 2017).

The numerous changes brought about by Republic Act No. 9194 of 2003, which amended Republic Act No. 9160, included refining the definition of covered transactions and the offense of money laundering, introducing a new provision on suspicious transactions, adding predicate crimes, and expanding the powers of Anti-Money Laundering Council (AMLC). An Act Amending Republic Act No. 9160, Otherwise Known as the "Anti-Money Laundering Act of 2001", Republic Act No. 9194 (2003).

Meanwhile, significant changes brought about by Republic Act No. 10167 of 2012 are amending provisions on petitions for freeze orders and applications for bank inquiries, both of which were put in place as Sections 10 and 11 of the Anti-Money Laundering Act (AMLA) respectively were expressly amended. An Act to Further Strengthen the Anti-Money Laundering Law, Amending for the Purpose Sections 10 and 11 of Republic Act No. 9160, Otherwise Known as the Anti-Money Laundering Act of 2001, as Amended, and for Other Purposes, Republic Act No. 10167 (2012).

On the other hand, Republic Act No. 10365 of 2013 further expanded the persons liable to include natural and juridical persons while adding new covered persons such as jewelry dealers and company service providers. Republic Act No. 10365 also modified the definition of money laundering, added new predicate crimes, and expanded the power of AMLC to include an *ex parte* freeze order application before the Court of Appeals. An Act Further Strengthening the Anti-Money Laundering Law, Amending for the Purpose Republic Act No. 9160, Otherwise Known as the "Anti-Money Laundering Act Of 2001", as Amended, Republic Act No. 10365 (2012).

96. Bangko Sentral ng Pilipinas, BSP Advocacy on Anti-Money Laundering (AML) — Passage of Anti-Money Laundering Act (AMLA) of 2001 (Republic Act No.

The State policy is contained in Section 2 of the AMLA, as amended,⁹⁷ to wit —

[Section] 2. Declaration of Policy. — It is hereby declared the policy of the State to protect and preserve the integrity and confidentiality of bank accounts and to ensure that the Philippines shall not be used as a money laundering site for the proceeds of any unlawful activity. Consistent with its foreign policy, the State shall extend cooperation in transnational investigations and prosecutions of persons involved in money laundering activities wherever committed.⁹⁸

Pursuant to the AMLA, the Anti-Money Laundering Council (AMLC) was created.⁹⁹ The AMLC was meant to serve as the “financial intelligence unit”¹⁰⁰ analyzing both covered and suspicious transactions.¹⁰¹ The law provides that AMLC shall act unanimously as it discharges its powers and functions,¹⁰² which include:

- (1) Implementing appropriate measures to combat money laundering activities;¹⁰³
- (2) Investigating covered and suspicious transactions;¹⁰⁴

9160) and Subsequent AMLA Amendments (RA 9194, RA 10167 and RA 10365), available at www.bsp.gov.ph/about/advocacies_anti.asp (last accessed Aug. 10, 2017).

97. Unless otherwise provided, subsequent references to the AMLA refer to the current form of the Anti-Money Laundering Act, as amended.

98. Anti-Money Laundering Act of 2001, § 2.

99. *Id.* § 7.

100. The Egmont Group, a network of financial intelligence units worldwide, defines a “financial intelligence unit” as

a central, national agency responsible for receiving, (and as permitted, requesting), analyzing[,] and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing.

The Egmont Group, Annual Report: May 2007 – June 2008 at 7, available at https://egmontgroup.org/en/filedepot_download/1660/28 (last accessed Aug. 10, 2017).

101. Official Gazette, BSP briefer on the Anti-Money Laundering Act of 2001, available at <http://www.officialgazette.gov.ph/2012/02/21/bsp-briefer-on-anti-money-laundering-act-of-2001> (last accessed Aug. 10, 2017).

102. Anti-Money Laundering Act, § 7.

103. Chrysilla Carissa P. Bautista, *Philippines*, in ANTI-MONEY LAUNDERING IN 24 JURISDICTIONS WORLDWIDE 116 (James G. Tillen & Laura Billings eds., 2014) (citing Anti-Money Laundering Act, § 7 (7)).

- (3) Filing of complaints for prosecution of AMLA violations with the Department of Justice [(DOJ)] or the Ombudsman;¹⁰⁵
- (4) Instituting through the Office of the Solicitor General civil forfeiture proceedings and all other remedial proceedings;¹⁰⁶ and,
- (5) Investigating “any property or funds that are in any way related to financing of terrorism or acts of terrorism”¹⁰⁷ and “property or funds of any person or persons in relation to whom there is probable cause to believe that such person or persons are committing or attempting or conspiring to commit, or participating in or facilitating the financing of terrorism or acts of terrorism as defined [in the Terrorism Financing Prevention and Suppression Act of 2012].”¹⁰⁸

2. Offenders of Money Laundering Laws

AMLA provides for the statutory definition of money laundering in Section 4 —

[Section] 4. *Money Laundering Offense.* [—] Money laundering is committed by any person who, knowing that any monetary instrument or property represents, involves, or relates to the proceeds of any unlawful activity:

- (a) transacts said monetary instrument or property;
- (b) converts, transfers, disposes of, moves, acquires, possesses[,] or uses said monetary instrument or property;
- (c) conceals or disguises the true nature, source, location, disposition, movement[,] or ownership of or rights with respect to said monetary instrument or property;
- (d) attempts or conspires to commit money laundering offenses referred to in paragraphs (a), (b)[,] or (c);
- (e) aids, abets, assists in[,] or counsels the commission of the money laundering offenses referred to in paragraphs (a), (b)[,] or (c) above; and[,]

104. Bautista, *supra* note 103 (citing Anti-Money Laundering Act of 2001, §§ 3 (b) & 7 (4)).

105. Bautista, *supra* note 103 (citing Anti-Money Laundering Act of 2001, § 7 (4)).

106. Bautista, *supra* note 103 (citing Anti-Money Laundering Act of 2001, § 7 (3)).

107. Bautista, *supra* note 103 (citing An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for Other Purposes [The Terrorism Financing Prevention and Suppression Act of 2012], Republic Act No. 10168, § 10 (2012)).

108. The Terrorism Financing Prevention and Suppression Act of 2012, § 10.

- (f) performs or fails to perform any act as a result of which he [or she] facilitates the offense of money laundering referred to in paragraphs (a), (b)[,] or (c) above.

Money laundering is also committed by any covered person who, knowing that a covered or suspicious transaction is required under this Act to be reported to the ... [AMLC], fails to do so.[]¹⁰⁹

Under the AMLA, money laundering may be committed by “any person” or “any covered person.”¹¹⁰ “Covered persons” are defined by law as either natural or juridical persons¹¹¹ which include banks, remittance and transfer companies, insurance companies, and jewellery dealers, among others.¹¹² The AMLA provides for an exclusive list of covered persons¹¹³ and, at the time the BBH occurred, casinos were notably not included in the said list.

3. Covered and Suspicious Transactions

The AMLA requires that “covered transactions” and “suspicious transactions” be reported by covered persons to the AMLC within five working days from occurrence, unless a different period not exceeding 15 working days is prescribed by the AMLC.¹¹⁴ “Covered transactions” are defined as those transactions involving a total amount exceeding ₱500,000 within a single banking day.¹¹⁵ Meanwhile, the law provides for circumstances to consider in classifying a transaction as a “suspicious transaction,” viz —

[] ‘Suspicious transaction’ are transactions with covered institutions, regardless of the amounts involved, where any of the following circumstances exist:

- (1) There is no underlying legal or trade obligation, purpose[,] or economic justification;
- (2) The client is not properly identified;
- (3) The amount involved is not commensurate with the business or financial capacity of the client;
- (4) Taking into account all known circumstances, it may be perceived that the client’s transaction is structured in order to avoid being the subject of reporting requirements under the Act;

109. Anti-Money Laundering Act of 2001, § 4.

110. *Id.*

111. *Id.* § 3 (a).

112. *Id.*

113. *See* Anti-Money Laundering Act of 2001, § 3 (a).

114. Anti-Money Laundering Act of 2001, § 9 (c).

115. *Id.* § 3 (b).

- (5) Any circumstances relating to the transaction which is observed to deviate from the profile of the client and/or the client's past transactions with the covered institution;
- (6) The transaction is in a way related to an unlawful activity or offense under this Act that is about to be, is being[,] or has been committed; or
- (7) Any transaction that is similar or analogous to any of the foregoing.¹¹⁶

4. Predicate Crimes

AMLA covers a long list of unlawful activities or predicate crimes that produce the illicit funds to eventually be subject to placement, the first stage of money laundering.¹¹⁷ Based on the 2016 National Risk Assessment on

¹¹⁶ *Id.* § 3 (b), para. 1.

¹¹⁷ A list of predicate crimes have been enumerated under Section 3 (t) of the AMLA:

- (1) Kidnapping for ransom under Article 267 of Act No. 3815, otherwise known as the Revised Penal Code, as amended;
- (2) Sections 3, 4, 5, 7, 8[,] and 9 of Article Two of Republic Act No. 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 No. 3019, as amended; otherwise known as the Anti-Graft and Corrupt Practices Act;
- (4) Plunder under Republic Act No. 7080, as amended;
- (5) Robbery and extortion under Articles 294, 295, 296, 299, 300, 301[,] and 302 of the Revised Penal Code, as amended;
- (6) Jueteng and Masiao punished as illegal gambling under Presidential Decree No. 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, as amended;
- (9) Swindling under Article 315 of the Revised Penal Code, as amended;
- (10) Smuggling under Republic Act Nos. 455 and 1937;
- (11) Violations under Republic Act No. 8792, otherwise known as the Electronic Commerce Act of 2000;
- (12) Hijacking and other violations under Republic Act No. 6235; destructive arson and murder, as defined under 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.
 - (15) Bribery under Articles 210, 211[,] and 211-A of the Revised Penal Code, as amended, and Corruption of Public Officers under Article 212 of the Revised Penal Code, as amended;
 - (16) Frauds and Illegal Exactions and Transactions under Articles 213, 214, 215[,] and 216 of the Revised Penal Code, as amended;
 - (17) Malversation of Public Funds and Property under Articles 217 and 222 of the Revised Penal Code, as amended;
 - (18) Forgeries and Counterfeiting under Articles 163, 166, 167, 168, 169[,] and 176 of the Revised Penal Code, as amended;
 - (19) Violations of Sections 4 to 6 of Republic Act No. 9208, otherwise known as the Anti-Trafficking in Persons Act of 2003;
 - (20) Violations of Sections 78 to 79 of Chapter IV, of Presidential Decree No. 705, otherwise known as the Revised Forestry Code of the Philippines, as amended;
 - (21) Violations of Sections 86 to 106 of Chapter VI, of Republic Act No. 8550, otherwise known as the Philippine Fisheries Code of 1998;
 - (22) Violations of Sections 101 to 107, and 110 of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995;
 - (23) Violations of Section 27(c), (e), (f), (g)[,] and (i), of Republic Act No. 9147, otherwise known as the Wildlife Resources Conservation and Protection Act;
 - (24) Violation of Section 7(b) of Republic Act No. 9072, otherwise known as the National Caves and Cave Resources Management Protection Act;
 - (25) Violation of Republic Act No. 6539, otherwise known as the Anti-Carnapping Act of 2002, as amended;
 - (26) Violations of Sections 1, 3[,] and 5 of Presidential Decree No. 1866, as amended, otherwise known as the decree Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing In, Acquisition or Disposition of Firearms, Ammunition or Explosives;
 - (27) Violation of Presidential Decree No. 1612, otherwise known as the Ant Fencing Law;
 - (28) Violation of Section 6 of Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as amended by Republic Act No. 10022;
 - (29) Violation of Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines;
 - (30) Violation of Section 4 of Republic Act No. 9995, otherwise known as the Anti-Photo and Video Voyeurism Act of 2009;
 - (31) Violation of Section 4 of Republic Act No. 9775, otherwise known as the Anti-Child Pornography Act of 2009;

