

# Emerging from Secrecy Space: From Bank Secrecy to Financial Transparency

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## I. INTRODUCTION

On 2 April 2009, the Organisation for Economic Co-operation and Development (OECD) blacklisted the Philippines, Costa Rica, Malaysia, and Uruguay for not having pledged to conform to the international tax standard on exchange of information, which requires banking information to be made available upon request by foreign tax authorities.<sup>1</sup> This standard is in line

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“with the global campaign against international crimes and terrorism” and the failure of such countries to implement it rendered them tax havens.<sup>2</sup>

A few days later, the OECD moved the four countries to the grey list — or “jurisdictions that have committed to the internationally agreed tax standard [on exchange of information], but have not substantially implemented [it]”<sup>3</sup> — after they committed to propose, within the year, legislation implementing the standard.<sup>4</sup>

The OECD published the three lists (white, grey, and black) after commitments made by G20 members at the London Summit to further

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1. Lala Rimando, *OECD removes RP from list of tax havens*, ABS-CBN NEWS, Apr. 7, 2009, available at <http://www.abs-cbnnews.com/business/04/07/09/oecd-removes-rp-list-tax-havens> (last accessed Aug. 29, 2010) (The white list consists of countries that have “implemented the tax reporting standards.”); Katrina Mennen A. Valdez, *BIR expects RP’s removal from tax-haven blacklist*, MANILA TIMES, Mar. 27, 2010, available at <http://www.manilatimes.net/index.php/business-columns/14164-bir-expects-rps-removal-from-tax-haven-blacklist> (last accessed Aug. 29, 2010).

According to the OECD report:

The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.

Organisation for Economic Co-operation and Development, *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, Progress Made as at 10th August 2010*, at n.1, available at <http://www.oecd.org/dataoecd/50/0/43606256.pdf> (last accessed Aug. 29, 2010) [hereinafter OECD, Progress Report].

2. Leila Salaverria, *Changes may be needed in bank secrecy law*, INQUIRER.NET., Apr. 7, 2009, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090407-198280/Changes-may-be-needed-in-bank-secrecy-law> (last accessed Aug. 29, 2010).
3. Organisation for Economic Co-operation and Development, *Four more countries commit to OECD tax standards*, Apr. 7, 2009, available at [http://www.oecd.org/document/0/0,3343,en\\_2649\\_34487\\_42521280\\_I\\_I\\_I\\_1,00.html](http://www.oecd.org/document/0/0,3343,en_2649_34487_42521280_I_I_I_1,00.html) (last accessed Aug. 29, 2010).
4. *Id.* Rimando, *supra* note 1.

transparency in the global financial system and to eradicate tax havens,<sup>5</sup> which are perceived to have contributed to “the worsening economic crisis by disguising the true value of some global assets.”<sup>6</sup>

The OECD listing, thus, prompted the enactment of Republic Act (R.A.) No. 10021, or the Exchange of Information on Tax Matters Act of 2009,<sup>7</sup> which took effect on 10 April 2010. The statute — which amended the 1997 National Internal Revenue Code<sup>8</sup> by authorizing the Commissioner of Internal Revenue to inquire into bank deposits and other financial information and supply such information to requesting foreign counterparts — is expected to facilitate the country’s removal from the OECD grey list and allow the infusion of more foreign investments.<sup>9</sup> As of the writing of this Note, however, the Philippines remains as one of the 14 jurisdictions on the grey list.<sup>10</sup>

These recent events are but a fraction of a worldwide trend towards financial transparency — a trend that finds acute importance at this time of global financial crisis. In view of this trend and the recent enactment of R.A. No. 10021, this Note surveys the bank secrecy law as it has evolved and how it relates to the present global movement towards financial transparency.

## II. UNSHROUDING THE SHADOW FINANCIAL SYSTEM: THE GLOBAL MOVEMENT TOWARDS FINANCIAL TRANSPARENCY

At present, there is an increasing interest in financial transparency and the deleterious effects of opacity in the prevailing financial system, least of which is the 2008 financial crisis, persistent even at this time. Understanding the shadow financial system or the secrecy world<sup>11</sup> and the means by which it can be unveiled is, thus, imperative.

5. Valdez, *supra* note 1; Rimando, *supra* note 1.

6. Rimando, *supra* note 1 (The white list consists of countries that have “implemented the tax reporting standards.”).

7. An Act to Allow the Exchange of Information by the Bureau of Internal Revenue of Tax Matters Pursuant to Internationally-Agreed Tax Standards, Amending Sections 6(F), 71 and 270 of the National Internal Revenue Code of 1997, as Amended, and for Other Purposes [Exchange of Information on Tax Matters Act of 2009], Republic Act No. 10021 (2010).

8. An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes [TAX REFORM ACT OF 1997], Republic Act No. 8424 (1997).

9. Valdez, *supra* note 1.

10. OECD, Progress Report, *supra* note 1 (The others on the grey list are Belize, Cook Islands, Liberia, Marshall Islands, Montserrat, Nauru, Niue, Panama, Vanuatu, Brunei, Costa Rica, Guatemala, and Uruguay.).

11. While the nuances of these terms may be somewhat different, for purposes of this Note, the ‘shadow financial system’ and ‘secrecy world’ are the same and

### A. *The Secrecy World*

The Tax Justice Network defines the term ‘secrecy world’ as “the sum total of the operations facilitated by the secrecy jurisdictions, the secrecy space and the secrecy providers.”<sup>12</sup> The secrecy world enables illicit financial flows through “a synergistic relationship between the world’s secrecy jurisdictions and its secrecy providers (usually accountants, lawyers and bankers) who create the structures that these jurisdictions facilitate.”<sup>13</sup>

Secrecy jurisdictions are geographical locations (not necessarily states or nations) that enact regulations, primarily for the benefit and use of non-residents, deliberately calculated to undermine another jurisdiction’s regulations through a legally-ensconced veil of secrecy — such as bank secrecy laws — which prevent the identification of non-residents availing of the secrecy jurisdiction’s regulations.<sup>14</sup> This veil of secrecy is enforced by the creation of secrecy space, or unregulated spaces hinted to be outside the authority’s jurisdiction or the geographically-inexistent ‘elsewhere’ or ‘nowhere,’ as well as the efforts of secrecy providers, or organizations and

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used interchangeably. This Note primarily adopts the definition of ‘secrecy world’ as advanced by the Tax Justice Network and applies it to the term ‘shadow financial system.’ Nevertheless, the Task Force on Financial Integrity and Economic Development defines the ‘shadow financial system’ as “a global financial structure that facilitates the movement of illicit money across borders, primarily out of poorer countries into richer countries.” This encompasses tax havens, secrecy jurisdictions, disguised corporations, flee clauses, anonymous trust accounts, fake foundations, false documentation, falsified pricing in imports and exports, and gaps in anti-money laundering laws. Task Force on Financial Integrity and Economic Development, *Economic Transparency: Curtailing the Shadow Financial System*, at 10-11, Feb. 2009, available at <http://www.financialtaskforce.org/wp-content/uploads/2009/06/the-case-for-global-financial-transparency-updated.pdf> (last accessed Aug. 29, 2010) [hereinafter TFFIED].

12. TAX JUSTICE NETWORK, *The Language of Tax*, at 33, in MAPPING THE FAULTLINES, available at <http://www.secrecyjurisdictions.com/PDF/Glossary.pdf> (last accessed Aug. 29, 2010) [hereinafter *The Language of Tax*].
13. Richard Murphy & Paul Sagar, *What is Financial Transparency?*, at 1, in TAX JUSTICE NETWORK, MAPPING THE FAULTLINES, available at <http://www.secrecyjurisdictions.com/PDF/FinancialTransparency.pdf> (last accessed Aug. 29, 2010) [hereinafter *Financial Transparency*].
14. *Id.* at 6; *The Language of Tax*, *supra* note 12, at 32-33; Richard Murphy, *Defining the Secrecy World: Rethinking the language of ‘offshore,’* at 4-6, TAX JUSTICE NETWORK, MAPPING THE FAULTLINES, available at <http://www.secrecyjurisdictions.com/PDF/SecrecyWorld.pdf> (last accessed Aug. 29, 2010) [hereinafter *Defining the Secrecy World*].

individuals “who provide the services needed to manage transactions in the secrecy space,” such as lawyers, accountants, bankers, and trust companies.<sup>15</sup>

While secrecy jurisdictions require full transparency in relation to ‘onshore’ activities and compliance with domestic regulations, they enable the obscuration of ‘offshore’ transactions by non-residents which have little or no ties with and/or effects within their jurisdiction, but have impacts on other jurisdictions.<sup>16</sup> By subjecting only the ‘here’ or ‘onshore’ transactions to disclosure and strict regulation, secrecy jurisdictions allow transactions outside the ring fence to be ‘elsewhere,’ ‘nowhere,’ or ‘offshore,’ a space not only geographically-unbound and unlocatable, but also beyond their duty to regulate.<sup>17</sup> To aggravate matters, secrecy providers in such jurisdictions also “commercially exploit the opportunities created by the legislation promulgated.”<sup>18</sup> Through this set-up, illicit financial flows are permitted to bypass physical locations subject to regulation and to float through secrecy space — a space impossible to locate and “effectively ‘nowhere’ for regulatory purposes.”<sup>19</sup>

Non-residents are lured to such jurisdictions by the promise of avoiding or mitigating the legal obligations in their jurisdiction of residence — such as the payment of taxes — through the guarantee of secrecy and the offer of less onerous regulations.<sup>20</sup> These jurisdictions hide “the fact that a transaction has taken place in one location by use of regulation and secrecy created in another location so that the full regulatory consequences of the transaction

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15. *Id.* at 13; *The Language of Tax*, *supra* note 12, at 33. ‘Elsewhere’ is defined as “[a]n unknown place in which it is assumed, but not proven, that a transaction undertaken by an entity registered in a secrecy jurisdiction is regulated.” ‘Nowhere’ is defined as “[t]he part of the secrecy space where by design or chance the combination of unregulated entities used results in transactions being either legally unregulated, or being very lightly regulated.” *Id.* at 9 & 23.

16. *Defining the Secrecy World*, *supra* note 14, at 7-8.

17. *Id.* at 8.

18. *Id.* at 13.

