

SHOW ME THE MONEY! UNEXPLAINED WEALTH AND CIVIL FORFEITURE IN MALAYSIA

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ABSTRACT

Unlike criminal forfeiture, civil forfeiture allows corrupt assets recovery without the necessity of proving the corruption act. In Malaysia, a combination of criminal and civil mechanisms for recovering corrupt assets is available. Civil forfeiture removes capital for future corrupt activity, deprives a person of enrichment due to the corruption, escalates the cost of perpetrating corruption and improves the probability of detection and imprisonment. Still, there are critiques against this technique globally. Using the doctrinal approach, this study analyses the application and sufficiency of Section 41 of the Malaysian Anti-Corruption Commission Act 2009 and Section 56 of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001 in recovering corrupt assets in Malaysia. The legal framework, its benefits and drawbacks are investigated. The study takes a comparative approach by looking at the practice in the United Kingdom for benchmarking and lessons to be learned. The study discovers constraints in the present civil forfeiture laws, which prevented the law enforcers from successfully meeting the burden of proof. Hence, reform suggestions for its enhancement are made via the unexplained wealth order (UWO) route. The UWO can potentially accelerate the process of recovering corrupt assets as it allows a court order requiring a person to provide details of the origin of specific assets. The assets could be recovered through the subsequent civil forfeiture proceedings. The study outcome may assist the government, policymakers and stakeholders in understanding the UWO concept in addressing corruption offences in Malaysia.

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DI MANA WANG ITU! – KEKAYAAN YANG TIDAK DIJELASKAN DAN PELUCUTHAKAN SIVIL DI MALAYSIA

ABSTRAK

Tidak seperti pelucuthakan jenayah, pelucuthakan sivil membenarkan penebusan semula aset hasil rasuah tanpa perlu membuktikan perbuatan rasuah. Di Malaysia, gabungan mekanisme jenayah dan sivil bagi memperolehi semula aset rasuah memang ada. Pelucuthakan sivil melenyapkan modal untuk aktiviti rasuah pada masa akan datang, menghilangkan kekayaan seseorang akibat rasuah, meningkatkan kos melakukan rasuah dan meningkatkan kebarangkalian pengesanan dan pemenjaraan. Namun terdapat kritikan terhadap kaedah ini di seluruh dunia. Dengan menggunakan pendekatan doktrin, kajian ini menganalisis pemakaian Seksyen 41 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Seksyen 56 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001, dengan tujuan meneliti sama ada akta-akta tersebut mencukupi untuk mendapatkan semula aset rasuah di Malaysia. Kerangka perundangan, faedah dan kelemahannya dikaji dengan teliti. Kajian ini mengambil pendekatan perbandingan dengan melihat amalan di United Kingdom sebagai penanda aras dan pengajaran yang perlu dipelajari. Melalui kajian ini didapati terdapat kekangan dalam undang-undang pelucuthakan sivil yang sedia ada, yang menghalang penguatkuasa undang-undang daripada memenuhi beban pembuktian. Oleh yang demikian, dicadangkan supaya dibuat pembaharuan untuk penambahbaikan, melalui perintah kekayaan dimiliki tidak sepadan dengan pendapatan (UWO). UWO berpotensi untuk mempercepatkan proses mendapatkan semula aset yang diperoleh secara rasuah kerana ia membenarkan Mahkamah membuat perintah menghendaki seseorang memberikan butiran asal usul aset tertentu. Aset tersebut boleh diperoleh semula melalui prosiding pelucuthakan sivil selepas UWO. Hasil kajian ini boleh membantu kerajaan, penggubal dasar dan pihak berkepentingan dalam memahami konsep UWO dalam menangani kesalahan rasuah di Malaysia.

Kata Kunci: Pelucuthakan Sivil, Rasuah, Pemerolehan Semula Aset, Perintah Memperolehi Semula Harta Secara Sivil, Perintah Kekayaan Yang Tidak Dapat Dijelaskan.