Money Laundering and Terrorism Financing of the AMLC, major predicate crimes, as indicated by trends over the years, include violations of the Comprehensive Dangerous Drugs Act of 2001¹¹⁸ plunder,¹¹⁹ violations of the Anti-Graft and Corrupt Practices Act,¹²⁰ investment scams and fraud,¹²¹ and smuggling.¹²²

5. Issuance of Freeze Orders

The AMLA provides for an “extraordinary and interim relief” known as a freeze order.¹²³ The primary purpose of a freeze order is

to *temporarily preserve* monetary instruments or property that are in any way related to an unlawful activity or money laundering, by preventing the owner from utilizing them during the duration of the freeze order. The relief is *pre-emptive* in character, meant to prevent the owner from disposing his property and thwarting the State’s effort in building its case and eventually filing civil forfeiture proceedings and/or prosecuting the owner.¹²⁴

R.A. No. 9160, the original version of the law, gave the AMLC the authority to directly issue a freeze order upon determination of probable cause.¹²⁵ However, upon passage of R.A. No. 9194 of 2003 amending R.A. No. 9160, the AMLC’s power was restricted in that it needed to file an

(32) Violations of Sections 5, 7, 8, 9, 10[](c), (d) and (e), 11, 12[,] and 14 of Republic Act No. 7610, otherwise known as the Special Protection of Children Against Abuse, Exploitation and Discrimination;

(33) Fraudulent practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000; and[.]

(34) Felonies or offenses of a similar nature that are punishable under the penal laws of other countries.”

Id. § 3 (t).

118. Anti-Money Laundering Council, The 1st Philippine National Risk Assessment on Money Laundering and Terrorism Financing (A Report on the Self-Assessment of Philippine Authorities) at 38, *available at* <http://www.amlc.gov.ph/images/PDFs/NRARreport.pdf> (last accessed Aug. 10, 2017).

119. *Id.* at 41.

120. *Id.*

121. *Id.* at 43.

122. *Id.* at 45 & Anti-Money Laundering Act of 2001, § 3 (i).

123. *Ligot v. Republic*, 692 SCRA 509, 536 (2013) (citing *Republic v. Eugenio, Jr.*, 545 SCRA 384 (2008)).

124. *Id.* at 537.

125. Anti-Money Laundering Act of 2001, § 10.

application *ex parte* before the Court of Appeals (CA); the appeals court would then accordingly issue the freeze order upon determination of probable cause.¹²⁶ Following subsequent amendments via R.A. No. 10167 and R.A. No. 10365, the freeze order issued by the CA shall be effective immediately, for a period not exceeding six months, as determined by the circumstances of each case.¹²⁷ Moreover, the account holder of a frozen account may file a motion to lift the freeze order, which must be resolved by the court before the expiration of the freeze order.¹²⁸ In addition, the law confers to the Supreme Court the sole authority to issue a temporary restraining order or a writ of injunction against a freeze order.¹²⁹

6. Penalties & Sanctions

Penalties prescribed by the AMLA for violations of its provisions primarily vary depending on the type of money laundering offense.¹³⁰ For offenders of these money laundering offenses, the penalty of imprisonment ranges from as low as seven years to as high as 14 years and a fine of ₱3 million at the minimum to a maximum amount which is at most equal to twice the value of the monetary instrument or property involved.¹³¹ Covered institutions are

126. Republic Act No. 9194, § 7.

127. *See* Republic Act No. 10365, § 8.

128. Anti-Money Laundering Act of 2001, § 10.

129. *Id.*

130. *Id.* §§ 4 & 14.

131. *Id.* § 14 (a). This provides —

[Section]. 14. Penal Provisions. [—] (a) Penalties for the Crime of Money Laundering. The penalty of imprisonment ranging from seven (7) to fourteen (14) years and a fine of not less than [three] million Philippine pesos (₱3,000,000.00) but not more than twice the value of the monetary instrument or property involved in the offense, shall be imposed upon a person convicted under Section 4[](a), (b), (c)[,] and (d) of this Act.

[]The penalty of imprisonment from four (4) to seven (7) years and a fine of not less than [one] million five hundred thousand Philippine pesos (₱1,500,000.00) but not more than [three] million Philippine pesos (₱3,000,000.00), shall be imposed upon a person convicted under Section 4[](e) and (f) of this Act.

[]The penalty of imprisonment from six (6) months to four (4) years or a fine of not less than [one] hundred thousand Philippine pesos (₱100,000.00) but not more than [five] hundred thousand Philippine pesos (₱500,000.00), or both, shall be imposed on a person convicted under the last paragraph of Section 4 of this Act.

The penalty of imprisonment from four (4) to seven (7) years and a fine of not less than [one] million five hundred thousand Philippine pesos (₱1,500,000.00) but not more than [three] million Philippine

also penalized by corresponding penalties for their failure to keep records as required by the AMLA.¹³² The law likewise provides for penalties for malicious reporting¹³³ and breach of confidentiality,¹³⁴ while also conferring the AMLC with the discretion to impose administrative sanctions.¹³⁵ Juridical persons are also sanctioned by the imposition of the penalty upon the officers responsible under certain circumstances.¹³⁶ Distinct penalties are also especially laid down for foreign nationals and public officials.¹³⁷

7. Exceptions to Bank Secrecy Laws Pursuant to the AMLA: AMLC's Application of Bank Inquiry and the Power of Bangko Sentral ng Pilipinas (BSP) to Periodic Examination

The AMLA carves out an exception to the confidentiality of bank accounts as it confers the AMLC and BSP with powers to examine and inquire into bank deposits and investments.¹³⁸ Given that the AMLA provisions make no distinction, the exception applies to both sets of bank secrecy laws — the Law on the Secrecy of Bank Deposits, as amended, governing peso accounts, as well as the FCDA governing non-peso or foreign currency accounts.¹³⁹

The AMLC is empowered by the AMLA to examine and inquire into bank deposits and investments, including related accounts thereto. A court order secured from the CA is required in the exercise of such power in cases where those deposits or investments are related to a money laundering offense,¹⁴⁰ or to a predicate crime generally referred to as an “unlawful activity”¹⁴¹ under the AMLA.¹⁴² However, when probable cause exists

pesos (₱3,000,000.00), shall be imposed upon a person convicted under Section 4[](b) of this Act.

The penalty of imprisonment from six (6) months to four (4) years or a fine of not less than [one] hundred thousand Philippine pesos (₱100,000.00) but not more than [five] hundred thousand Philippine pesos (₱500,000.00), or both, shall be imposed on a person convicted under Section 4[](c) of this Act.

Id.

132. *Id.* §§ 9 (b) & 14.

133. *Id.* § 14 (c).

134. Anti-Money Laundering Act of 2001, § 14 (d).

135. *Id.* § 14 (f).

136. *Id.* § 14 (c).

137. *Id.*

138. *Id.* §§ 9 & 11.

139. *Id.*

140. Anti-Money Laundering Act of 2001, § 4.

141. *Id.* § 3 (i).

142. *Id.* § 11. This provision of law provides —

showing that deposits or investments are related to predicate crimes such as kidnapping for ransom,¹⁴³ certain drug-related crimes,¹⁴⁴ hijacking, destructive arson, and murder,¹⁴⁵ an examination and inquiry by the AMLC

[Section] 11. Authority to Inquire into Bank Deposits. — Notwithstanding the provisions of Republic Act No. 1405, as amended; Republic Act No. 6426, as amended; Republic Act No. 8791; and other laws, the AMLC may inquire into or examine any particular deposit or investment, including related accounts, with any banking institution or non-bank financial institution upon order of any competent court based on an [*ex parte*] application in cases of violations of this Act, when it has been established that there is probable cause that the deposits or investments, including related accounts involved, are related to an unlawful activity as defined in Section 3 [](i) hereof or a money laundering offense under Section 4 hereof; except that no court order shall be required in cases involving activities defined in Section 3 [](i) [](1), (2), and (12) hereof, and felonies or offenses of a nature similar to those mentioned in Section 3 [](i) [](1), (2), and (12), which are [punishable] under the penal laws of other countries, and terrorism and conspiracy to commit terrorism as defined and penalized under Republic Act No. 9372.[]

[]The Court of Appeals shall act on the application to inquire into or examine any deposit or investment with any banking institution or non-bank financial institution within twenty-four (24) hours from filing of the application.[]

[]To ensure compliance with this Act, the [BSP] may, in the course of a periodic or special examination, check the compliance of a [covered] institution with the requirements of the AMLA and its implementing rules and regulations.[]

[]For purposes of this [Section], ‘related accounts’ shall refer to 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).[]

[]A court order [*ex parte*] must first be obtained before the AMLC can inquire into these related [accounts;] Provided, That the procedure for the [*ex parte*] application of the [*ex parte*] court order for the principal account shall be the same with that of the related accounts. []

[]The authority to inquire into or examine the main account and the related accounts shall comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by reference.[]

Id.