19. *Id.* at 20.

20. *Id.* at 5-6; *Financial Transparency*, *supra* note 13, at 8.

[S]ecrecy jurisdictions provide tax and regulatory privileges to those who do not conduct active business affairs within their own jurisdiction whilst allowing such affairs to be recorded in their domain even though they occur elsewhere. Hence, if one of the privileges provided by using a secrecy jurisdiction is to pay tax in that place (payment being somewhat notional of course if the tax is charged at zero per cent) this is, presumably, a only benefit because tax is not being paid (in full) in the jurisdiction where the actual economic activity takes place (or else, why locate offshore?).

*Id.*

do not arise in the place where it was really located.”<sup>21</sup> The main commercial value of secrecy jurisdictions, thus, lies in deliberate information asymmetry: their purpose being “to hide information from some agents on behalf of others.”<sup>22</sup>

### *B. Financial Transparency*

While establishment of the shadow financial system began as far back as the 1960s,<sup>23</sup> the issue has come to the forefront due to the present global financial crisis. The root cause of the crisis has been identified to be the lack of transparency in the global financial system, as an estimated half of global trade and capital movements goes through the shadow financial system.<sup>24</sup> The crisis is said to be “the end product of a half century of creating and expanding a shadow financial structure compris[ed of] tax havens, secrecy jurisdictions, disguised corporations, anonymous trust accounts, and fake foundations”<sup>25</sup> — a structure which includes “trade mispricing mechanisms, money laundering techniques, and gaps left in [W]estern laws that facilitate the movement of corrupt, criminal, and commercially tax-evading money across borders.”<sup>26</sup>

Previously, the predominant response to such financial problems caused by the shadow financial system consisted of more stringent financial regulations. Prevailing consensus, however, is steadily turning to greater financial transparency as a solution.<sup>27</sup> Regulation merely calibrates the shadow financial system through “a tighter set of rules governing financial transactions[;] transparency requires that the shadow financial system itself be largely dismantled.”<sup>28</sup>

“[T]ransparency means public records, multiple oversight mechanisms to review financial structures, a genuine curtailment of tax-evading activities, and trade conducted without disadvantaging weaker nations.”<sup>29</sup> It is the actual and effective communication of data.<sup>30</sup> It “means that a jurisdiction has a duty to ensure that the consequences of the structures it facilitates ... are reported in the locations where those consequences arise ... to mitigate

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21. *Defining the Secrecy World*, *supra* note 14, at 7.

22. *Financial Transparency*, *supra* note 13, at 4.

23. TFFIED, *supra* note 11, at 10.

24. *See* TFFIED, *supra* note 11, at i.

25. TFFIED, *supra* note 11, at i.

26. *Id.*

27. *See* TFFIED, *supra* note 11, at 1.

28. TFFIED, *supra* note 11, at 1-2.

29. *Id.* at 2.

30. *Financial Transparency*, *supra* note 13, at 7.

the risk that financial crime, including tax evasion, might occur ... those places.”<sup>31</sup> Through transparency, a transaction or activity can be identified as licit or illicit.<sup>32</sup> Increased financial transparency, therefore, makes hiding illicit financial flows more difficult and results in their decline.<sup>33</sup> It would likewise eliminate the data asymmetry and permit the participation of the other 80% of the population in a free market system not skewed against them.<sup>34</sup>

The case for financial transparency has an ethical and an economic dimension.<sup>35</sup> The ethical dimension mandates that “allowing individuals and profit-making entities to employ certain structures for their private gain” corollarily grants “other members of society ... [the] right to scrutinise and oversee the use of those structures to ensure that they are not being harmed by their abuse.”<sup>36</sup> The economic dimension declares that “[a]chieving the best possible approximation to perfect information ... reduce[s] risk in the market place by increasing certainty which in turn is likely to promote the efficient allocation of resources.”<sup>37</sup> The two dimensions are interrelated: “[i]ncreased stability [in the market] and more efficient resource allocation promote the interests of all members of society.”<sup>38</sup> Disclosure, thus, produces stable markets, enforces the rule of law, protects properties and interests from the regulatory abuse of others, and places market participants on equal ground in terms of access to information.<sup>39</sup>

### III. A RULE OF EXCEPTIONS: THE EVOLUTION OF PHILIPPINE BANK SECRECY LAW

The examination into the shadow financial system has illuminated four main resultant problems: money laundering of proceeds from drug trafficking, financing of terrorism, financial instability, and tax evasion.<sup>40</sup> In turn, exploring financial transparency as a solution has both raised the requisites for such a solution and has brought forward concrete priorities in carrying out such a solution.

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31. *Id.* at 8.

32. *Id.*

33. *Id.* at 1.

34. TFFIED, *supra* note 11, at 7.

35. *Financial Transparency*, *supra* note 13, at 3.

36. *Id.*

37. *Id.*

38. *Id.* at 5.

39. *Id.* at 4-5.

40. *Defining the Secrecy World*, *supra* note 14, at 4.

First, financial transparency requires: (a) ascertainability of “[t]he true identity, beneficial ownership and real management of”<sup>41</sup> a transaction party to the other party;<sup>42</sup> (b) the full and faithful recording of a person’s legal capacity to enter into transactions, in a manner that discloses both the transaction’s form and substance and in accordance with international standards, in a “freely accessible public record in all jurisdictions in which they transacted;”<sup>43</sup> (c) timely access to information on transactions that state regulatory authorities reasonably believe have been undertaken within their jurisdiction and cooperation and assistance from other states in related inquiries without need of proof of illicit activity;<sup>44</sup> and (d) narrow and limited exceptions to international cooperation on financial transparency based only on the “reasonable probability that the security of a natural person would be prejudiced as a consequence of disclosure.”<sup>45</sup>

Second, five primary priorities in financial transparency have been presented: (a) curtailment of cross-border trade mispricing to boost tax revenue, (b) country-by-country reporting of sales, profits, and taxes by multinational corporations to eliminate tax havens, (c) public recording of beneficial ownership and control in banking and securities accounts to impede illicit financial flows; (d) automatic exchange of tax information to facilitate tax collection in a borderless market; and (e) harmonization across states of predicate offenses under anti-money laundering laws to strengthen law enforcement and effectively prevent the laundering of illicit funds.<sup>46</sup>

A brief examination of bank secrecy law as it has developed through the years, especially the myriad exceptions that have been carved from it, quickly reveals an alignment with the foregoing. The advancements in disclosure have largely been enacted to address the chief problems arising out of the shadow financial system and have been established to mirror the requisites of and the primary priorities in financial transparency.

#### *A. The Secrecy of Bank Deposits*

In the Philippines, the main law governing bank secrecy is R.A. No. 1405.<sup>47</sup> The law was enacted to encourage “people to deposit their money in banking institutions and to discourage private hoarding so that the same may

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41. *Financial Transparency*, *supra* note 13, at 9.

42. *Id.*

43. *Id.*

44. *Id.* at 10.

45. *Id.*

46. *See* TFFIED, *supra* note 11, at 1-7.

47. An Act Prohibiting Disclosure of or Inquiry Into, Deposits with Any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955).

be properly utilized by banks in authorized loans to assist in the economic development of the country.”<sup>48</sup>

Under Section 2 of this law, “[a]ll deposits of whatever nature with banks or banking institutions,”<sup>49</sup> including investments in government-issued bonds, are absolutely confidential.<sup>50</sup> The term “deposits” is understood broadly and is not restricted to accounts resulting in a creditor-debtor relationship between the depositor and the bank; for instance, confidentiality extends to trust accounts. The policy of the law must be considered: if the money deposited under an account can be used by banks for authorized loans, then the account is a deposit protected in order to promote the country’s economic development.<sup>51</sup> The Department of Justice (DOJ) has, however, opined that other documents and records, such as letters of credit, trust receipts, bank drafts, and promissory notes, are not covered by the law.<sup>52</sup>

Under the law, such deposits may only be examined in four instances — (a) “upon written permission of the depositor;”<sup>53</sup> (b) “in cases of impeachment;”<sup>54</sup> (c) “upon order of a competent court in cases of bribery or dereliction of duty of public officials;”<sup>55</sup> or (d) “in cases where the money deposited or invested is the subject matter of the litigation.”<sup>56</sup> Recent laws, however, have added several exceptions.

The law prohibits bank officials or employees from disclosing any information regarding such deposits to any person other than those in Section 2<sup>57</sup> and imposes upon offenders a penalty of imprisonment for a period not exceeding five years, a fine not exceeding ₱ 20,000, or both, at

48. *Id.* § 1.

49. *Id.* § 2.

50. *Id.*

51. *Ejercito v. Sandiganbayan*, 509 SCRA 190, 210 (2006); *People v. Estrada*, 583 SCRA 302, 329 (2009).

52. Department of Justice, DOJ Opinion No. 5, Series of 1982 (Jan. 8, 1982); Department of Justice, DOJ Opinion No. 126, Series of 1989 (June 22, 1989). It has been opined, however, that these are covered by the protection accorded under Section 55 (1) (b) of the General Banking Law of 2000. See RAFAEL A. MORALES, *THE PHILIPPINE GENERAL BANKING LAW (ANNOTATED)* 154 (3d ed. 2007).

53. R.A. No. 1405, § 2.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* § 3.

the court's discretion.<sup>58</sup> The law, however, does not provide for exclusion of evidence obtained in violation of it.<sup>59</sup>

Subsequently, a law was enacted to govern foreign currency deposits. Section 8 of R.A. No. 6426, or the Foreign Currency Deposit Act of the Philippines,<sup>60</sup> establishes the absolute confidentiality of foreign currency deposits.<sup>61</sup> The only exception provided by the statute is the examination of such deposits "upon the written permission of the depositor."<sup>62</sup> This law contains a blanket penal provision which punishes willful violations of its provisions or Monetary Board (MB) regulations promulgated under it. For each violation, the statute imposes a penalty of imprisonment for a period of not less than one year nor more than five years, a fine of not less than ₱5,000 nor more than ₱25,000, or both, at the court's discretion.<sup>63</sup>

Corollary to both laws, Section 55.1(b) of the General Banking Law of 2000<sup>64</sup> prohibits any bank director, officer, employee, or agent from disclosing "to any unauthorized person any information relative to the funds or properties in the custody of the bank belonging to private individuals, corporations, or any other entity,"<sup>65</sup> without a court order.<sup>66</sup>

### *B. Exceptions to Bank Secrecy*

The exceptions under R.A. Nos. 1405 and 6426 may seem narrow and few, but other statutes and jurisprudence have added several more to the enumeration.