INTRODUCTION

Studies have associated corruption with depressed economic growth, lower investment rates, inflation, and currency depreciation.¹ Realising the adverse impact of corrupt activities, the internationally accepted target is that by 2030, illicit financial flows will be significantly reduced, the recovery and return of stolen assets will be strengthened, and all forms of organised crime will be combatted. This target is embedded in the Sustainable Development Goals 2030 (SDG) under Goal 16: Peace, Justice and Strong Institutions, where under Goal 16.5, the aim is to ‘substantially reduce corruption and bribery in all their forms’.²

The aim obliges States to work towards strengthening the legal instrument system,³ and one of the measures is to provide and strengthen the illicit gains recovery mechanism to deprive the corrupt of their criminal earnings and remove the financial incentive that drives the illegal and corrupt activities. While there is a consensus that wrongdoers must be denied their illicit gains and governments must recover corrupt assets, how these can be effectively conducted is the subject of ongoing debate.⁴

Forfeiture of assets following a criminal conviction has been the favoured enforcement mechanism to deprive a criminal of his ill-gotten

¹ Khairul Saidah Abas Azmi and Rozaimah Zainudin, "Money in politics: a recipe for corruption in Malaysia", *Journal of Financial Crime*, (2020); Ritwik Banerjee, Amadou Boly, and Robert Gillanders, "Is corruption distasteful or just another cost of doing business?", *Public Choice*, no. 0123456789 (2021).

² M Lohaus, "Asset recovery and illicit financial flows from a developmental perspective: Concepts, scope, and potential", (2019).

³ Agatino Camarda and Jackson Oldfield, "The Stolen Wealth Opportunities and challenges for civil society in asset recovery", Friedrich Ebert Stiftung International Policy Analysis, <<http://library.fes.de/pdf-files/iez/15285.pdf>> (accessed 26 February, 2021).

⁴ Ugochukwu Nwosu-Iheme, "A Critical Assessment Of The Efficacy Of The Nigerian Anti-Money Laundering Legal And Institutional Frameworks", (Durham theses, Durham University. Available at Durham, 2021); Ehi Eric Esoimeme, "Institutionalising the war against corruption: new approaches to assets tracing and recovery", *Journal of Financial Crime*, vol. 27, no. 1 (2020): 217–230.

gains. The civil recovery mechanism is increasingly considered an integral approach for combating severe crime and is viewed as complementary to criminal enforcement actions to retrieve corrupt assets.⁵ In some jurisdictions,⁶ civil forfeiture is buttressed by unexplained wealth law that seeks to require a person who appears to be living beyond his means, i.e., unsupported by his lawfully acquired wealth, to explain the source and justification for his financial well-being.

In Malaysia, civil forfeiture provisions via Section 41 of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) and Section 56 of the Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA) were enacted subsequent to Malaysia becoming a member to the United Nations Convention Against Corruption 2003 (UNCAC).⁷

The UNCAC proposes nations take into account measures allowing confiscation of property without a criminal conviction in circumstances where the offender cannot be prosecuted due to death, flight, or absence, or in other appropriate cases.⁸ Forfeiture laws aim to prevent criminals from fleeing with the proceeds of illegal activities where the forfeiture is hindered or halted by the financial system.⁹ With forfeiture, these corrupt individuals will be incapable of committing

⁵ Jennifer Hendry and Colin King, "Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids", *Criminal Law and Philosophy*, vol. 11 (2017): 733–757.

⁶ For example, Australia, Ireland, Colombo and Barbados, see Andrew Dornbierer, *Illicit Enrichment : A Guide To Laws Targeting Unexplained Wealth*, (Basel : Basel Institute on Governance, 2021).

⁷ Malaysia signed the UNCAC on 9 December 2003 and ratified it on 24 September 2008. UNCAC entered into force in Malaysia on 24 October 2008; Implementation Review Group United Nations, *UN Implementation Review Group, Vol. 83790, (Executive summary: Malaysia, 2013)*.

⁸ Mat Tromme, "Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law", *Duke Journal of Comparative & International Law*, vol. 29 (2019): 165–233.

⁹ Anusha Aurasu, "Anti-Money Laundering Law As A Legal Mechanism To Combat Corruption in Malaysia", (Doctor of Philosophy, Universiti Utara Malaysia (UUM), 2018).

further crimes.¹⁰ “Civil forfeiture” is court-ordered state appropriation of the profit or property, irrespective of whether or not charges or a conviction has been filed.¹¹ Given Malaysia’s commitment to eradicating corruption, this article examines Section 41 of the MACC Act and Section 56 of the AMLATFPUAA to examine their sufficiency in recovering corrupt assets in Malaysia.