143. *Id.* § 3 (i) (1).

144. *Id.* § 3 (i) (2).

145. Anti-Money Laundering Act of 2001, § 3 (i) (12).

of such accounts may be made without the need for a court order.¹⁴⁶ Whenever a court order is required, the CA shall act on the application within 24 hours from the filing of the application.¹⁴⁷

Meanwhile, the BSP may, even without probable cause, conduct periodic or special examination of covered institutions, e.g., banking or non-bank financial institutions, to ensure compliance with the AMLA and its implementing rules and regulations.¹⁴⁸ The BSP is also given the authority to conduct annual testing for the sole purpose of determining the existence and true identity of the owners of these accounts.¹⁴⁹

IV. THE 2016 US\$81-MILLION BANGLADESH BANK HEIST

On 15 May 2015, four dollar bank accounts under the names of Enrico Teodoro Vasquez, Alfred Santos Vergara, Michael Francisco Cruz, and Jessie Christopher Lagrosas, with an initial deposit of US\$500 each, were opened in the Jupiter, Makati branch of the Rizal Commercial Banking Corporation (RCBC).¹⁵⁰ Later, these accounts would be found to be dubious and would remain idle until 4 February 2016.¹⁵¹ On 4 February 2016, hackers got into the Bangladesh Bank's account with the Federal Reserve Bank of New York (Federal Reserve Bank), ordering a total of 35 transfers worth \$951 million, most of which are to be transferred to the RCBC Jupiter branch.¹⁵² Thirty of the 35 transfers were not executed by the Federal Reserve Bank due to "lack of details."¹⁵³ Meanwhile, an instruction to a fake Sri Lankan foundation was put on hold due to a typographical mistake.¹⁵⁴ And so, the other five transfers worth US\$101 million were not blocked, US\$20 million of which had been salvaged while the other US\$81 million were transferred to four fake bank accounts in the Philippines — the accounts of Cruz, Vergara, Vasquez, and Lagrosas, the last getting the bulk of the funds.¹⁵⁵ On the same day, a dollar account in the name of William So Go of DBA Centurytex Trading (Centurytex) was opened and the said funds were

146. *Id.* § 11.

147. *Id.*

148. *Id.*

149. *Id.* § 9.

150. *Timeline: \$81-M Money Laundering*, PHIL. DAILY INQ., Mar. 10, 2016, available at newsinfo.inquirer.net/772258/timeline-81-m-money-laundering (last accessed Aug. 10, 2017).

151. Dela Paz, *supra* note 1.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

withdrawn from their respective accounts and deposited in the newly-opened dollar account.¹⁵⁶

Between the 5th and 13th of February, the funds amounting to US\$81 million in So Go's account were again transferred to Philrem Services Corporation (Philrem), a money transfer company.¹⁵⁷ Some of the funds were converted into Philippine currency and the money was then delivered to Weikang Xu who operated a registered casino company, Eastern Hawaii Leisure Company, and Bloomberry Hotels Incorporated which owns the Solaire Resort & Casino.¹⁵⁸

On Chinese New Year, 8 February 2016, Bangladesh Bank sent a "stop payment" order to RCBC, which meant that the Bangladesh central bank was requesting to refund the stolen funds or to freeze the funds if they were not transferred yet.¹⁵⁹ That day was a non-working holiday in the Philippines.¹⁶⁰ It was only on the next day, 9 February 2016, that the SWIFT¹⁶¹ code from Bangladesh Bank relaying the request was received by RCBC.¹⁶² However, the RCBC Jupiter branch allowed about US\$58.15 million to be withdrawn from the accounts despite this "stop payment" order sent by Bangladesh Bank.¹⁶³ Around a week later, on 16 February 2016, Atiur Rahman, the Bangladesh Bank Governor, relayed to Amando M. Tetangco, Jr., the BSP Governor at that time, that the SWIFT code which ordered the remittance of US\$81 million to the Philippines "[was] fraudulent" and asked Tetangco, Jr. to assist Bangladesh authorities to recover the US\$81 million lost from the Bangladesh's account with the Federal Reserve Bank.¹⁶⁴

156. *Id.*

157. Dela Paz, *supra* note 1.

158. *Id.*

159. *Id.*

160. *Id.*

161. SWIFT or the Society for Worldwide Interbank Financial Telecommunication is a global messaging financial platform owned and used by 3,000 financial institutions to process fund transfers worldwide. Reuters, *Swift: fraudulent messages sent over international bank transfer system*, GUARDIAN, Apr. 26, 2016, available at <https://www.theguardian.com/technology/2016/apr/26/international-bank-transfer-system-hacked-swift-group-admits> (last accessed Aug. 10, 2017).

162. Dela Paz, *supra* note 1.

163. *Id.*

164. *Id.*

The AMLC started its investigation on 12 February 2016, focusing on the involved transactions, financial institutions, and account holders.¹⁶⁵ On 23 February 2016, according to the real William So Go, RCBC Jupiter branch manager Maia Santos-Deguito asked him to meet her in Taguig, which made the businessman “suspicious.”¹⁶⁶ So Go averred that Santos-Deguito told him about the fictitious dollar- and peso-bank accounts opened for Centurytex at RCBC without his knowledge.¹⁶⁷ Meanwhile, according to Santos-Deguito, a certain Kim Wong introduced her to the four depositors namely, Cruz, Lagrosas, Vergara, and Vasquez, and she claims that it was the same Kim Wong who instructed her to open a dollar account in the name of So Go and place the consolidated funds therein.¹⁶⁸ Kam Sin Wong, alias Kim Wong, is a Chinese casino junket operator who has denied stealing the laundered money through web hacking and who claims that it was other operators who brought the laundered money to casinos in the country.¹⁶⁹

On 1 March 2016, the CA issued freeze orders for the accounts of Cruz, Lagrosas, Vergara, Vasquez, So Go, Centurytex, Kam Sin Wong, and other related accounts for six months, pursuant to AMLC’s request to freeze 44 bank accounts for proper investigation.¹⁷⁰ Two weeks later, on 15 March 2016, the first hearing of the Senate Blue Ribbon Committee on the BBH was conducted.¹⁷¹ That same day, the Bangladesh Bank Governor resigned and three of his subordinate officers were fired.¹⁷² Over the course of the Senate investigation, RCBC bank officers were asked why they allowed the money to be withdrawn from RCBC’s Jupiter branch despite the prior issuance of the stop-payment order.¹⁷³ In response, RCBC officials

165. Jon Viktor D. Cabuenas, RCBC reported \$81-M transaction as ‘suspicious’ a day after AMLC probe, *available at* www.gmanetwork.com/news/money/companies/560022/rcbc-reported-81-m-transaction-as-suspicious-a-day-after-amlc-probe/story (last accessed Aug. 10, 2017).

166. Dela Paz, *supra* note 1.

167. *Id.*

168. Gigi Grande, Who is Kim Wong?, *available at* news.abs-cbn.com/focus/03/17/16/who-is-kim-wong (last accessed Aug. 10, 2017).

169. *Id.* & Reynaldo Santos Jr., Kim Wong: No stranger to controversy, Senate probes, *available at* www.rappler.com/newsbreak/iq/130183-kim-wong-senate-probe-controversy (last accessed Aug. 10, 2017).

170. Dela Paz, *supra* note 1.

171. *Id.*

172. *Id.*

173. Mark Merueñas, Why Bankers Clam Up In Bank Heist Probe: PHL’s bank secrecy law among the toughest in the world, *available at* <http://www.gmanetwork.com/news/money/content/559611/phl-s-bank->

repeatedly invoked bank secrecy laws, drawing the ire of several senators.¹⁷⁴ At one point, RCBC president Lorenzo Tan said, “I apologize, your honor, I [cannot] talk specifically about this case because of bank secrecy [laws] but I assure you that an investigation is going on in our bank to determine the actual facts that happened.”¹⁷⁵ On the other hand, the head of the bank’s anti-money laundering division, Laurinda Rogero, even averred that they cannot give information on the bank accounts because “the determination of the ownership as well as whether or not there was fraud committed has not yet been established.”¹⁷⁶

On 18 November 2016, the AMLC filed a complaint before the DOJ supporting the filing of criminal cases relating to money laundering under Section 4 (f) of AMLA.¹⁷⁷ Those who were charged were Raul Victor B. Tan, the former RCBC retail banking group head, and five other officials.¹⁷⁸ About five months later, on 24 April 2017, the DOJ found probable cause to charge and approved the filing of cases in relation to money laundering against officials of RCBC and Philrem.¹⁷⁹ Santos-Deguito and the four depositors — Cruz, Lagrosas, Vergara, and Vasquez — were charged with eight counts of conspiracy to violate anti-money laundering laws following the BBH while Philrem owners Salud Bautista, Michael Bautista, and Anthony C. Pelejo were charged with four counts of violation of the AMLA.¹⁸⁰

secrecy-law-among-the-toughest-in-the-world/story (last accessed Aug. 10, 2017).

174. Maila Ager, *RCBC officials repeatedly invoke bank secrecy law; senators lose cool*, PHIL. DAILY INQ., Mar. 15, 2016, available at <http://newsinfo.inquirer.net/773904/rcbc-officials-repeatedly-invoke-bank-secrecy-law-senators-lose-cool> (last accessed Aug. 10, 2017).

175. *Id.*

176. *Id.*

177. Ben O. de Vera, *AMLC files charges vs. 6 RCBC execs for ‘money laundering’*, PHIL. DAILY INQ., Nov. 22, 2016, available at <http://globalnation.inquirer.net/150001/amlc-files-charges-vs-6-rcbc-execs-money-laundering> (last accessed Aug. 10, 2017). Section 4 (f) of the AMLA punishes an individual who “performs or fails to perform any act as a result of which he [or she] facilitates the offense of money laundering,” as defined in several previous subsections of Section 4. Anti-Money Laundering Act of 2001, § 4 (f).

178. *Id.*

179. Christopher Lloyd T. Caliwan, DOJ OKs raps vs RCBC, Philrem over \$81-M Bangladesh Bank heist, available at beta.interaksyon.com/doj-oks-raps-vs-rcbc-philrem-over-81-m-bangladesh-bank-heist (last accessed Aug. 10, 2017).