#### *I. Waiver*

Both R.A. Nos. 1405 and 6426 establish that a bank deposit may be examined upon the written permission of the depositor.<sup>67</sup> This consent constitutes a waiver of the depositor's right to privacy in relation to such deposit.

58. *Id.* § 5.

59. *Ejercito v. Sandiganbayan*, 509 SCRA 190, 217 (2006).

60. An Act Instituting a Foreign Currency Deposit System in the Philippines, and for Other Purposes, Republic Act No. 6426 (1974).

61. *Id.* § 8.

62. *Id.*

63. *Id.* § 10.

64. An Act Providing for the Regulation of the Organization and Operations of Banks, Trust Entities, and for Other Purposes. [General Banking Law of 2000] Republic Act No. 8791 (2000).

65. *Id.* § 55 (1) (b).

66. *Id.*

67. R.A. No. 1405, § 2; R.A. No. 6426, § 8.

Such waiver of the secrecy of bank deposits is, at times, mandatory. The Bangko Sentral ng Pilipinas (BSP) 2008 Manual of Regulations for Banks<sup>68</sup> requires this waiver in the following instances: (a) a bank's issuance or a market maker's holding for its own account of long-term negotiable certificates of time deposits;<sup>69</sup> (b) a bank's application for emergency loan or advance;<sup>70</sup> (c) applications for loans and other credit accommodations;<sup>71</sup> and (d) a bank's trusteeship of any mortgage or bond issued by a municipality, government-owned or controlled corporation, or any body politic.<sup>72</sup> The New Central Bank Act<sup>73</sup> also requires the waiver of confidentiality where a director, officer, or stockholder, together with his related interest (DOSRI), contracts a loan or other financial accommodation from (a) his bank or (b) a bank which is a subsidiary of the same holding company as his bank or the controlling portion of which is held by the same interest holding the controlling proportion of his bank under certain parameters.<sup>74</sup>

Jurisprudence in relation to R.A. No. 6426 has clarified, however, that the secrecy of deposits cannot be invoked against the person who owns the funds deposited. The privileges under the law could only be enjoyed and invoked by the owner of the funds illegally taken and deposited.<sup>75</sup> The intent of the Legislature in enacting the secrecy of foreign currency deposits could not have been to perpetuate injustice.<sup>76</sup>

## 2. Impeachment

R.A. No. 1405, likewise, allows deposits to be examined in impeachment cases.<sup>77</sup>

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68. Bangko Sentral ng Pilipinas, Manual of Regulations for Banks (2008 rev. ed.) [hereinafter 2008 MORB].

69. *Id.* §§ X233 (9) (d) (1) (a) & X223 (9) (g).

70. *Id.* § X272 (4) (e).

71. *Id.* § X304 (1) (c). *See also* 2008 MORB, § X315 (e)-(f) & § X337 (a) loans secured by holdout on and/or assignment of Certificates of Time Deposits; and (b) loans or financial accommodations contracted by a director, officer, or stockholder, together with his related interest (DOSRI) from his bank or a bank which is a subsidiary of the same holding company as his bank or the controlling proportion, is held by the same interest holding the controlling proportion of his bank under certain parameters.).

72. 2008 MORB, § X409 (16) (f).

73. The New Central Bank Act, Republic Act No. 7653 (1993).

74. *Id.* § 26.

75. *China Banking Corporation v. Court of Appeals*, 511 SCRA 110, 120 (2006); *Van Twest v. Court of Appeals*, 230 SCRA 42, 50 (1994).

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

77. R.A. No. 1405, § 2.

The Constitution exclusively enumerates the public officers subject to impeachment — the President, the Vice-President, Supreme Court justices, members of the Constitutional Commissions, and the Ombudsman.<sup>78</sup> The grounds for impeachment are “culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.”<sup>79</sup> Notably, bribery and graft and corruption, which are exceptions to bank secrecy, are likewise grounds for impeachment.

This exception is rooted in the constitutional principle that public office is a public trust.<sup>80</sup> Section 1 of Article XI states that, “[p]ublic officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.”<sup>81</sup> This is in line with not only the mandate that the State “maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption,”<sup>82</sup> but also the policy “of full public disclosure of all its transactions involving public interest.”<sup>83</sup> The Constitution also guarantees the right to information on matters of public concern.<sup>84</sup> Further, it has been established that the right to privacy of public figures, like public officers, “is necessarily narrower than that of a private citizen.”<sup>85</sup>

### 3. Bribery and Dereliction of Duty, Plunder, Unexplained Wealth, and Ill-Gotten Wealth

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78. PHIL. CONST. art. XI, § 2.

79. PHIL. CONST. art. XI, § 2.

80. PHIL. CONST. art. XI, § 1.

81. PHIL. CONST. art. XI, § 1.

82. PHIL. CONST. art. II, § 27.

83. PHIL. CONST. art. II § 28.

84. PHIL. CONST. art. III, § 7.

85. *Ayer Productions Pty. Ltd. v. Capulong*, 160 SCRA 861, 876 (1988). This case provides:

*Such public figures were held to have lost, to some extent at least, their right to privacy. Three reasons were given, more or less indiscriminately, in the decisions that they had sought publicity and consented to it, and so could not complain when they received it; that their personalities and their affairs has already public, and could no longer be regarded as their own private business; and that the press had a privilege, under the Constitution, to inform the public about those who have become legitimate matters of public interest. On one or another of these grounds, and sometimes all, it was held that there was no liability when they were given additional publicity, as to matters legitimately within the scope of the public interest they had aroused.*

*Id.* at 875 (citing 5 WILLIAM LLOYD PROSSER, ET AL., PROSSER AND KEETON ON TORTS 859-61 (1984 ed.)) (emphasis supplied).

Cases of bribery and dereliction of duty by public officials are likewise specifically excluded by R.A. No. 1405 so long as a court order is issued.<sup>86</sup> In relation to these two exceptions, jurisprudence has added to the exceptions cases of plunder and unexplained wealth. The DOJ has also opined the inclusion of Presidential Commission on Good Government (PCGG) investigations in the list of exceptions.

Section 8 of R.A. No. 3019<sup>87</sup> allows the dismissal of a public official found to have directly or indirectly acquired, during his incumbency, unexplained wealth — or “an amount of property and/or money manifestly out of proportion to his salary and to his other lawful income.”<sup>88</sup> Pertinently, the provision goes on to state that, “[b]ank deposits shall be taken into consideration in the enforcement of this section, notwithstanding any provision of law to the contrary.”<sup>89</sup> *Philippine National Bank v. Gancayco*<sup>90</sup> pointed out that the blatant inconsistency of this clause with R.A. No. 1405 clearly shows that R.A. No. 3019 must have intended to amend R.A. No. 1405 by adding an additional exception.<sup>91</sup> The Court found cases of unexplained wealth similar to cases of bribery and dereliction of duty, so much so that the policy must be the same as to both: public office being a public trust, “any person who enters upon its discharge does so with the full knowledge that his life, so far as relevant to his duty, is open to public scrutiny.”<sup>92</sup> Additionally, the allowable inquiry is not limited to deposits under the names of the government official, his spouse, and his unmarried children, but extends to those concealed under the name of any other person.<sup>93</sup>

The DOJ has likewise opined that the PCGG is empowered to require the production of bank records material to its investigations. The DOJ found the *Philippine National Bank* ruling on unexplained wealth applicable to this exception, as proceedings conducted by the PCGG are under R.A. No. 3019 and R.A. No. 1379<sup>94</sup> (on the forfeiture of ill-gotten wealth).<sup>95</sup> Further,

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86. R.A. No. 1405, § 2.

87. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

88. *Id.* § 8.

89. *Id.*

90. *Phil. National Bank v. Gancayco*, 15 SCRA 91 (1965).

91. *Id.* at 95.

92. *Id.* at 96.

93. *Banco Filipino Savings and Mortgage Bank v. Purisima*, 161 SCRA 576, 582 (1988).

94. An Act Declaring Forfeiture in Favor of the State Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceedings Therefor, Republic Act No. 1379 (1955).

95. Department of Justice, DOJ Opinion No. 013, Series of 1988 (Feb. 24, 1987).

the DOJ took note of Executive Order (E.O.) Nos. 1, 2, and 14, which (a) shows that there is evidence that former President Ferdinand Marcos, with his relatives and associates, illegally acquired assets — specifically including “bank accounts, deposits, trust accounts”<sup>96</sup> — which assets were the subject of a freeze or sequestration order pending proceedings;<sup>97</sup> (b) grants the PCGG broad investigatory and subpoena powers in the recovery of ill-gotten wealth;<sup>98</sup> (c) requires full disclosure to the PCGG by persons in the Philippines holding such assets;<sup>99</sup> (d) grants the PCGG the authority to call on witnesses and grant them immunity from criminal prosecution;<sup>100</sup> and (e) grants E.O. No. 14 precedence over all other laws in relation to “the investigation, prosecution, and trial of cases for violations of laws involving the acquisition and accumulation of ill-gotten wealth.”<sup>101</sup> The DOJ, thus, concluded that, “the laws creating and defining the jurisdiction of the PCGG should prevail over the provisions of R.A. No[s]. 1405 and 6426.”<sup>102</sup> Further, the DOJ opined that, “[t]o hold that such a massive undertaking to track down the ill-gotten wealth of former Pres[ident] Marcos and his associates can be subject to the constraints of the law on the secrecy of bank deposits, would frustrate the mission of the Commission as clearly directed by law.”<sup>103</sup>

Plunder was likewise held by jurisprudence to be an exception to the secrecy of bank deposits. The Court found that plunder necessarily involved unexplained wealth as Section 2 of R.A. No. 7080<sup>104</sup> requires the offender to amass, accumulate, or acquire ill-gotten wealth amounting to at least ₱75 million through a combination or series of the overt or criminal acts

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96. *Id.* (citing Regarding the Funds, Moneys, Assets, and Properties Illegally Acquired or Misappropriated by Former President Ferdinand Marcos, Mrs. Imelda Romualdez Marcos, Their Close Relatives, Subordinates, Business Associates, Dummies, Agents, or Nominees, Executive Order No. 2, 2nd whereas clause (1986)).

97. *Id.* (citing E.O. No. 2, 1st whereas clause & ¶ 4).

98. *Id.* (citing Creating the Presidential Commission on Good Government, Executive Order No. 1, 1st whereas clause & § 3 (a) & (e) (1986)).

99. *Id.* (citing E.O. No. 2, ¶ 3).

100. *Id.* (citing Defining the Jurisdiction over Cases Involving the Ill-Gotten Wealth of Former President Ferdinand E. Marcos, Mrs. Imelda R. Marcos, Members of Their Immediate Family, Close Relatives, Subordinates, Close and/or Business Associates, Dummies, Agents and Nominees, Executive Order No. 14, §§ 4 & 5 (1986)).

101. DOJ Opinion No. 013, s. 1988 (citing E.O. No. 14, § 7).

102. *Id.*

103. *Id.*

104. An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080 (1991).

specified by Section 1(d) of the same law. All the overt or criminal acts under Section 1(d) are, in turn, similar to plunder.<sup>105</sup> Again, as plunder is likewise a crime committed by public officers, the policy that public office is a public trust that opens one to public scrutiny applies. As plunder is analogous to bribery, it likewise operates as an exception to the secrecy of bank deposits.<sup>106</sup>

#### 4. Subject Matter of the Litigation

The last exception under R.A. No. 1405 permits the examination of deposits “where the money deposited or invested is the subject matter of the litigation.”<sup>107</sup> The Court has clarified that the subject matter of the litigation is neither the wrong committed nor the relief sought, but is “the matter or thing with respect to which the controversy has arisen, concerning which the wrong has been done, and this ordinarily is the property, or the contract and its subject matter, or the thing in dispute.”<sup>108</sup> Several cases have expounded on this exception.

For instance, the Court of Appeals has ruled that deposits of the deceased, like any of his or her assets, are part of the subject matter of the litigation in cases of settlement of estate.<sup>109</sup> In another case, *Mellon Bank, N.A. v. Magsino*,<sup>110</sup> where a case was filed by a bank to recover funds erroneously transferred, the Court allowed the examination of the transferee bank account, even when the account was under another person’s name, on the ground that the money deposited was the subject matter of the litigation.<sup>111</sup> The Court has established that, “an inquiry into the whereabouts of the illegally acquired amount extends to whatever is concealed by being held or recorded in the name of persons other than the

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105. *Ejercito v. Sandiganbayan*, 509 SCRA 190, 214 (2006). See An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080, §§ 1 & 2 (1991).

106. *Ejercito*, 509 SCRA at 214.

107. R.A. No. 1405, § 2.

108. *Union Bank of the Philippines v. Court of Appeals*, 321 SCRA 563, 568 (1999) (citing *Yusingco v. Ong Hing Lian*, 42 SCRA 589, 88 (1971); *Mathay v. Consolidated Bank and Trust Company*, 58 SCRA 559, 571 (1974)) (The subject matter of the litigation is “the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted.”).

109. *Sy v. Judge, Regional Trial Court of Iloilo City*, 93 O.G. 5407, 5409 (Court of Appeals 1993).

110. *Mellon Bank, N.A. v. Magsino*, 190 SCRA 633 (1990).

111. *Id.* at 648.

one responsible for the illegal acquisition.”<sup>112</sup> Affirming this doctrine, the Court, in *Ejercito v. Sandiganbayan*,<sup>113</sup> likewise ruled that a plunder case “necessarily involves an inquiry into the whereabouts of the amount purportedly acquired illegally.”<sup>114</sup> The Court clarified that, “the subject matter of the litigation cannot be limited to bank accounts under the name of [the accused] alone, but must include those accounts to which the money purportedly acquired illegally or a portion thereof was alleged to have been transferred.”<sup>115</sup>

In contrast, in *Union Bank of the Philippines v. Court of Appeals*,<sup>116</sup> the Court disallowed inquiry into the drawer’s bank account in a case filed by the collecting bank to recover from the drawee bank the deficiency from a check erroneously under-coded, where the drawee bank failed to inform the collecting bank of the under-coding.<sup>117</sup> The Court established that this exception requires that “the ‘money deposited’ itself should be the subject matter of the litigation.”<sup>118</sup> As recovery of the amount was being sought not from the drawer’s account, but from the drawer’s bank for its failure to inform the collecting bank of the under-coding, the account could not have been the subject matter of the litigation and was being employed only to collect more information on the extent of the culpability of the drawer’s bank and the amount of damages that could be recovered.<sup>119</sup> Similar to this case, the Court held, in *Oñate v. Abrogar*,<sup>120</sup> that the money deposited was not the subject matter of the litigation in a case where the issue is the nature of the transaction for which the money was received.<sup>121</sup>

Recently, in *BSB Group, Inc. v. Go*,<sup>122</sup> the Court held that a bank deposit is not the subject matter of the litigation and may not be inquired into in a criminal case for qualified theft where the funds taken were deposited as checks in the account of the accused.<sup>123</sup> The Court found that, considering that free disposition of the stolen property is immaterial in the

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112. *Id.* (citing *Banco Filipino Savings and Mortgage Bank v. Purisima*, 161 SCRA 576, 582 (1988)).

113. *Ejercito v. Sandiganbayan*, 509 SCRA 190 (2006).

114. *Id.* at 215.

115. *Id.*

116. *Union Bank of the Philippines v. Court of Appeals*, 321 SCRA 563 (1999).

117. *Id.* at 573.

118. *Id.*

119. *Id.*

120. *Oñate v. Abrogar*, 241 SCRA 659 (1995).

121. *Id.* at 669 (1995).

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

123. *Id.* at 613-14.

crime of theft, evidence from the examination of the bank account is likewise immaterial and, consequently, inadmissible.<sup>124</sup> The case suggests that the evidence from such examination would be material in a case for *estafa* by conversion.<sup>125</sup> Additionally, the Court established that a subject matter in litigation is determined not by the prosecution's evidence, but by the indictment charging the offense. Thus, where the Information makes no allegation in relation to the bank account or the checks, but only refers to the stolen amount, it is the stolen amount, and not the account, which is the subject matter of the litigation.<sup>126</sup>

### 5. Garnishment

Section 9(c) of Rule 39 of the 1997 Rules of Civil Procedure allows the garnishment of, among others, bank deposits.<sup>127</sup> This garnishment, however, "cover[s] only such amount as will satisfy the judgment and all lawful fees."<sup>128</sup> The garnishee bank, after service of notice of garnishment upon it, makes a written report to the court on (a) "whether or not the judgment obligor has sufficient funds or credits to satisfy the amount of the judgment,"<sup>129</sup> and, (b) if the funds are insufficient, "how much funds or credits the garnishee holds for the judgment obligor."<sup>130</sup>

Garnishment only entails disclosure of whether the judgment debtor has any deposit with the bank for purposes thereof and is a bar on any withdrawal from such deposit.<sup>131</sup> No real inquiry into the deposit is conducted and disclosure of the existence of the deposit is "purely incidental to the execution process."<sup>132</sup> The legislative intent behind bank secrecy does not preclude execution of a final judgment.<sup>133</sup> Secrecy only applies when "the purpose of such inquiry or investigation is merely to determine the existence and nature, as well as the amount[,] of the deposit in any given bank account."<sup>134</sup> The Legislature could not have intended the evasion of

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124. *Id.* at 608-09 (citing *Valenzuela v. People*, 525 SCRA 306, 343 (2007)).

125. *Id.*

126. *Id.* at 613.

127. 1997 RULES OF CIVIL PROCEDURE, rule 39, § 9 (c).

128. *Id.*

129. *Id.*

130. *Id.*

131. *China Banking Corporation v. Ortega*, 49 SCRA 355, 358 (1973).

132. *Id.* at 360; *Phil. Commercial & Industrial Bank v. Court of Appeals*, 193 SCRA 452, 462 (1991).

133. *Ortega*, 49 SCRA at 360; *Phil. Commercial & Industrial Bank*, 193 SCRA at 462.

134. *BSB Group, Inc. v. Go*, 612 SCRA 596, 611 (2010). See *China Banking Corporation v. Ortega*, 49 SCRA 355, 359 (1973).

just debts through the mere expedient of depositing funds.<sup>135</sup> Further, R.A. No. 1405, unlike R.A. No. 6426, does not provide for the exemption of deposits from garnishment and such deposits do not fall under any of the properties exempted from execution.<sup>136</sup>

Foreign currency deposits are, however, another matter. R.A. No. 6426 exempts all foreign currency deposits “from attachment, garnishment, or any other order or process of any court, legislative body, government agency or any administrative body whatsoever.”<sup>137</sup> Nevertheless, only the owner of the funds can invoke this exemption, even if he is not the depositor.<sup>138</sup> It must also be noted that this rule is not without exception. In *Salvacion v. Central Bank of the Philippines*,<sup>139</sup> the Court allowed garnishment of a foreign currency deposit of a transient foreigner, who escaped jail while charged for the illegal detention and rape of a minor, to satisfy the damages imposed in the civil case.<sup>140</sup> The Court allowed the garnishment, as a contrary ruling would (a) render futile the award of damages to the minor;<sup>141</sup> (b) fail to take into account the past economic realities behind the enactment of R.A. No. 6426;<sup>142</sup> (c) fail to consider that the application of the law for a purpose not contemplated by it would have “far-reaching implications on the right of a national to obtain redress for a wrong committed by an alien;”<sup>143</sup> (d) fail to further the purposes for which Presidential Decree (P.D.) Nos. 1246, 1034, and 1035 were enacted<sup>144</sup> as it would extend the protection of confidentiality to a transient foreigner;<sup>145</sup> and (e) result in the use of the law as a device for injustice.<sup>146</sup> In ruling that the exemption found no application in *Salvacion*,

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135. *Ortega*, 49 SCRA at 360.

136. See R.A. No. 1405; 1997 RULES OF CIVIL PROCEDURE, rule 39, § 13.

137. R.A. No. 6426, § 8.

138. *Van Twest v. Court of Appeals*, 230 SCRA 42, 51 (1994).