180. *Id.*

Meanwhile, as of this writing, in the international scene, United States federal prosecutors are looking into North Korea's involvement after security researchers found evidence linking the said country to the bank heist.¹⁸¹

V. PROBLEMS ENCOUNTERED AND WORKING WITHIN THE CONFINES OF THE LAW

A. Problems Encountered

The BBH and the subsequent investigation conducted by the Philippine government have shown that the legal framework at that time was insufficient and, therefore, a hindrance. As lawmakers,¹⁸² government agencies,¹⁸³ and experts,¹⁸⁴ all pointed out, the BBH exposed numerous vulnerabilities in the country's legal framework, contending that the Philippines had weak anti-money laundering laws and strict bank secrecy laws.¹⁸⁵ Following the heist, various proposed amendments to strengthen the AMLA were transmitted by the Department of Finance, prepared jointly

181. Michael Corkery & Matthew Goldstein, *North Korea Said to Be Target of Inquiry Over \$81 Million Cyberheist*, N.Y. TIMES, Mar. 22, 2017, available at https://www.nytimes.com/2017/03/22/business/dealbook/north-korea-said-to-be-target-of-inquiry-over-81-million-cyberheist.html?_r=0 (last accessed Aug. 10, 2017).

182. See Teresa Cerojano, *Bangladesh Bank heist shows weak spots in finance safeguards*, available at <https://phys.org/news/2016-03-bangladesh-bank-heist-weak-safeguards.html> (last accessed Aug. 10, 2017).

183. The Daily Star/Asia Network, *IMF backs reforms in PH after Bangladesh Bank heist*, PHIL. DAILY INQ., July 18, 2016, available at <http://business.inquirer.net/212009/imf-backs-reforms-in-ph-after-bangladesh-bank-heist> (last accessed Aug. 10, 2017) & Melissa Luz T. Lopez, *BSP backs easing of bank secrecy*, BUSINESSWORLD, Mar. 19, 2016, available at <http://www.bworldonline.com/content.php?section=TopStory&title=bsp-backs-easingbr-of-bank-secrecy&id=124751> (last accessed Aug. 10, 2017).

184. See Kia B. Obang, *1st Quarter Banking Report (2016): What have we learned about the Bangladesh Bank heist (From the Senate hearings)*, BUSINESSWORLD, May 30, 2016, available at [http://research.bworldonline.com/banking-report/story.php?id=880&title=What-have-we-learned-about-the-Bangladesh-Bank-heist-%3Ci%3E\(From-the-Senate-hearings\)%3C/i%3E](http://research.bworldonline.com/banking-report/story.php?id=880&title=What-have-we-learned-about-the-Bangladesh-Bank-heist-%3Ci%3E(From-the-Senate-hearings)%3C/i%3E) (last accessed Aug. 10, 2017) & Floyd Whaley & Neil Gough, *Electronic heist of \$80 million puts focus on Philippines*, SEATTLE TIMES, Mar. 19, 2016, available at <http://www.seattletimes.com/business/electronic-heist-of-80-million-puts-focus-on-philippines> (last accessed Aug. 10, 2017).

185. Ben O. de Vera, *AMLC calls for easing of PH bank secrecy law*, PHIL. DAILY INQ., Mar. 18, 2016, available at <http://newsinfo.inquirer.net/775065/amlc-calls-for-easing-of-ph-bank-secrecy-law> (last accessed Aug. 10, 2017).

with the AMLC and BSP.¹⁸⁶ All these point to the perceived deficiencies in the law at the time. An analysis of the timeline of the heist itself shows that the call by various sectors to amend the law was justified. There were several key problems that contributed to the result of the highly-orchestrated bank heist while there were other problems that became stumbling roadblocks in the ensuing investigation. Notably, the heist exposed four significant problems, as follows.

1. AMLA's Failure to Deter the BBH

First, there was clearly a failure of AMLA to deter hackers from making the Philippines the place to launder the money. Such failure was particularly recognized by lawmakers during the Senate investigations.¹⁸⁷ In addition,

186. On 10 May 2017, the Department of Finance transmitted a proposal, which the former prepared jointly with the AMLC and BSP, to strengthen the AMLA. The government agencies proposed that the AMLA be amended to (1) include casinos, as stated in the recommendations of the FATF, as one of the “covered persons” under the said law and (2) to include tax evasion, among other activities, as a predicate crime to money laundering. In its press release, the DOF said that

[a]mendments to the AMLA have been proposed in the last two years and have been made more urgent by recent financial controversies that have exploited the weakness in the country's tax and financial system's legal framework[—] the Bangladeshi Bank heist involving a local bank and casinos; the Panama Papers exposing offshore bank transactions from across the globe that may have avoided or evaded domestic taxation; the [“de-risking[”] phenomenon, where foreign banks are closing the accounts of our money transfer operators abroad and may double the cost of remitting money to the Philippines from abroad.

...

The proposal also seeks to improve the AMLC's ability to safeguard the financial system from money laundering activities[] by authorizing the AMLC to issue subpoenas, by allowing the AMLC, instead of the Court of Appeals, to issue [*ex parte*] freeze orders with respect to certain unlawful activities, and by adding unlawful activities that are exempted from the requirement of a court order before a bank inquiry may be conducted. The proposed bill also increases the monetary penalty for administrative sanctions.

Department of Finance, Philippines Seeks to Strengthen Financial System's Legal Framework, *available at* <http://www.dof.gov.ph/index.php/philippines-seeks-to-strengthen-financial-systems-legal-framework> (last accessed Aug. 10, 2017).

187. *Philippines emerges as haven for dirty money after US\$81 million stolen from the Bangladesh bank*, SOUTH CHINA MORNING POST, Mar. 20, 2016, *available at* <http://www.scmp.com/news/asia/southeast-asia/article/1927627/philippines-emerges-haven-dirty-money-after-us81-million> (last accessed Aug. 10, 2017).

despite the State's policy "to ensure that the Philippines shall not be used as a money laundering site for the proceeds of any unlawful activity[.]"¹⁸⁸ the State Department of the United States released its International Narcotics Control Strategy Report on March 2017, around a year after the heist, which still considers the Philippines as one of the 88 major money laundering sites in the world.¹⁸⁹

2. Casinos Beyond AMLA's Coverage

Second, casinos were not included in the exclusive enumeration of covered institutions under the AMLA by the time the BBH transpired. Thus, the casinos then had no obligation to report transactions,¹⁹⁰ even if the parameters of such transactions may have fallen under covered¹⁹¹ or suspicious¹⁹² transactions as defined under the AMLA. As casinos were not included in the list of covered institutions under the AMLA, at that time Senate investigations regarding the heist were met with much frustration.¹⁹³ AMLC Executive Director Julia Bacay-Abad even conceded that "the money trail ended at casinos. It's a dead end. Non-inclusion of casino in AMLA just increased the probability of money laundering in the Philippines."¹⁹⁴

3. Freeze Orders Belatedly Issued

Third, the issuance of freeze orders by the CA was too late. AMLC began its investigation on 12 February,¹⁹⁵ four days after the "stop payment order" was issued,¹⁹⁶ as it found out that the transactions were not only "covered

188. Anti-Money Laundering Act of 2001, § 2.

189. United States Department of State, Bureau for International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes (A Report by the United States Government) at 8, available at <https://www.state.gov/documents/organization/268024.pdf> (last accessed Aug. 10, 2017).

190. See Anti-Money Laundering Act, § 9 (c).

191. *Id.* § 3 (b).

192. *Id.* § 3 (b), para. 1.

193. Chrisee Dela Paz, \$81-M bank heist money trail hits dead end in casinos, available at www.rappler.com/business/industries/banking-and-financial-services/125959-bangladesh-bank-fund-heist-senate-hearing (last accessed Aug. 10, 2017).

194. *Id.*

195. Cabuenas, *supra* note 165.

196. Rappler.com, Limited power restricts AMLC actions in Bangladesh Bank heist, available at <http://www.rappler.com/business/industries/banking-and-financial-services/126754-amlc-bangladesh-bank-money-laundering> (last accessed Aug. 10, 2017).

transactions,” but were also deemed to be “suspicious transactions.”¹⁹⁷ Following the procedure for the filing a petition for a freeze order required by law, AMLC was only able to secure the freeze orders from the CA for all accounts linked to the BBH investigation on 1 March, 18 days later. According to AMLC Executive Director Bacay-Abad during the Senate investigations on the matter, by that time, US\$81 million deposited in the four RCBC accounts were gone¹⁹⁸ as they were already withdrawn as early as 9 February.¹⁹⁹

4. Bank Secrecy Laws Hampering Investigations

Fourth, bank secrecy laws hampered the Senate investigations as to information regarding the fraudulent RCBC bank accounts. As previously discussed, RCBC bank officials would repeatedly invoke bank secrecy laws, including the FCDA, when asked about information with regard to the funds in the four dollar accounts opened in RCBC’s Jupiter branch. They refused to answer the queries relating to the bank accounts for fear of incurring criminal liability under bank secrecy laws in the event that they disclosed such information.²⁰⁰

B. Working Within the Confines of the Law

An analysis of the laws on anti-money laundering and bank secrecy shows that the government could only do so much as the statutes allowed. Given that the set of laws by the legislature at that time was admittedly unable to sufficiently address the problems brought about by the BBH, a resort to the other branches of government — the executive and the judiciary — is in order.

1. BSP’s and Philippine Amusement and Gaming Corporation’s (PAGCOR) Regulatory Powers

As governmental bodies granted personality by special charters, BSP and PAGCOR are in a position to effect institutional safeguards as regards the entities they regulate that include banks and casinos, respectively, which are the very same entities which became subject of the money laundering scheme in the BBH.

197. Ben O. de Vera, *PH not a money-laundering hub — AMLC*, PHIL. DAILY INQ., Mar. 23, 2016, available at globalnation.inquirer.net/138039/ph-not-a-money-laundering-hub-amlc (last accessed Aug. 10, 2017).

198. Rappler, @rapplerdotcom, Tweet, Mar. 29, 2016: 12:23 a.m., TWITTER, available at <https://twitter.com/rapplerdotcom/status/714714474998063104> (last accessed Aug. 10, 2017).