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

140. *Id.* at 46.

141. *Id.* at 41.

142. *Id.*

143. *Id.* at 42.

144. 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); Authorizing the Establishment of An Offshore Banking System in the Philippines, Presidential Decree No. 1034 (1976); Expanding the Authority of Certain Depository Banks under R.A. No. 6426 and for Other Purposes, Presidential Decree No. 1035 (1976).

145. *Salvacion v. Central Bank of the Philippines*, 278 SCRA 27, 45 (1997).

146. *Id.* at 45.

the Court declared that, “the application of the law depends on the extent of its justice.”<sup>147</sup>

## 6. Unclaimed Balances

Act No. 3936, or the Unclaimed Balances Act,<sup>148</sup> mandates that all banks, building and loan associations, and trust corporations file, in January of every odd year, with the Treasurer of the Philippines a statement, under the oath of its managing officers, of any unclaimed balances it holds.<sup>149</sup> “Unclaimed balances” are defined as including:

credits or deposits of money, bullion, security or other evidence of indebtedness of any kind, and interest thereon with banks, buildings and loan associations, and trust corporations . . . in favor of any person known to be dead or who has not made further deposits or withdrawals during the preceding ten years or more.<sup>150</sup>

Such unclaimed balances are to be escheated in favor of the government.<sup>151</sup>

The sworn statement must disclose the (a) the names and last known or post office addresses of the depositors or creditors;<sup>152</sup> (b) “[t]he amount[s] and the date[s] of the outstanding unclaimed balance[s] and whether the same [are] in money or in security, and if the latter, the nature of the same;”<sup>153</sup> (c) dates of the depositors’ or creditor’s deaths, if known, or the dates of last deposit or withdrawal;<sup>154</sup> and (d) the interests due on the

147. *Id.*

148. An Act Requiring Banks, Trust Companies, Savings and Mortgage Banks, Mutual Building and Loan Associations, and Banking Institutions of Every Kind to Transfer Unclaimed Balances Held by Them to the Insular Treasury, and for Other Purposes, Act No. 3936 (1932).

149. *Id.* § 2. Section 4 of the Act provides:

If the president, cashier or managing officer of the bank, building and loan association, or trust corporation neglects or refuses to make and file the sworn statement required by this action, such bank, building and loan association, or trust corporation shall pay to the Government the sum of five hundred pesos a month for each month or fraction thereof during which such default shall continue.

*Id.* § 4.

150. *Id.* § 1.

151. *Id.* See Act No. 3936, § 5 (The bank, building and loan association, or trust corporation will not be liable to any person for unclaimed balances it properly deposits with the Treasurer.).

152. Act No. 3936, § 2 (a).

153. *Id.* § 2 (b).

154. *Id.* § 2 (c).

unclaimed balances.<sup>155</sup> A copy of the statement must be posted in a conspicuous place in the bank's, building and loan association's, or trust corporation's premises for at least 60 days from its filing. Prior to filing the statement, however, the bank, building and loan association, and trust corporation must contact the depositors or creditors at their last known or post office addresses.<sup>156</sup>

The Treasurer, in turn, is obligated to inform the Solicitor General of the existence of the unclaimed balances held by such banks, building and loan associations, and trust corporations.<sup>157</sup>

#### 7. Ombudsman's *In Camera* Inspection

Section 15(8) of R.A. No. 6770<sup>158</sup> accords the Ombudsman "the power to examine and have access to bank accounts and records."<sup>159</sup> *Marquez v. Desierto*<sup>160</sup> has clarified that the Ombudsman may only conduct an *in camera* inspection of bank deposits when there is a case pending before a court of competent jurisdiction.<sup>161</sup> The Court further established requirements before such inspection be allowed. First, the bank account must be clearly identified. Second, such inspection must be restricted to the subject matter of the pending case.<sup>162</sup> Third, "[t]he bank personnel and the account holder must be notified to be present during the inspection."<sup>163</sup> Finally, "such inspection may cover only the account identified in the pending case."<sup>164</sup> *Marquez* was later affirmed by *Office of the Ombudsman v. Ibay*.<sup>165</sup> In both *Marquez* and *Ibay*, the Court disallowed the Ombudsman from inspecting the bank accounts in the course of its investigation, to fish for more information for the filing of a formal charge, where there was yet no case pending in court.<sup>166</sup>

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155. *Id.* § 2 (d).

156. *Id.*

157. *Id.* § 2. See Act No. 3936, § 3 (actions filed by the Solicitor General).

158. An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770 (1989).

159. *Id.* § 15 (8).

160. *Marquez v. Desierto*, 359 SCRA 772 (2001).

161. *Id.* at 781. This doctrine laid down by *Marquez* may not, however, apply retroactively. See *Ejercito v. Sandiganbayan*, 509 SCRA 190, 124 (2006).

162. *Marquez*, 359 SCRA at 781.

163. *Id.*

164. *Id.*

165. *Office of the Ombudsman v. Ibay*, 364 SCRA 281 (2001).

166. *Id.* at 287; *Marquez v. Desierto*, 359 SCRA 772, 782 (2001).

## 8. Money Laundering

The enactment of R.A. No. 9160, or the Anti-Money Laundering Act of 2001,<sup>167</sup> established another exception to the secrecy of bank deposits. The statute declares a policy of preserving the confidentiality of bank accounts, while ensuring that the country is not used as a money laundering site.<sup>168</sup> The law also declares a policy of “cooperation in transnational investigations and prosecutions of persons involved in money laundering activities wherever committed.”<sup>169</sup>

The law empowers the Anti-Money Laundering Council (AMLC) to inquire into or examine deposits or investments with banks or other financial institutions where there is probable cause to believe that such deposits or investments involved are related to an unlawful activity or a money laundering offense. Generally, such inquiry or examination is allowed only upon a court order in the event of a violation of this law.<sup>170</sup> This court order is, however, dispensed with in cases involving (a) kidnapping for ransom;<sup>171</sup> (b) the enumerated crimes under the Comprehensive Dangerous Drugs Act of 2002;<sup>172</sup> and (c) violations of R.A. No. 6235<sup>173</sup> (which penalizes acts inimical to civil aviation, including hijacking), as well as destructive arson and murder,<sup>174</sup> “including those perpetrated by terrorists against non-combatant persons and similar targets.”<sup>175</sup>

A money laundering offense is committed when “proceeds of an unlawful activity are transacted, thereby making them appear to have originated from legitimate sources.”<sup>176</sup> The offender commits it either by (a)

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167. 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).

168. *Id.* § 2.

169. *Id.*

170. *Id.* § 11.

171. See An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 267 (1930).

172. See An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, as Amended, Providing Funds Therefor, and for Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165, §§ 4-6, 8-10, & 12-16 (2002).

173. See An Act Prohibiting Certain Acts Inimical to Civil Aviation, and for Other Purposes, Republic Act No. 6235 (1971).

174. See REVISED PENAL CODE, arts. 248 & 320.

175. Anti-Money Laundering Act of 2001, §§ 3 (i) (1), (2), & (12) & 11.

176. *Id.* § 4.

transacting or attempting to transact a monetary instrument or property which he knows to represent, involve, or relate to the proceeds of an unlawful activity;<sup>177</sup> (b) performing or failing to perform an act, which performance or failure facilitates the transaction or attempt in (a), despite knowledge that the money instrument or property involves proceeds of an unlawful activity;<sup>178</sup> and (c) failing to disclose and file with the AMLC a monetary instrument or property which he knows must be so disclosed and filed.<sup>179</sup>

On the other hand, “unlawful activity” has a specific meaning under the law. It is an act or omission, or series or combination thereof, involving or directly relating to the following: (a) kidnapping for ransom; (b) Sections 4 to 6, 8 to 10, and 12 to 16 of the Comprehensive Dangerous Drugs Act of 2002;<sup>180</sup> (c) subsections (b) to (c), (e), and (g) to (i) of Section 3 of R.A. No. 3019;<sup>181</sup> (d) plunder; (e) robbery and extortion;<sup>182</sup> (f) *jueteng* and *masiao*;<sup>183</sup>

177. *Id.* § 4 (a).

178. *Id.* § 4 (b).

179. *Id.* § 4 (c).

180. These offenses are the (a) importation of dangerous drugs and/or controlled precursors and essential chemicals; (b) sale, trading, administration, dispensation, delivery, distribution, and transportation of dangerous drugs and/or controlled precursors and essential chemicals; (c) maintenance of a den, dive, or resort; (d) manufacture of dangerous drugs and/or controlled precursors and essential chemicals; (e) illegal chemical diversion of controlled precursors and essential chemicals; (f) manufacture or delivery of equipment, instrument, apparatus, and other paraphernalia for dangerous drugs and/or controlled precursors and essential chemicals; (g) possession of equipment, instrument, apparatus, and other paraphernalia for dangerous drugs; (h) possession of dangerous drugs during parties, social gatherings, or meetings; (i) possession of equipment, instrument, apparatus, and other paraphernalia for dangerous drugs during parties, social gatherings, or meetings; (j) use of dangerous drugs; (k) cultivation or culture of plants classified as dangerous drugs or are sources thereof. Comprehensive Dangerous Drugs Act of 2002, §§ 4-6, 8-10, & 12-16.

181. R.A. No. 3019, § 3 (b), (c), (e), (g), (h), & (i).

(b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law.

(c) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act.

(g) piracy on the high seas under the Revised Penal Code<sup>184</sup> and in Philippine waters under P.D. No. 532;<sup>185</sup> (h) qualified theft;<sup>186</sup> (i) *estafa*;<sup>187</sup> (j)

(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

...

(g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

(h) Director or indirectly having financing or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

(i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group.

Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transaction or acts by the board, panel or group to which they belong.

*Id.*

182. See REVISED PENAL CODE, arts. 294-96 & 299-302 (The crimes here are (a) robbery with violence against or intimidation of persons; (b) robbery with physical injuries, committed in an uninhabited place and by a band, or with the use of firearm on a street, road, or alley; (c) robbery in an inhabited house or public building or edifice devoted to worship; (d) robbery in (c) in an uninhabited place and by a band; and (e) robbery in an uninhabited place or in a private building.).