199. Rappler.com, *supra* note 196.

200. Merueñas, *supra* note 173.

Placement, the first stage of money laundering, was seen in the deposit of the illicit funds into the RCBC accounts. In response to the heist, the BSP, as the regulator of banks,²⁰¹ issued a memorandum dated 5 April 2016 reminding all banks to observe sound risk management practices in their dealings with foreign exchange dealers, money changers, and remittance agents.²⁰² On 1 June 2016, the BSP said the Monetary Board, the highest policy-setting body, cancelled the certificates of registration for Philrem as a remittance agent and two other firms involved in remittance and foreign exchange for having committed “significant violations” of rules governing non-bank financial institutions.²⁰³ The BSP said these three firms had violated Section 4511N of the Manual of Regulations for Non-Bank Financial Institutions²⁰⁴ and Circular No. 706 issued in 2011.²⁰⁵ Likewise,

201. See Republic Act No. 7653, § 3.

202. In a Memorandum Circular, the BSP reminded banks

Pursuant to Part 8 of the Manual of Regulations for Banks [MORB], banks dealing with foreign exchange dealers, money changers[,] and remittance agents ... should take extra caution and vigilance and shall perform enhanced due diligence, upon onboarding and during transaction monitoring, consistent with regulations and the bank’s procedures as provided under its Money Laundering and Terrorist Financing Prevention Program [].

Bangko Sentral ng Pilipinas, Reminder on Sound Management Practices when Dealing with Foreign Exchange Dealers, Money Changers and Remittance Agents, Memorandum No. M-2016-004 [BSP Memo. Circ. M-2016-004], para. 1 (Apr. 5, 2016). See also Chrisee Dela Paz, BSP: Banks bear ‘ultimate responsibility’ in avoiding dirty money, *available at* www.rappler.com/business/industries/banking-and-financial-services/128457-bsp-banks-responsibility-dirty-money (last accessed Aug. 10, 2017).

Violation of Part 8 of the MORB would subject banks to sanctions and penalties under Section X811 of MORB. BSP Memo. Circ. M-2016-004, para. 6.

203. Ben O. de Vera, *BSP cancels Philrem registration*, PHIL. DAILY INQ., June 1, 2016, *available at* <http://newsinfo.inquirer.net/788669/bsp-cancels-philrem-registration> (last accessed Aug. 10, 2017).

204. Bangko Sentral ng Pilipinas, Manual of Regulations for Non-Bank Financial Institutions, N Regulations, § 4511N. This manual governs the registration and operations of foreign exchange dealers, money changers, and remittance agents. The said Section required submission to the AMLC of a report on covered transactions and suspicious transactions under the AMLA. *Id.* See also Bangko Sentral ng Pilipinas, Amendment to Section 4511N of the Manual of Regulations for Non-Bank Financial Institutions, Circular No. 942 [BSP Circ. No. 942] (Jan. 20, 2017).

205. Bangko Sentral ng Pilipinas, Updated Anti-Money Laundering Rules and Regulations, Circular No. 706 [BSP Circ. No. 706] (Jan. 5, 2011) & de Vera, *supra* note 203.

around two months later, the Monetary Board of the BSP ordered RCBC to pay ₱1 billion as it approved the imposition of a supervisory enforcement action²⁰⁶ pursuant to BSP's supervisory powers under Section 4 of the General Banking Law of 2000.²⁰⁷ The fine was “the largest amount ever approved as part of its supervisory enforcement actions on a BSP supervised financial institution[.]”²⁰⁸

These actions taken by the BSP suggest that a strongly regulated banking system may be able to thwart the possibility of banks becoming exploited once again in possible money laundering schemes in the future. In addition, as discussed previously, BSP has been empowered by the AMLA to conduct examinations of banks and other financial institutions and to conduct tests to ensure the true identity of account holders.²⁰⁹ Thus, given the strong regulatory powers granted by its charter and additional visitorial powers conferred by the AMLA, the BSP may, when exercising its powers properly, compel financial institutions to exercise more diligence in overseeing their employees and conducting their operations.

In the BBH, while the banks were involved at the placement stage of money laundering, casinos, on the other hand, were the subjects of layering, the second stage of money laundering. Consequently, this necessitates a review of PAGCOR's regulatory power conferred by its charter²¹⁰ in order

206. Media Release by Bangko Sentral ng Pilipinas, *MB Approves Record Supervisory Enforcement Action on RCBC* (Aug. 5, 2016), available at www.bsp.gov.ph/publications/media.asp?id=4134 (last accessed Aug. 10, 2017).

207. See Bangko Sentral ng Pilipinas, Bangko Sentral ng Pilipinas (BSP) Supervisory Enforcement Policy, Circular No. 875 [BSP Circ. No. 875] (Apr. 15, 2015) & An Act Providing for the Regulation of the Organization and Other Purposes [The General Banking Law of 2000], Republic Act No. 8791, § 4 (2000).

208. Bangko Sentral ng Pilipinas, *supra* note 206.

209. Anti-Money Laundering Act of 2001, §§ 9 & 11.

210. The nature of Philippine Amusement and Gaming Corporation's regulatory powers is described in this wise —

Philippine Amusement and Gaming Corporation (PAGCOR) is a government owned and controlled corporation created under Presidential Decree No. [] 1869 to enable the government to regulate and centralize all games of chance authorized by existing franchise or permitted by law. ... Under Section 9 thereof, it was given regulatory powers over persons and/or entities with contract or franchise with it.

...

On [20 June] 2007, [Republic Act] No. 9487 was enacted, extending PAGCOR's franchise up to [10 July] 2033, renewable for another twenty-five (25) years, viz [—]

[Section] 1. The Philippine Amusement and Gaming Corporation (PAGCOR) franchise granted under Presidential Decree No. 1869,

to prevent casinos from turning into black holes where the money trail vanishes.²¹¹ Ultimately, these regulatory agencies — BSP and PAGCOR — can only supervise banks and casinos, respectively, and sanction them administratively. As banks and casinos are merely part of the many institutions that may be exploited by money launderers, the country remains vulnerable to the possibility of money laundering being committed through the exploitation of other institutions or the use of other means.

otherwise known as the PAGCOR Charter, is hereby further amended to read as follows:

(1) Section 10, Nature and Term of Franchise, is hereby amended to read as follows:

‘[Section] 10. *Nature and Term of Franchise.* Subject to the terms and conditions established in this Decree, the Corporation is hereby granted from the expiration of its original term on July 11, 2008, another period of twenty-five (25) years, the rights, privileges[,] and authority to operate and license gambling casinos, gaming clubs[,] and other similar recreation or amusement places, gaming pools, i.e.[,] basketball, football, bingo, etc.[,] except jai-alai, whether on land or sea, within the territorial jurisdiction of the Republic of the Philippines[;] *Provided,* That the corporation shall obtain the consent of the local government unit that has territorial jurisdiction over the area chosen as the site for any of its operations.’

Philippine Amusement and Gaming Corporation (PAGCOR) v. Fontana Development Corporation, 622 SCRA 461, 466, & 488 (2010) (citing Consolidating and Amending Presidential Decree Nos. 1067-A, 1067-B, 1067-C, 1399 and 1632, Relative to the Franchise and Powers of the Philippine Amusement and Gaming Corporation (PAGCOR), Presidential Decree No. 1869, whereas cl. para. 1 & § 9 (2000) & An Act Further Amending Presidential Decree No. 1869, Otherwise Known as PAGCOR Charter, Republic Act No. 9487, § 1 (2007)).

See also Chrisee Dela Paz, Pagcor imposes 5-year moratorium on new Metro Manila casinos, *available at* <http://www.rappler.com/business/164837-pagcor-moratorium-new-metro-manila-casinos> (last accessed Aug. 10, 2017).

211. Notably, the PAGCOR itself launched its own investigation pursuant to the powers granted to it by its charter, which allows it to “[r]egulate, operate, authorize[,] and license games of chance, games of cards[,] and games of numbers, particularly casino gaming in the Philippines[.]” Daxim L. Lucas, *PH blocks \$870M stolen from Bangladesh*, PHIL. DAILY INQ., Mar. 9, 2016, *available at* business.inquirer.net/208243/ph-blocks-870m-stolen-from-bangladesh (last accessed Aug. 10, 2017) & Philippine Amusement and Gaming Corporation, *What is PAGCOR?*, *available at* www.pagcor.ph/gob/pagcor-transparency/corporate-profile/ (last accessed Aug. 10, 2017).

2. Supreme Court Rulings Related to Bank Secrecy Laws on Equity

Despite the strict bank secrecy laws, the Supreme Court has, on several occasions, decided on cases based on equity outside the bounds of the letter of the law. This is squarely illustrated by the cases of *Salvacion v. Central Bank of the Philippines*²¹² and *China Banking v. Court of Appeals*.²¹³ In these cases, the Court had set aside the statutory prohibition of confidentiality of deposits, thereby effectively bending the law to serve the ends of justice. In the case of *Salvacion*, where a transient alien was found guilty of raping a minor, the garnishment of his foreign currency deposit account was allowed by the Court on the basis of equity, despite the legal provisions expressly prohibiting garnishment of foreign currency accounts, among them was the FCDA.²¹⁴ In explaining its rationale, the Court said —

In fine, the application of the law depends on the extent of its justice. Eventually, if we rule that the questioned Section 113 of Central Bank Circular No. 960[,] which exempts from attachment, garnishment, or any other order or process of any court, legislative body, government agency[,] or any administrative body whatsoever, is applicable to a foreign transient, injustice would result especially to a citizen aggrieved by a foreign guest like accused Greg Bartelli. This would negate Article 10 of the New Civil Code which provides that [‘]in case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.[’] ‘*Ninguno non deue enriquecerse tortizerzmente con damo de otro.*’ Simply stated, when the statute is silent or ambiguous, this is one of those fundamental solutions that would respond to the vehement urge of conscience.

...

It would be unthinkable, that the questioned Section 113 of Central Bank No. 960 would be used as a device by accused Greg Bartelli for wrongdoing, and in so doing, acquitting the guilty at the expense of the innocent.²¹⁵

In the dispositive portion of the decision, the Court said that the Central Bank’s circulars insofar as it amended Section 8 of R.A. No. 6426 were “[inapplicable] to [the] case because of its peculiar circumstances.”²¹⁶

212. *Salvacion v. Central Bank of the Philippines*, 278 SCRA 27 (1997).

213. *China Banking Corporation v. Court of Appeals*, 511 SCRA 110 (2006).

214. *Salvacion*, 278 SCRA at 45-46 (citing *Padilla v. Padilla*, 74 Phil. 377 (1943)).