183. See Prescribing Stiffer Penalties on Illegal Gambling, Presidential Decree No. 1602, § 1 (1978).

184. REVISED PENAL CODE, arts. 122-123 (Piracy in the high seas under Article 122 is committed either by *any person* who attacks or seizes a vessel or by a *person who is neither a passenger nor a member of the complement* who seizes the whole or part of the vessel's cargo, equipment, or passengers.).

185. Anti-Piracy and Anti-Highway Robbery Law of 1974, Presidential Decree No. 532, §§ 2 (d) & 3 (a) (1974) (In contrast, piracy under P.D. No. 532 can only occur in Philippine waters and is committed by *any person* who, "by means of violence against or intimidation of persons or force upon things," either attacks

smuggling;<sup>188</sup> (k) violations of the Electronic Commerce Act;<sup>189</sup> (l) violations of R.A. No. 6235 and destructive arson and murder, “including those perpetrated by terrorists against non-combatant persons and similar targets;” (m) fraudulent practices and other violation of the Securities Regulation Code;<sup>190</sup> and (n) “[f]elonies or offenses of a similar nature that are punishable under the penal laws of other countries.”<sup>191</sup>

The issuance of a bank inquiry order, despite the black letter of the law, does not require that a case be pending in court, as long as there is a violation of R.A. No. 9160.<sup>192</sup> Also, a bank inquiry order is neither a search warrant nor a warrant of arrest and, therefore, save for the necessity of probable cause, is not bound by the stringent requirements for the issuance thereof.<sup>193</sup> Nevertheless, the order cannot be issued *ex parte*: the depositor must be given prior notice and an opportunity to contest the issuance.<sup>194</sup> It must also be noted that an order cannot be issued in relation to transactions that occurred prior to the passage of R.A. No. 9160.<sup>195</sup>

In addition to the bank inquiry order, for the purpose of ensuring compliance with its provisions, the law allows the BSP to inquire into or examine deposits or investments with banks or other financial institutions “in

or seizes a vessel or takes away the whole or part of the vessel, its cargo, equipment, or the personal belongings of its passengers and complement.).

186. See REVISED PENAL CODE, art. 310.

187. See REVISED PENAL CODE, art. 315.

188. See An Act to Amend Section Two Thousand Seven Hundred and Two, and Two Thousand Seven Hundred and Three of the Revised Administrative Code, Republic Act No. 455 (1950); An Act to Revise and Codify the Tariff and Customs Laws of the Philippines [TARIFF AND CUSTOMS CODE], Republic Act No. 1937 (1957).

189. See An Act Providing for the Recognition and Use of Electronic Commercial and Non-Commercial Transactions, Penalties for Unlawful Use Thereof, and for Other Purposes [Electronic Commerce Act of 2000], Republic Act No. 8792 (2000).

190. See The Securities Regulation Code [SECURITIES REGULATION CODE], Republic Act No. 8799 (2000).

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

192. Republic v. Eugenio, Jr., 545 SCRA 384, 403-04 (2008) (The Court found that to require that there be a case pending in court would make the bank inquiry order ineffective as a discovery tool and encourage the indiscriminate filing of complaints.).

193. *Id.* at 411-12.

194. *Id.* at 404.

195. *Id.* at 420 (This would violate the constitutional prohibition against *ex post facto* laws.). See PHIL. CONST. art. III, § 22.

the course of a periodic or special examination, in accordance with the [its] rules of examination.”<sup>196</sup>

#### 9. Terrorism

The Human Security Act of 2007, or R.A. No. 9372,<sup>197</sup> lays down another exception to bank secrecy and provides elaborate safeguards for the permitted examination.

The law empowers Court of Appeals justices to issue a written order authorizing the examination of deposits, accounts, placements, trust accounts, assets, and records of banks or other financial institutions of persons or entities, where there is probable cause to believe that they are (a) “charged with or suspected of the crime of terrorism or conspiracy to commit terrorism,”<sup>198</sup> (b) “judicially declared and outlawed terrorist organization[s], association[s], or group[s] of persons;”<sup>199</sup> and (c) members of (b).<sup>200</sup> Upon service to them of the Court of Appeals order, banks or other financial institutions cannot refuse to allow the examination or provide information.<sup>201</sup>

The order is issued upon an *ex parte* application for the same by police or law enforcement officers, where such officers have been authorized in writing by the Anti-Terrorism Council (ATC) to file the application, and upon examination under oath or affirmation of such applicant and his witnesses as to the necessity and urgency for the order.<sup>202</sup> The order must identify the (a) person charged with or suspected of terrorism or the

196. An Act Amending Republic Act No. 9160, Otherwise Known as the Anti-Money Laundering Act of 2001, Republic Act No. 9194, § 11 (2003).

197. An Act to Secure the State and Protect Our People from Terrorism [Human Security Act of 2007], Republic Act No. 9372 (2007).

198. *Id.* § 27.

199. *Id.*

200. *Id.* See Human Security Act of 2007, § 36 (Any person who examines the same without the authorization from the Court of Appeals or any police or law enforcement officer personnel who maliciously obtains such authorization is subject to imprisonment of 10 years and one day to 12 years.).

This Note focuses on the *examination* of deposits, accounts, placements, trust accounts, assets, and records of banks or other financial institutions. Freezing, seizure, and sequestration of the same are governed by Sections 39 to 43 of the law. See Human Security Act of 2007, §§ 39-43.

201. Human Security Act of 2007, § 27. See Human Security Act of 2007, § 37 (“An employee, official, or a member of the board of directors of a bank or financial institution, who refuses to allow” such examination is likewise subject to imprisonment of 10 years and one day to 12 years.).

202. Human Security Act of 2007, §§ 27 & 28.

conspiracy to commit the same or “judicially declared and outlawed terrorist organization, association, or group of persons” or members thereof;<sup>203</sup> (b) the bank or other financial institution holding the deposits, accounts, placements, trust accounts, assets, and records;<sup>204</sup> (c) persons who will carry out the examination;<sup>205</sup> and (d) the duration of the authorization’s effectivity.<sup>206</sup> The law limits the effectivity of the order to a period not exceeding 30 days, extendible or renewable for a maximum of 30 days from the expiration of the original period upon the ATC’s authorization, an *ex parte* application by the original applicant for the same, and the Court of Appeals finding that extension or renewal is in the public interest.<sup>207</sup>

The applicant officer must, however, file the case for violation of this law with the Public Prosecutor’s Office within 30 days from the expiration of the order’s effectivity (including extensions and renewals). If no such case is filed within this period, the applicant officer must immediately notify in writing the owner of the deposits, accounts, placements, trust accounts, assets, and records examined.<sup>208</sup> The owner not only has the right to be informed of the examination, but also to challenge the legality of the interference.<sup>209</sup>

The Court of Appeals order, the application for the order or for any extension or renewal of the same, and the ATC authorizations are, however, considered classified information.<sup>210</sup> Further, “[a]ll information, data, excerpts, summaries, notes, memoranda, working sheets, reports, and other documents obtained from the examination of the bank deposits, placements, trust accounts, assets and records”<sup>211</sup> must be deposited in a sealed envelope or package with the authorizing division of the Court of Appeals within 48 hours of the expiration of the order’s effectivity (including any extensions or

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203. *Id.* § 29.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* § 30 (Where the original applicant is dead or physically incapable of filing the application for extension or renewal, the one next in rank among those named in the original order shall file such application.). See Human Security Act of 2007, § 29 (The application for extension or renewal is likewise *ex parte*.).

208. Human Security Act of 2007, § 30 (Failure of the applicant officer to notify the owner subjects him to imprisonment of 10 years and one day to 12 years. Failure of any other person who has the duty to provide written notification shall be subject to imprisonment of six years and one day to eight years.).

209. *Id.* § 29.

210. *Id.*

211. *Id.* § 31.

renewals).<sup>212</sup> This must be accompanied with a joint affidavit of the applicant officer and the persons who carried out the examination, which affidavit, among others, certifies under oath that no duplicates or copies of the contents have been made or that any such duplicates or copies have been included in the sealed envelope or package.<sup>213</sup> Such contents are likewise deemed classified information.<sup>214</sup> The envelope or package can only be opened and its contents “divulged, revealed, read, or used as evidence” where the authorizing division of the Court of Appeals issues a written order to this effect upon the written application of the DOJ, as duly authorized in writing by the ATC, and written notice to the owner not later than three days prior to the scheduled opening.<sup>215</sup> Such contents secured in violation of the law are absolutely inadmissible as evidence against any person “in any judicial, quasi-judicial, legislative, or administrative investigation, inquiry, proceeding, or hearing.”<sup>216</sup> The owner may, however, upon motion, use the contents “as evidence for the prosecution of any police or law enforcement personnel who maliciously procured [the Court of Appeals] authorization.”<sup>217</sup> Finally, criminal penalties are also provided for the unauthorized revelation of classified materials by any person.<sup>218</sup>

#### 10. Unsafe or Unsound Banking Practices

The Charter of the Philippine Deposit Insurance Corporation (PDIC) authorizes it and/or the BSP to “inquire into or examine deposit accounts and all information related thereto in case there is a finding of unsafe or unsound banking practice.”<sup>219</sup> This covers deposits under both R.A. No. 1405 and R.A. No. 6426. In order to forestall any overlapping of PDIC and

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* §§ 31-32. See Human Security Act of 2007, § 38 (“Any false or untruthful statement or misrepresentation of [a] material fact in the joint affidavits” makes each affiant subject to imprisonment of 10 years and one day to 12 years.). See also Human Security Act of 2007, § 32 (“Any person who copies, removes, deletes, expunges, incinerates, shreds or destroys” any of the contents of the sealed envelope or package is subject to imprisonment of six years and one day to 12 years.).

<sup>214</sup> Human Security Act of 2007, § 33.

<sup>215</sup> *Id.* (Failure of any person obligated to so provide written notice to the owner is subject to imprisonment of six years and one day to eight years.). See Human Security Act of 2007, § 34 (This section enumerates the requirements of the written application.).

<sup>216</sup> Human Security Act of 2007, § 35.

<sup>217</sup> *Id.* § 36.

<sup>218</sup> *Id.* § 46 (imprisonment of 10 years and one day to 12 years).

<sup>219</sup> An Act Establishing the Philippine Deposit Insurance Corporation, Defining Its Powers and Duties and for Other Purposes, Republic Act No. 3591, § 8 (1963).