215. *Id.*

216. The dispositive portion reads —

IN VIEW WHEREOF, the provisions of Section 113 of [Central Bank] Circular No. 960 and [Presidential Decree] No. 1246, insofar as [they amend] Section 8 of [Republic Act No.] 6426[,] are hereby held to be INAPPLICABLE to this case because of its peculiar

Likewise, the Court in *China Banking Corporation* handed a *pro hac vice* ruling.²¹⁷ In that case, the Court observed that

Clearly[,] it was not the intent of the [legislature] when it enacted the law on secrecy on foreign currency deposits to perpetuate injustice. This Court is of the view that the allowance of the inquiry would be in accord with the rudiments of fair play [and] the upholding of fairness in our judicial system and would be an avoidance of delay and time-wasteful and circuitous way of administering justice.²¹⁸

The Court held that Jose Gotianuy, who was a co-payee of his daughter Margaret Dee in several checks, is deemed a co-depositor to the dollar account of Dee.²¹⁹ Moreover, according to the Court, given that Gotianuy is the owner of the funds unlawfully taken from him, he has the right to inquire into the accounts where the deposits were made.²²⁰

While these cases brushed off bank secrecy laws under rare and exceptional circumstances, such Court rulings may still point to the possibility for the judiciary to uphold the piercing of the veil of bank secrecy in the future with respect to foreign currency deposits. These equity-based rulings may even arguably extend to peso deposits being mainly governed by R.A. No. 1405 as there is that possibility that the Court would allow equity to prevail when faced with absurdity in the law or under compelling and special circumstances.²²¹

While a resort to these regulatory agencies and the Supreme Court may be considered, these are essentially stopgap measures that fall short of effectively curbing money laundering in a tripartite system of government. For an effective anti-money laundering regime to exist, the legislature must be able to enact laws that confer powers to the executive branch and its instrumentalities to enforce the law while subjecting the same to judicial review. To rely on courts to rule based on equity not grounded on law is

circumstances. Respondents are hereby REQUIRED to COMPLY with the writ of execution issued ... and to RELEASE to petitioners the dollar deposit of respondent Greg Bartelli y Northcott in such amount as would satisfy the judgment.

Id. at 46.

217. *China Banking Corporation*, 511 SCRA at 121.

218. *Id.* at 121-22.

219. *Id.* at 119.

220. *Id.* at 120.

221. Article 10 of the Civil Code provides that “[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.” An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, § 10 (1950).

dangerous as it essentially becomes tantamount to judicial legislation, which is repugnant to the basic principle of separation of powers.²²²

VI. REPUBLIC ACT NO. 10927

Last July 2017, primarily as a response to the BBH, Congress passed R.A. No. 10927, an amendment to the AMLA that included casinos in the list of covered persons.²²³ Likewise, the said law adds a “casino cash transaction” involving an amount “in excess of ₱5 million or its equivalent in any other currency” as a “covered transaction” which obligates the covered institution, in this case, casinos, to report the said transaction.²²⁴ The amendment also defines the terms “casino,” “internet-based casino,” “ship-based casino,” and “gaming operations.”²²⁵ In addition, R.A. No. 10927 further modified the procedures with regard to freeze orders, as it provides that the CA would retain the power to issue the order upon a verified *ex parte* petition but the effectivity period of the order is now set to 20 days, and that the CA would conduct a summary hearing within the said 20-day period to determine whether to modify, lift, or extend the effectivity of the freeze order which is not to exceed six months.²²⁶

VII. ANALYSIS OF THE CURRENT LAWS AND PROPOSED MEASURES IN LIGHT OF THE BANGLADESH BANK HEIST

According to a 2009 study by the United Nations Office on Drugs and Crime, proceeds from money laundering annually was equivalent to 2.7% of the global gross domestic product, equal to about \$1.6 trillion.²²⁷ The Philippines, in an effort to contribute to the global effort to suppress money laundering, must formulate an effective anti-money laundering regime that, at best, would be able to deter and prosecute offenders effectively, or, at the very least, avoid the country from being a notorious haven for laundering money. According to W.C. Gilmore, an international expert in money laundering, there are three interconnected components of the international strategy to counter money laundering: (a) establishment of preventive

222. Tañada v. Yulo, 61 Phil. 515, 519 (1935).

223. An Act Designating Casinos as Covered Persons Under Republic Act No. 9160, Otherwise Known as the “Anti-Money Laundering Act of 2001”, as Amended, Republic Act No. 10927, § 1.

224. *Id.* § 2.

225. *Id.* § 3.

226. *Id.* § 4.

227. Financial Action Task Force, *supra* note 57. However, because money laundering is illegal and usually conducted without any paper trail, the numbers are not meant to be particularly accurate. Figures only provide a rough estimate of the amount of laundered money annually, illustrating the magnitude of such illicit activities. *Id.*

measures involving private-sector actors; (b) the enhancement of domestic criminal justice systems; and, (c) increased levels of international cooperation.²²⁸ The discussion of possible amendments to the law herein shall be structured based on the aforementioned components.

A. Establishment of Preventive Measures Involving Private-Sector Actors

As previously discussed, PAGCOR and BSP are in crucial positions to compel private-sector actors such as casinos and banks, respectively, to diligently monitor their activities.

Casinos undeniably played a big role in the BBH. With the passage of R.A. No. 10927 amending the country's anti-money laundering laws, casinos are now included in the list of covered institutions and thus have an obligation to report covered and suspicious transactions to the AMLC.²²⁹ However, the AMLC has admitted that it is overburdened with millions of transactions to monitor annually.²³⁰ If that would turn out to be the case following this recent amendment, a possible alternative would be to amend the PAGCOR charter to grant and transfer to PAGCOR the same monitoring power over casinos²³¹ to ease the load of the transactions being monitored by AMLC daily. This, in turn, would ensure that money laundering activities are detected and stopped sooner. Furthermore, giving the power to PAGCOR would be strategic given its expertise in monitoring suspicious and covered transactions and in overseeing these particular covered institutions, i.e., casinos. In any case, the inclusion of casinos brought about by R.A. No. 10927 would, at the very least, deter the use of casinos in money laundering typologies moving forward.

On the other hand, BSP's powers must also be reconsidered in light of the role RCBC played in the BBH. Currently, the administrative fine that the BSP can impose pursuant to its charter, specifically in accordance to Section 37 (a) of the New Central Bank Act, is limited to a maximum of

228. W.C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES* 235-36 (1995).

229. Republic Act No. 10927, § 1.

230. For example, in 2015, the AMLC received a total of about 36 million covered transaction reports and 146,308 suspicious transaction reports. Rappler.com, *supra* note 196.

231. Previous Senate deliberations have shown that PAGCOR was of the view that the law should invest the power to check alleged money laundering activities to PAGCOR and report it thereafter to the AMLC, instead of the AMLC itself monitoring the casinos. RG Cruz, 'Casinos lobbied for exclusion from AMLA', *available at* <http://news.abs-cbn.com/nation/03/02/16/casinos-lobbied-for-exclusion-from-amla> (last accessed Aug. 10, 2017).

₱30,000 per day or per transaction,²³² assessed on a case-by-case basis if RCBC is adjudged to be liable for money laundering.²³³ Notwithstanding the ₱1 billion fine imposed upon RCBC by the BSP's monetary board in the exercise of its supervisory powers pursuant to the General Banking Law,²³⁴ an amendment of the BSP charter or the New Central Bank Act increasing administrative penalties for banks involved in money laundering may further ensure that banks keep a diligent and watchful eye of their affairs.²³⁵ Likewise, to further strengthen the financial system from future threats similar to the BBH, covered institutions such as banks should be continuously supervised by the BSP in relation to their duties as covered institutions under Section 9 of the AMLA.²³⁶

B. Enhancement of Domestic Criminal Justice Systems

While the AMLA already outlines penalties in the form of fines and imprisonment, the process relating to the investigation of money laundering and prosecution of offenders should be revisited in order to secure their conviction and effectively mete out the appropriate penalties.

1. Freeze Orders

As regards the investigatorial and prosecutorial processes in relation to the BBH incident, there was a problem in responding quickly to such a fast-moving illicit scheme. Freeze orders were belatedly issued allowing the funds

232. This was admitted by BSP Deputy Governor Nestor Espenilla, Jr. in the fifth session of the Senate Blue Ribbon Committee probing the bank heist. The New Central Bank Act, § 37 (a) & Chrisee Dela Paz, *Hard lessons learned as Senate ends bank heist probe*, available at <http://www.rappler.com/business/industries/banking-and-financial-services/133620-bangladesh-bank-senate-hearing-ends-lessons> (last accessed Aug. 10, 2017).

233. Chrisee Dela Paz, *BSP eyes bigger fines for banks violating anti-money laundering law*, available at <http://www.rappler.com/business/industries/banking-and-financial-services/129213-bsp-rcbc-penalties-bank-heist> (last accessed Aug. 10, 2017). According to the Rappler article, “Senator Ralph Recto said that the monetary fines [‘]are low compared to other countries.[‘] [‘]We read all these articles in other jurisdictions, particularly in the US. Penalties there range all the way up to billions of dollars.[‘] Recto said during the hearing.” *Id.*

234. *See* The General Banking Law of 2000, § 4.

235. Dela Paz, *supra* note 233.

236. Under Section 9 of the AMLA, covered institutions are required to keep a system of proper customer identification and record keeping. Likewise, these institutions are required to report covered and suspicious transactions to the AMLC within a fixed period. Anti-Money Laundering Act of 2001, § 9 (a), (b), & (c), para. 1.

to be withdrawn. The issuance came only after the AMLC was required to follow procedures for securing a freeze order pursuant to the AMLA. It has been contended that requiring the AMLC to go through several procedures would defeat the very purpose of the freeze order — to prevent account withdrawals. The issuance of freeze orders following a lengthy application process via the CA has been pointless in the past as funds would usually be withdrawn prior to such issuance.²³⁷

Currently, even with the passage of R.A. No. 10927, the AMLC still has to go to its statutory counsel, the Office of the Solicitor General, before a petition is filed to the CA.²³⁸ When the AMLC goes through the motions of these processes, “many eyes have seen the petition”²³⁹ and the time-consuming process gives an opportunity for perpetrators to withdraw the money prior to the issuance of a freeze order by the CA. Amending the AMLA to revert back to its original provision granting the AMLC the power to directly issue an *ex parte* freeze order relating to violations of the

237. See, e.g., Kimberly Jane Tan, Senate panel summons bank execs in AFP corruption mess, *available at* <http://www.gmanetwork.com/news/news/nation/214756/senate-panel-summons-bank-exec-in-afp-corruption-mess/story> (last accessed Aug. 10, 2017) & *Ligot v. Republic of the Philippines*, 692 SCRA 509 (2013).