BSP efforts, the law mandates that relevant reports, information, and findings of the BSP are to be made available to the PDIC.<sup>220</sup> This is also in line with the PDIC's basic policy to "promote and safeguard the interests of the depositing public by way of providing permanent and continuing insurance coverage on all insured deposits."<sup>221</sup> In addition, the law grants the PDIC the powers to (a) examine banks, at most, once every 12 months, upon the MB's prior approval;<sup>222</sup> and, (b) in coordination with the BSP, to conduct a special examination upon a majority vote of all the members of its Board of Directors "if there is a threatened or impending closure of a bank."<sup>223</sup>

#### 11. Gross Estate and Compromise of Tax Liability

Prior to the enactment of R.A. No. 10021, Section 6(F) of the 1997 National Internal Revenue Code allowed the Commissioner of Internal Revenue to inquire into bank deposits in only two instances. First, the Commissioner of Internal Revenue is authorized to inquire into the bank deposits of a decedent in order to determine his gross estate.<sup>224</sup> Second, the Commissioner of Internal Revenue is likewise authorized to examine the bank deposits of a "taxpayer who has filed an application for compromise of his tax liability under Sec. 204(A)(2) of this Code by reason of financial incapacity to pay his tax liability."<sup>225</sup> For the second ground, however, the law states that such application for compromise based on financial incapacity will not be considered unless the taxpayer executes a written waiver of his privilege under R.A. No. 1405 or other laws.<sup>226</sup> The second ground, thus, more properly falls under the exception on waiver of bank secrecy.

#### 12. Internationally Agreed Tax Standard

In response to the blacklisting of the Philippines by the OECD, R.A. No. 10021 was enacted and came into effect on 10 April 2010.<sup>227</sup> It amended Section 6(F) to add another exception: the Commissioner of Internal Revenue is authorized to look into the deposits of specific taxpayers who are the "subject of a request for the supply of tax information from a foreign tax authority pursuant to an international convention or agreement on tax

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220. *Id.*

221. *Id.* § 1.

222. *Id.*

223. *Id.*

224. TAX REFORM ACT OF 1997, § 6 (F) (1).

225. *Id.* § 6 (F) (2). See TAX REFORM ACT OF 1997, § 204 (A) (2).

226. TAX REFORM ACT OF 1997, § 6 (F).

227. Exchange of Information on Tax Matters Act of 2009, § 11. The law was published on Mar. 26, 2010.

matters to which the Philippines is a signatory or a party of.”<sup>228</sup> Such information may, however, also be used for tax assessment, verification, audit, and enforcement by the Bureau of Internal Revenue (BIR).<sup>229</sup>

The requesting foreign tax authority must “demonstrate the foreseeable relevance of the information to the request” by providing the following information:

- (a) The identity of the person under examination or investigation;
- (b) A statement of the information being sought including its nature and the form in which the said foreign tax authority prefers to receive the information from the Commissioner;
- (c) The tax purpose for which the information is being sought;
- (d) Grounds for believing that the information requested is held in the Philippines or is in the possession or control of a person within the jurisdiction of the Philippines;
- (e) To the extent known, the name and address of any person believed to be in possession of the requested information;
- (f) A statement that the request is in conformity with the law and administrative practices of the said foreign tax authority, such that if the requested information was within the jurisdiction of the said foreign tax authority then it would be able to obtain the information under its law or in the normal course of administrative practice and that it is conformity with a convention or international agreement; and
- (g) A statement that the requesting foreign tax authority has exhausted all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.<sup>230</sup>

Generally, the Commissioner should provide the required information within 90 days from receipt of the request. Otherwise, he must inform the requesting tax authority of the nature of the obstacles he has encountered in the furnishing of the information or the reasons for the bank’s or other financial institution’s refusal to furnish such information.<sup>231</sup>

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228. *Id.* § 3 (The foreign tax authority referred to is “the tax authority or tax administration of the requesting State under the tax treaty or convention to which the Philippines is a signatory or a party of.”).

229. *Id.*

230. *Id.* (The Commissioner must notify the requesting tax authority of any deficiencies in the request within 60 days from receipt of the request.).

231. *Id.* See Exchange of Information on Tax Matters Act of 2009, § 6 (An officer, owner, agent, manager, director, or officer-in-charge of a bank or other financial institution who willfully refuses to furnish the information, despite being required, in writing, by the Commissioner to do so, is subject to a fine of

The Commissioner must notify the taxpayer in writing of such request made by the foreign tax authority.<sup>232</sup> The foreign tax authority must deem all information received as absolutely confidential “as information obtained by the latter under its laws.”<sup>233</sup> The information can only be disclosed to those “persons or authorities, including courts and administrative bodies, involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by such conventions of agreements.”<sup>234</sup> BIR officers and employees are also enjoined to divulge the information obtained by them in the discharge of their official duties only to the requesting foreign tax authority and only in the manner provided by law.<sup>235</sup>

#### IV. ISSUES IN THE UNVEILING OF FINANCIAL SECRETS: MATTERS OF PRIVACY AND ISOLATION

The extensive expansion of the exceptions to bank secrecy, as well as the growing global movement towards financial transparency, raises the issue of financial privacy and financial isolation. In the face of the diminished and diminishing financial privacy of the depositor, a question arises as to whether advancements in financial transparency have crossed the line between transparency and surveillance. On the other hand, the global advancement towards financial transparency questions whether any jurisdiction can retain secrecy legislation without risking financial isolation.

##### A. *The Financial Panopticon: An Issue of Privacy*

Bank secrecy traces its origins from the right to privacy — a fundamental human right first acknowledged in 1968 by *Morfe v. Mutuc*.<sup>236</sup> Citing *Griswold v. Connecticut*,<sup>237</sup> the Court recognized the creation of zones of privacy under constitutional guarantees and accorded the right to privacy constitutional protection.<sup>238</sup> Later, the Court also recognized that the right

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not less than ₱ 50,000, but not exceeding ₱ 100,000; imprisonment of not less than two years, nor exceeding five years; or both.).

232. Exchange of Information on Tax Matters Act of 2009, § 8.

233. *Id.* § 7.

234. *Id.*

235. TAX REFORM ACT OF 1997, § 270 (Any unlawful divulgence of information subjects such officer or employee to a fine of not less than ₱50,000, but not exceeding ₱ 100,000, imprisonment of not less than two years, but not exceeding five years, or both.).

236. *Morfe v. Mutuc*, 22 SCRA 424 (1968).

237. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

238. *Morfe*, 22 SCRA at 444 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

had roots in the Universal Declaration of Human Rights, under which “[n]o one shall be subjected to arbitrary interference with his privacy” and “[e]veryone has the right to the protection of the law against such interference or attacks.”<sup>239</sup> *Marquez*, in discussing the Ombudsman *in camera* inspection exception, further pointed out that the Civil Code, Revised Penal Code, and special laws, like R.A. No. 1405, recognize and protect the right to privacy.<sup>240</sup>

*Morfe* distinguished between the public sector, which could be subject to state control, and the private sector, which should be protected from state intrusion. Adopting Justice William O. Douglas’s view that “[t]he right to be let alone is indeed the beginning of all freedom,”<sup>241</sup> the Court declared unmitigated state control over the private sector to be a badge of a totalitarian state.<sup>242</sup> Considering the primacy of the right to privacy, the

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239. *Sabio v. Gordon*, 504 SCRA 704, 736 (2006) (citing Universal Declaration of Human Rights, art. 12, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948)).

240. *Marquez v. Desierto*, 359 SCRA 772, 782 (2001) (citing *Ople v. Torres*, 354 Phil. 948, 973-74 (1998)).

The Civil Code provides that “[e]very person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons” and punishes as actionable torts several acts for meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The Revised Penal Code makes a crime of the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. *Invasion of privacy is an offense in special laws like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act, and the Intellectual Property Code.*

*Id.* (emphasis supplied).

241. *Morfe*, 22 SCRA at 442 (citing *Public Utilities Commission v. Pollak*, 343 U.S. 451, 467 (1952) (J. Douglas, dissenting)).

242. *Morfe v. Mutuc*, 22 SCRA 424, 445 (1968) (citing Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. LAW REV. 219, 229 (1965)). The Court recognized the right to privacy independent of the right to liberty:

The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government, safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization,

Court likewise adopted Justice Louis D. Brandeis' view that it is "the most comprehensive of rights and the right most valued by civilized men."<sup>243</sup> Not only is the right comprehensive, the need to protect it grows as technology and development progress: "[p]rotection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it."<sup>244</sup>

Early this year, the Court reiterated the importance of privacy — specifically, financial privacy. Despite the multiplication of the exceptions to bank secrecy, the Court declared that bank secrecy, which falls within the legally-recognized zones of privacy, remains the general rule and that "the present legal order is obliged to conserve the absolutely confidential nature of bank deposits."<sup>245</sup> The Court likewise found there to be much disfavor to construction of the exceptions in a manner that authorizes unwarranted and unbridled inquiry into bank accounts.<sup>246</sup> In this regard, the Court stated that,

[I]n 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 [C]ongress lifts its finger to reverse the general state policy respecting the absolutely confidential nature of bank deposits.<sup>247</sup>

Despite such pronouncements by the Court, the actuations by both the Court and the Legislature indicate that the secrecy guaranteed by the law has steadily declined. While the general rule facially appears to be secrecy, the

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urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

*Id.*

243. *Id.* at 442 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (J. Brandeis, dissenting)).

244. *Id.* at 445 (citing Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. LAW. REV. 219, 229 (1965)).

245. *BSB Group, Inc. v. Go*, 612 SCRA 596, 610 (2010) (citing *Republic v. Eugenio, Jr.*, 545 SCRA 384, 414 (2008); Amending Republic Act No. 1405, Presidential Decree No. 1792 (1981) (repealed)).

246. *Id.*

247. *Id.* (citing 16B Am. Jur. 2d *Constitutional Law* § 605 (1998); *Republic v. Eugenio, Jr.*, 545 SCRA 384, 414 (2008)).

voluminous exceptions have, in substance, created a rule of exceptions. The fear of financial Orwellianism, thus, easily arises.