238. Anti-Money Laundering Act of 2001, §§ 7 (3) & (6).

239. Reynaldo Santos, Jr., FAST FACTS: The Anti-Money Laundering Council, *available at* www.rappler.com/newsbreak/iq/94516-fast-facts-anti-money-laundering-council-amlc (last accessed Aug. 10, 2017); Kimberly Jane Tan, De Lima to propose bill allowing AMLC to issue freeze orders, *available at* <http://www.gmanetwork.com/news/money/content/221058/de-lima-to-propose-bill-allowing-amlc-to-issue-freeze-orders/story> (last accessed Aug. 10, 2017); & Raul J. Palabrica, *Effects of CA freeze order*, PHIL. DAILY INQ., May 18, 2015, *available at* <http://business.inquirer.net/192073/effects-of-ca-freeze-order> (last accessed Aug. 10, 2017).

Raul J. Palabrica in his business column opines that

[c]onsidering the porous state of confidentiality in our country, it is likely that, ahead of the issuance of the order, word about it had already leaked to the affected parties.

...

It is difficult to enforce secrecy discipline in an activity that required the participation of the staff of three government offices[]— []AMLC, Office of the Solicitor General[,] and Court of Appeals[]—[] and several banks, financial institutions, securities brokers[,] and insurance companies.

[‘]For your eyes and ears only[’] information does not mean much in our rumor- and gossip-oriented society.

Palabrica, *supra* note 239.

AMLA²⁴⁰ subject to review and extension by courts thereafter would be able to ensure that the alleged illicitly-obtained funds are secured to further the interests of justice.

Although R.A. No. 10927 provides for a summary hearing to be conducted within a 20-day period following the issuance of the freeze order,²⁴¹ the Authors opine that this still does not sufficiently address the nature of fast-moving money laundering transactions such as that in the BBH. Instead, it is submitted that giving the AMLC the power to directly issue freeze orders would be far more efficient and ideal.

Moreover, the conferment of powers to directly issue freeze orders is nothing new. In 2012, the AMLC had been conferred with the power to directly issue freeze orders through the passage of R.A. No. 10168 or the “The Terrorism Financing Prevention and Suppression Act of 2012,” albeit for violations defined under the said act in relation to terrorism financing,²⁴²

240. Currently, the AMLA is allowed to issue an *ex parte* freeze order pursuant to The Terrorism Financing Prevention and Suppression Act of 2012 which defines terrorist financing crimes, as previously discussed. The Terrorism Financing Prevention and Suppression Act of 2012, § 4.

In contrast, the AMLC must secure a freeze order from the court for violations under the provisions of the AMLA. Anti-Money Laundering Act of 2001, § 7 (6).

The pertinent portion of the original provision in the AMLA is as follows —

[Section] 10. Authority to Freeze. [—] Upon determination that probable cause exists that any deposit or similar account is in any way related to an unlawful activity, the AMLC may issue a freeze order, which shall be effective immediately, on the account for a period not exceeding fifteen (15) days. Notice to the depositor that his [or her] account has been frozen shall be issued simultaneously with the issuance of the freeze order. The depositor shall have seventy-two (72) hours upon receipt of the notice to explain why the freeze order should be lifted. The AMLC has seventy-two (72) hours to dispose of the depositor’s explanation. If it fails to act within seventy-two (72) hours from receipt of the depositor’s explanation, the freeze order shall automatically be dissolved. The fifteen (15)-day freeze order of the AMLC may be extended upon order of the court, provided that the fifteen (15)-day period shall be tolled pending the court’s decision to extend the period.

Anti-Money Laundering Act of 2001, § 10, para. 1.

241. Republic Act No. 10927, § 4.

242. With regard to terrorism financing, the AMLC has the authority to directly issue an *ex parte* order to freeze the following without delay:

(a) property or funds that are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to

not money laundering. An amendment of the AMLA giving the AMLC that direct power would enable the government to swiftly respond to attempts to launder money. A quick response would halt money laundering in its tracks either at the layering stage of money laundering where suspicious activity may be detectable, or even immediately at the onset, in the placement stage which involves the deposit of proceeds of a crime to a legitimate financial institution.

A useful template may be the statutory powers given to the BSP to unilaterally shut down distressed banking institutions but affording post-closure opportunities to challenge the BSP's actions.²⁴³ Though on its face such power may be complained of as offending constitutionally guaranteed due process rights, this “close now and hear later” power of the BSP has been upheld as constitutional by the Supreme Court²⁴⁴ —

This ‘close now and hear later’ scheme is grounded on practical and legal considerations to prevent unwarranted dissipation of the bank’s assets and as a valid exercise of police power to protect the depositors, creditors, stockholders[,] and the general public.²⁴⁵

Should Congress deem it appropriate to trust the AMLC with such type of police powers that would permit it to take unilateral immediate action in light of the practical and legal considerations that money laundering transactions pose, the opportunities for money launderers to exploit institutional delays may be minimized even further.

whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism as defined [in the Act].

The Terrorism Financing Prevention and Suppression Act of 2012, § 11, para. 1.

The freeze order in that case would be effective for a maximum period of 20 days, and the said period is subject to extension by the Court of Appeals upon petition of the AMLC before such period expires. *Id.* § 11, para. 2. Likewise, the same law gives the AMLC the power to issue freeze orders in compliance with the Philippines’ international obligations and binding terrorism-related resolutions such as Resolution No. 1373 of the United Nations Security Council. *Id.* § 11, para. 3. In such case, the freeze order is effective until the basis for issuance has been lifted while the law allows an aggrieved party to question the basis before the Court of Appeals. *Id.*

243. See Republic Act No. 7653, § 30.

244. See, e.g., *Bangko Sentral ng Pilipinas Monetary Board v. Antonio-Valenzuela*, 602 SCRA 698 (2009).

245. *Central Bank of the Philippines v. Court of Appeals*, 220 SCRA 536, 545 (1993).

2. Bank Secrecy Laws

On the other hand, bank secrecy laws should keep up with the times. For instance, the oldest bank secrecy law of the country, R.A. No. 1405, was passed more than half a century ago and has not been subject to significant wholesale changes. R.A. No. 1405 was passed at a time when the Philippine banking system was still at its beginnings in view of hoarding and capital flight.²⁴⁶ Despite fundamental changes in the banking system, the said law remains unchanged but has been qualified with numerous piecemeal exceptions as per statutes and jurisprudence.

While the AMLA carves out exceptions to bank secrecy laws such as AMLC's power to apply for a bank inquiry²⁴⁷ and BSP's power to conduct periodic examinations,²⁴⁸ an overhaul of the country's bank secrecy laws to allow disclosures by bank officials pending regulatory investigation of questionable accounts may be in order to strengthen the country's anti-money laundering regime. Bank secrecy laws should live up to their original purpose of protecting legitimate depositors while not serving as a shield for possible offenders.

Notably, secrecy of bank accounts is just one facet of an individual's privacy. Inasmuch as any proposed anti-money laundering amendment may look into bank accounts for investigatory and prosecutorial purposes, one significant limitation that cannot be transgressed is enshrined in the Bill of Rights of the 1987 Constitution, which provides several provisions safeguarding one's right to privacy against the awesome machinery of the State,²⁴⁹ which have been codified in various legislative enactments.²⁵⁰ In

246. Lim, *supra* note 20, at 211.

247. Anti-Money Laundering Act of 2001, § 11, para. 1.

248. *Id.* § 11, para. 3.

249. PHIL. CONST. art. III, §§ 1-2, 3 (1), 6, & 8.

250. *See, e.g.*, An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, arts. 26, 32, 19, & 723 (1950); An Act Prohibiting Disclosure of or Inquiry into, Deposits with any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955); An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes, Republic Act No. 4200 (1965); An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes [Intellectual Property Code of the Philippines], Republic Act No. 8293, (1997); & An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this Purpose a National Privacy Commission, and for Other Purposes [Data Privacy Act of 2012], Republic Act No. 10173 (2012). *See also* An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, arts. 128, 229, 280, & 290-292 (1930).

addition, with regard to international law agreements, the Philippines is a signatory to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which have provisions addressing a person's right to privacy.²⁵¹ Thus, given the Philippines' international obligations and with previous legislative enactments affirming the individual's right to privacy as prime examples, an amendment to the anti-money laundering law should corollarily continue to observe the constitutional right to privacy inasmuch as it endeavors to effectively prosecute money launderers.

Philippine jurisprudence has repeatedly affirmed this fundamental right.²⁵² The 2010 case of *BSB Group, Inc. v. Go*,²⁵³ has been instructive in this regard as it held that personal financial matters are well-within the right to privacy —

In any given jurisdiction where the right of privacy extends its scope to include an individual's financial privacy rights and personal financial matters, there is an intermediate or heightened scrutiny given by courts and legislators to laws infringing such rights. Should there be doubts in upholding the absolutely confidential nature of bank deposits against affirming the authority to inquire into such accounts, then such doubts must be resolved in favor of the former. This attitude persists *unless* [Congress] lifts its finger to reverse the general [State] policy respecting the absolutely confidential nature of bank deposits.²⁵⁴

As can be gleaned from the aforementioned passage from the case of *BSB Group, Inc.*, courts at present would have to regard absolute confidentiality of bank deposits as the general rule pursuant to the language of current bank secrecy laws evincing the State's policy. The above-quoted pronouncement of the court implies that a reverse of the State policy by the legislature would also shift the Court's attitude toward bank secrecy.

251. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (Dec. 10, 1948) & International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171. The right to privacy is explicitly stated under Article 12 of the Universal Declaration of Human Rights, which provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home[,] or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.” The International Covenant on Civil and Political Rights provision is essentially the same as that of the Universal Declaration of Human Rights provision on privacy. *Id.*

252. *See, e.g.*, *Morfe v. Mutuc*, 22 SCRA 424 (1968); *Ayer Productions Pty. Ltd v. Capulong*, 160 SCRA 861 (1988); & *Ople v. Torres*, 293 SCRA 141 (1998).

253. *BSB Group, Inc. v. Go*, 612 SCRA 596 (2010).

254. *Id.* (emphasis supplied).

However, whether or not all of an individual's rights to financial privacy which the Supreme Court characterized in *BSB Group, Inc.* as falling within "legally recognized zones of privacy," rise to the level of constitutional rights is debatable considering that the guarantee and implementation of such specific privacy rights in respect of bank deposits have had to be done through a legislative act, e.g., R.A. No. 1405. That Philippine legislative history is peppered with the enactment of subsequent statutes not struck down as unconstitutional by the Supreme Court which permitted further exceptions to the absolute confidentiality of bank deposits does suggest that financial privacy rights, specifically rights to privacy of one's bank deposits, are statutory rather than constitutional rights, and thus may be subject to dilution by Congress.

Accordingly, statutory amendments limiting the right to privacy, to a certain extent, should remain acceptable. Congressional flexibility in this regard would complement an observation, (given, however, in respect to a common law regime) that the right to privacy, similar to any other right of an individual in person and in property, must yield, to a certain extent, to other interests that may arise as time and technology progress.²⁵⁵

Given that the amendment and decision as to State policy regarding bank secrecy lies in the hands of the legislature, the question would be where would Congress draw the line and strike a balance between the right to privacy and the need to quell money laundering. Such balance may be examined in light of international trends as discussed in the following Section.

C. Increased Levels of International Cooperation

A 2016 report by the United States Department of State has flagged money laundering as a serious concern in the Philippines —

due to the Philippines' international narcotics trade, high degree of corruption among government officials, trafficking in persons, and the high volume of remittances from Filipinos living abroad. ... Insurgent groups in the Philippines' south engage in money laundering through ties to

255. As observed by Samuel Warren and Louis Brandeis of the Harvard Law Review as early as 1890 —

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.

Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 5 (1890).

organized crime, deriving funding from kidnapping for ransom and arms trafficking, and potentially narcotics.²⁵⁶

Moreover, the same report also suggests the possibility of money laundering being committed as formal and informal remittances are sent to the Philippines from abroad by Overseas Filipino Workers (OFWs) numbering over 10 million.²⁵⁷ The cash remittances of these OFWs are equivalent to eight to nine percent of the Philippines' gross domestic product and improvements in the country's financial services now allow banks and money remitters to seize about 90% of the remittances sent by these OFWs.²⁵⁸

As a member of the international community, the Philippines should be mindful of these threats and should do its share in making sure that transnational crimes such as money laundering is suppressed within its borders. At the most basic level, the cooperation of the Philippines is mainly gauged by its establishment and enforcement of an effective domestic anti-money laundering regime.

An amendment to bank secrecy laws may be considered and put forth by the Philippines as a matter of international cooperation in the fight against money laundering and in keeping with the country's continued commitment to comply with anti-money laundering regime standards set by the FATF. It has been repeatedly said that the Philippines has one of the strictest bank secrecy laws while having weak anti-money laundering laws.²⁵⁹ The apparent tension between striking a balance between bank secrecy laws and anti-money laundering laws is neither surprising nor novel. According to Gabriel dela Cruz Singson, the first governor of the BSP,²⁶⁰ —

[d]eliberations in Congress on the AMLA bill showed deep concern for the preservation of the right of a depositor to the privacy of his bank deposits. At the same time, Congress [realized] that such protection extended to depositors cannot be used as a shield for laundering the proceeds of any 'unlawful activity.' Balancing these two concerns will continue to be a challenge to the judicial and legislative branches of government.²⁶¹

256. United States Department of State, Countries/Jurisdictions of Primary Concern — Philippines, *available at* <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253426.htm> (last accessed Aug. 10, 2017).

257. *Id.*

258. *Id.*

259. de Vera, *supra* note 185.

260. Bangko Sentral ng Pilipinas, About the Bank: Bangko Sentral Governors, *available at* http://www.bsp.gov.ph/about/governance_pastgov.asp (last accessed Aug. 10, 2017).

261. Singson, *supra* note 39, at 683.

In addition, the interplay between the Philippines' bank secrecy laws and anti-money laundering laws has not gone unnoticed. The United States Department of State observes that

[t]he Philippines' bank secrecy provisions are among the world's strictest, requiring investigators to obtain a court order to access bank records in most cases. This makes it difficult for the AMLC to perform its basic financial analytical functions and inhibits the ability of law enforcement to proactively pursue money laundering cases in the absence of a link to a specific predicate crime.²⁶²

Both sets of laws — the anti-money laundering laws and the bank secrecy laws — are interlinked in that bank secrecy laws restrict and even prohibit disclosure of information relating to bank accounts — information which is vital for monitoring and prosecuting offenders under the AMLA. Inasmuch as money launderers should be penalized in the interests of the country's national security and economy, depositors must be afforded with the right to the confidentiality of their bank deposits for their own financial security. Rather than discarding bank secrecy laws altogether in favor of strong anti-money laundering laws, a balance must be struck between both sets of laws. Although the BBH underscores the need to fix the legal system, proposals to amend the laws moving forward must not go too far as to weaken bank secrecy laws or strengthen anti-money laundering laws to a point that depositors' confidence in the banking system would be undermined. Strengthening anti-money laundering laws should not reach a point that would render nugatory bank secrecy laws as such would result to the public's loss of trust in the banking system, which would, in turn, undermine the stability of the economy.

In any case, bank secrecy laws are slowly becoming obsolete in the international sphere,²⁶³ as Ray Flores has pointed out that “[b]ank secrecy laws appear to be eroding in the global move towards financial transparency. ... In the face of reform, countries holding on to bank secrecy may fear losing the business of wealthy clients, specifically to financial centers promising sustained confidentiality.”²⁶⁴

On the other hand, scholars have argued that as countries move towards financial transparency and do away with strong banking confidentiality, “[financial] centers could lose their economic imperative which in turn may lead to economic and political destabilization — an undesirable outcome not

262. United States Department of State, Bureau for International Narcotics and Law Enforcement Affairs, *supra* note 189, at 146.

263. See Ray Flores, *Lifting Bank Secrecy: A Comparative Look at the Philippines, Switzerland, and Global Transparency*, 14 WASH. U. GLOBAL STUD. L. REV. 779, 796 (2015) & Ronnel L. Yambao, *Lifting of the Philippine Bank Secrecy Law for Tax Fraud Cases*, NTRC TAX RES. J., July-Aug. 2016, at 13.

264. Flores, *supra* note 263, at 796.

just for the country concerned, but also for the global community.”²⁶⁵ However, this argument has been refuted primarily due to the dwindling number of “safe havens” with strong bank secrecy laws²⁶⁶ and given the global move toward financial transparency. According to the National Tax Research Center, there are only three “safe havens” or countries to date that still have restrictive bank secrecy laws — the Philippines, Lebanon, and Switzerland.²⁶⁷ Even Switzerland’s bank secrecy laws have noticeably been eroding over recent years due to international pressure.²⁶⁸ Moreover, Joy Stephanie C. Tajan observes —

Due to the inherently borderless nature of the problem and consequences, an effective solution cannot be localized and can only be on a global scale. The movement towards financial transparency is undeniably global. To remain financially secretive in this era of globalization, cooperation, and interdependence would be to cut off ties with the global financial system. Barring a policy of financial isolation, financial transparency is necessary and inevitable.²⁶⁹

With the global trend of reducing bank secrecy laws in order to suppress organized crimes such as money laundering, an overhaul of bank secrecy laws may put the Philippines in the right direction inasmuch as it fosters international cooperation as well.

VIII. CONCLUSION

According to the esteemed jurist Oliver Wendell Holmes, Jr.,

The life of the law has not been logic; it has been experience ... The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.²⁷⁰

265. MARY ALICE YOUNG, *BANKING SECRECY AND OFFSHORE FINANCIAL CENTERS: MONEY LAUNDERING AND OFFSHORE BANKING* 136 (2013).

266. The Manila Times, *How much of our secrets do we need to keep: Revisiting the bank secrecy law*, MANILA TIMES, Sep. 22, 2016, available at www.manilatimes.net/how-much-of-our-secrets-do-we-need-to-keep-revisiting-the-bank-secrecy-law/287182/ (last accessed Aug. 10, 2017).

267. Mayvelin U. Caraballo, *NTRC backs lifting of bank secrecy law*, MANILA TIMES, Oct. 3, 2016, available at <http://www.manilatimes.net/ntrc-backs-lifting-of-bank-secrecy-law/289350> (last accessed Aug. 10, 2017) (citing Yambao, *supra* note 263, at 1 & 5-7).

268. Flores, *supra* note 263, at 789-92.

269. Joy Stephanie C. Tajan, *Emerging From Secrecy Space: From Bank Secrecy to Financial Transparency*, 55 ATENEO L.J. 447, 483 (2010).

270. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881).

Following the BBH, the entire world had to confront the unsettling reality that money launderers are becoming cleverer at exploiting loopholes in the global financial system. The Philippines, as part of a much larger international community, must do its part in combatting money laundering.

The damage has been done, and the ongoing prosecution relating to the BBH is limited to the legal machinery the country currently had at the time of the heist. Any courses of action or possible legal remedies that should, in hindsight, have been pursued must instead be charged to experience to fuel the law's transformation. While the perpetrators of the BBH still elude courts of justice, policy-makers, regulators, and lawmakers should learn from the BBH to ensure that the Philippines does not turn into a notorious haven for money laundering.

Although the AMLA has prescribed penalties for convicted offenders, the BBH exposed hurdles that stood in the way of effective prosecution, especially with regard to fast-moving transactions. Even following the passage of R.A. No. 10927, the government must continuously review its laws and procedures on a pro-active basis and seek for ways to modernize and strengthen the country's anti-money laundering regime even further to avoid the Philippines from becoming a money laundering hotspot.

In addition, more than the penalties and quick response mechanisms both serving as deterrents for money launderers, the AMLA should not be read and enforced in isolation. Various regulators such as BSP and PAGCOR carry significant roles as empowered by their respective charters in preventing money laundering in that they are authorized to issue guidelines and impose sanctions in case these entities they supervise and regulate fail to comply.

At the same time, amendments to the bank secrecy laws in relation to anti-money laundering laws must be enacted to strengthen the anti-money laundering regime, whilst mindful of economic considerations and limitations as to the constitutional rights to due process and privacy. Despite the apparent dichotomy between these two sets of laws, globalization highlights the necessity of striking a balance between the State's interest to curb money laundering and the public interest to uphold bank confidentiality. Introducing anti-money laundering legislation that has more teeth does not necessarily bring with it the abolition of bank secrecy laws as both sets of laws should not be seen as mutually exclusive. A balancing act between the two is in order.