The fear, nevertheless, appears to be unfounded. The right to privacy, like most legal rights, is a qualified one.<sup>248</sup> Even the Court has recognized that the right to privacy is limited by overriding compelling state interests. Even *Morfe*, taking its cue from *Whalen v. Roe*,<sup>249</sup> allowed intrusion by applying the rational basis test: there is no infringement on the right to privacy if the requirement to disclose is for a valid purpose.<sup>250</sup> Not only do compelling interests exist for each exception to bank secrecy, the exceptions for the most part also involve persons who have or matters that entail a reduced expectation of privacy.<sup>251</sup> The Court declared that, “the right of the people to access information on matters of public concern prevails over the right to privacy of financial transactions.”<sup>252</sup>

Further, states match the rights accorded to individuals with corresponding obligations. The right to privacy is no exception. Such right is matched with two obligations: (a) the payment of taxes both in the jurisdiction where their economic activities are located and in the jurisdiction where they are recorded, and (b) the responsible use of structures and availment of privileges granted by jurisdictions that have a stake in their transactions.<sup>253</sup>

First, effective collection of taxes fosters a properly administered legal system that fairly and consistently enforces property rights and, consequently, permits the functioning of markets. It is, thus, incumbent on market participants that depend on a legal system for economic gain to contribute to its upkeep and comply with its laws in both letter and spirit. Such participants must adhere to the rule of law as equally applied to all of them.<sup>254</sup> To seek exemption from the law, while relying on others’

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248. *Financial Transparency*, *supra* note 13, at 2.

249. *Whalen v. Roe*, 429 U.S. 589 (1977).

250. *Sabio v. Gordon*, 504 SCRA 704, 738 (2006) (citing *Morfe v. Mutuc*, 22 SCRA 424, 445 (1968); *Whalen v. Roe*, 429 U.S. 589, 607 (1977); Reynato S. Puno, *Legislative Investigations and the Right to Privacy*, 32 INTEGRATED B. PHIL. J. 1, 60 (2005)).

251. *Id.* at 737 (citing *Burrows v. Superior Court of San Bernardino County*, 13 Cal.3d 238, 529 P.2d 590 (1974); *Katz v. U.S.*, 389 U.S. 347, 350-352 (1967); *People v. Krivda*, 5 Cal.3d 357, 364, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971); *Englund v. Chavez*, 8 Cal.3d 572, 623-624, 105 Cal. Rptr. 521, 504 P.2d 457 (1972); OSCAR B. HERRERA, A HANDBOOK ON ARREST, SEARCH AND SEIZURE 19 (2003 ed.)).

252. *Id.*

253. *Financial Transparency*, *supra* note 13, at 2.

254. *Id.* at 5.

adherence would run counter to the principle of equal treatment under the law.<sup>255</sup> Effective tax compliance, thus, requires compliance in both letter and spirit: tax compliance entails the payment of “the right amount of tax ... in the right place at the right time where ‘right’ means that the economic substance of the transactions undertaken coincides with the place and form in which they are reported for taxation purposes.”<sup>256</sup>

Second, the necessary and reasonable cost for benefits reaped from the use of structures and the availment of privileges within a jurisdiction is publicity or the right of others to know.<sup>257</sup> “[C]onversely, the price of non-disclosure should therefore be the cost of foregoing the enjoyment of the advantages of the privileges bestowed. If, say, a company refuses to disclose, then society should refuse to continue to grant it the legal privileges required for its continued operation.”<sup>258</sup> The right to privacy is not compromised as the obligation to disclose only arises upon enjoyment of such structures or privileges; such enjoyment, while provided by law, is optional, not compulsory. Such obligation safeguards other persons within the same jurisdiction from harm potentially arising from lack of access to information required to guard against abuse of such structures and privileges.<sup>259</sup>

The trend towards increasing financial transparency, therefore, does not infringe on the right to privacy. The right to privacy is not absolute and is limited by compelling state interests and the correlative obligations of tax compliance and the duty of disclosure upon use of the structures within and availment of the privileges offered by the legal system.

#### *B. Global Concerted Action towards Transparency: An Issue of Isolation*

There is a global movement towards enhanced financial transparency.<sup>260</sup> The global scope of the movement is owing to the inherent nature and effects of the shadow financial system, to which the movement is a response.

The problem of secrecy is borderless.

The illicit financial flows sought to be curbed do not move through locations, but through secrecy space.<sup>261</sup> Thus, “to locate these transactions in

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255. *Id.* See, e.g. PHIL. CONST. art. III, § 1 (the right to equal protection of the laws); PHIL. CONST. art. VI, § 28 (1) (“The rule of taxation shall be uniform and equitable.”).

256. *Financial Transparency*, *supra* note 13, at 5.

257. *Id.* at 3 (“artificial structures created by law, such as companies, partnerships, trusts, foundations, charities and other entities”).

258. *Id.*

259. *Id.* at 3 & 10.

260. *Id.* at 10.

261. *Defining the Secrecy World*, *supra* note 14, at 2.

a place is not only impossible in many cases, it is also futile: they are not intended to be and cannot be located in that way.”<sup>262</sup> Further, the problem of secrecy is not secrecy *per se* but the secrecy from other jurisdictions. No problem arises when a state chooses not to know of activities within its jurisdiction.<sup>263</sup> The problem arises, however, “when the regulation of one state is used to deny information to another state which considers it has the legal right to know.”<sup>264</sup> Measurement or regulation on a national basis will, therefore, always be problematic, if not impossible, especially as secrecy providers heavily influence regulation.<sup>265</sup>

Even the consequences of secrecy are borderless. The shadow financial system has wrought a global financial crisis — one that has equalized developed and developing countries.<sup>266</sup> Credit has dried up in developed countries (“[l]ending has nearly collapsed”) as this system prevents an accurate appraisal of “the quality of assets held by financial institutions” and the depths “of the global problem with subprime mortgages and other collateralized debt obligations, credit default swaps, derivatives contracts, and more.”<sup>267</sup> An estimated \$ 850 billion to \$ 1 trillion of funds illicitly generated through graft and corruption, crimes such as drug trading and racketeering, and commercial tax evasion (primarily through import and export mispricing) are permanently transferred each year from developing countries into developed countries, effectively “undermining poverty alleviation and delaying sustainable growth.”<sup>268</sup> As the scope of the predicament is global, so should the scope of the solution be global — the interests of developed and developing nations being identical.<sup>269</sup>

The movement for financial transparency is global precisely because it meets a problem which is and whose effects are global. The global-scale of this solution also lends to its effectiveness as jurisdictions reluctant to adopt a policy of financial transparency are coerced into doing so. While the choice of refusal exists, the consequence of this choice is financial isolation — a consequence any country can ill afford.

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262. *Id.*

263. *Id.* at 6.

264. *Id.*

265. *Id.* at 2 & 21.

266. TFFIED, *supra* note 11 at i.

267. *Id.* at i & 1.

268. *Id.* (graft and corruption constituting three percent; crimes such as drug trading and racketeering constituting 30%-35%; and commercial tax evasion constituting 60%-65%).

269. *Id.* at 2.

According to the Court, economic seclusion or isolation is not a policy that the Philippines subscribes to.<sup>270</sup> The fundamental law may be silent on the issue of globalization, but it “grow[s] with the society it seeks to re-structure and march[es] apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation.”<sup>271</sup> Thus, it took into account the economic realities of international cooperation as it mandated the state to “adopt[ ] the generally accepted principles of international law as part of the law of the land, and adhere[ ] to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations”<sup>272</sup> and to “pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.”<sup>273</sup> This recognizes that international economic cooperation fosters “domestic economic growth and prosperity.”<sup>274</sup> Despite any objections to cooperation, “[t]he alternative... is isolation, stagnation, if not economic self-destruction.”<sup>275</sup> Quoting Former U.S. President John F. Kennedy, the Court stated that, “[t]oday, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here.”<sup>276</sup> A state’s sovereignty cannot be absolute as the state coexists with other states and is limited by, among others, the “limitations imposed by the very nature of membership in the family of nations.”<sup>277</sup>

## VI. FINAL NOTE

Financial transparency finds critical and increasing relevance in today’s crisis-afflicted financial system. The legal veil of secrecy, concealing transactions from the jurisdictions wherein their consequences take effect, has fostered a virtual and secret space for the flow of illicit funds and the evasion of legal obligations. With the recent and persistent global financial crisis, more action has been directed towards global financial transparency. Secrecy laws, not least of which are bank secrecy laws, have merited reexamination.

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270. *Tañada v. Angara*, 272 SCRA 18, 59, 62, & 67 (1997) (This case involved membership of the Philippines in the World Trade Organization.).

271. *Id.* at 65.

272. *Id.* at 67 (citing PHIL. CONST. art. II, sec. 2).

273. *Id.* at 58 (citing PHIL. CONST. art. XII, sec. 13).

274. *Id.* at 28.

275. *Id.* at 82.

276. *Tañada v. Angara*, 272 SCRA 18, 67 (1997) (citing E.L. PARAS & EDGARDO PARAS, JR., *INTERNATIONAL LAW AND WORLD POLITICS* 178 (1994 ed.)).

277. *Id.* at 66-67.

The Philippines is no different. The Philippine bank secrecy law first legislated in 1955 has undergone considerable changes since its original enactment. While initially covering only four exceptions, the rule of bank secrecy has become a rule of exceptions — exceptions carved out by all three branches of government. These exceptions mirror the concerns raised in relation to the secrecy world, the priorities in the worldwide movement towards financial transparency, and the requisites of global financial transparency.

The unshrouding of financial secrets and the mandate for greater disclosure, however, unavoidably raises the issue of financial privacy. The fear of an Orwellian financial dystopia arises. This fear is quelled, however, when one considers that the right to privacy is not absolute and can be overridden by compelling state interests, such as those interests that prompted them to carve out the myriad exceptions to bank secrecy. This unveiling of secrets further finds justification in the general obligations of persons correlative to the rights they are accorded — the payment of taxes in both the jurisdiction where their economic activities are located and in the jurisdiction where they are recorded, as well as the responsible use of structures and availment of privileges granted by jurisdictions that have a stake in their transactions.

The issue of whether a state may refuse to effect financial transparency is also brought to the fore. Due to the inherently borderless nature of the problem and consequences of secrecy, 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.