Aurasu and Abdul Rahman¹² opined that civil forfeiture is more successful than the criminal method but Abdul Rahman also identified problems in the application and execution of the civil forfeiture approach.¹³ The study identifies the impediments to recouping proceeds of corruption utilising civil forfeiture within Malaysia’s legal framework and considers whether any improvement and enhancement can be suggested for Malaysia, juxtaposing the discussion on the United Kingdom’s (UK) legal framework using the Unexplained Wealth Order (UWO).

ASSET FORFEITURE BY WAY OF CIVIL AND CRIMINAL MECHANISMS

By the end of the 20th century, there was a universal consensus that asset recovery was the best tool for dealing with the enormous wealth accumulated by organised crime, money laundering, and corruption.¹⁴ Most ill-gotten gains are laundered to be utilised in the legitimate

¹⁰ Ibid.

¹¹ Ian Ko, "Tainted Assets, Dirty Money and the Civil Criminal Dichotomy : A Novel Approach to the Classification of Civil Forfeiture Proceedings under the Criminal Proceeds (Recovery) Act 2009", *Auckland UL Review*, vol. 21 (2015): 193.

¹² A. Aurasu and A. Abdul Rahman, "Forfeiture of criminal proceeds under anti-money laundering laws: A comparative analysis between Malaysia and United Kingdom (UK)", *Journal of Money Laundering Control*, vol. 21, no. 1 (2018): 104–111.

¹³ A. A. Rahman, "An analysis of the forfeiture regime under the anti-money laundering law", *Journal of Money Laundering Control*, vol. 25, no. 1 (2022): 50–62.

¹⁴ Florence Keen, *Occasional Paper Unexplained Wealth Orders Global Lessons for the UK Ahead of Implementation*, (Royal United Services Institute for Defence and Security Studies (RUSI), 2017).

economy.¹⁵ Encouraged by the phrase “crime should not pay”, jurisdictions around the world began to pursue criminal assets vigorously, reasoning that depriving organised crime groups of their financial gains reduces their ability to sustain a criminal enterprise and thus the incentive to commit a crime, and, consequently lessens crime as a whole.¹⁶

Asset forfeiture¹⁷ by way of civil and criminal mechanisms, removes criminal proceeds¹⁸ and illegally acquired property used as a front for criminals.¹⁹ According to the Financial Action Task Force (FATF) Recommendations 2019, “forfeiture” refers to the permanent deprivation of assets by court order or other competent authority. The persons or entities that hold an interest in the specified funds or other assets at the time of the confiscation lose all rights to the confiscated funds or other assets.²⁰ Confiscating assets is essential in the fight against corruption. It serves as a sanction for improper, dishonest, and corrupt behaviours and a deterrent as the incentive to commit

¹⁵ Ejike Ekwueme, "Dampening corruption and money laundering: emissions from soft laws", *Journal of Money Laundering Control*, vol. 24, no. 4 (2021): 848–859.

¹⁶ Keen, Occasional Paper Unexplained Wealth Orders Global Lessons for the UK Ahead of Implementation.

¹⁷ Forfeiture can be used interchangeably with confiscation; Jean-Pierre Brun, Anastasia Sotiropoulou, Larissa Gray, Clive Scott, and Kevin M. Stephenson, *Asset Recovery Handbook A Guide for Practitioners, Second Edition*, (2021).

¹⁸ Lena Chepkosgei, "Assessing the Effectiveness of Recovering Unexplained Wealth in Combating Corruption in the Public Sector: A Focused Comparison of Select Countries in Africa and Europe", (Degree of Master of Arts in International Conflict Management of the University of Nairobi, 2021).

¹⁹ Martin Collins and Colin King, "The disruption of crime in Scotland through non-conviction based asset forfeiture", *Journal of Money Laundering Control*, vol. 16, no. 4 (2013): 379–388.

²⁰ Brun, Sotiropoulou, Gray, Scott, and Stephenson, *Asset Recovery Handbook A Guide for Practitioners, Second Edition*; Emmanuel Senanu Mekpor, Anthony Aboagye, and Jonathan Welbeck, "The determinants of anti-money laundering compliance among the Financial Action Task Force (FATF) member states", *Journal of Financial Regulation and Compliance*, vol. 26, no. 3 (2018): 442–459.

corruption is eradicated.²¹ It cripples the wrongdoers as their assets and tools of misconduct are no longer capable of being used to perpetrate illegal activities.²²

The Islamic perspective on corruption is also well established, canvassing the prohibition and sinful nature of corruption and bribery,²³ based on both the Quran²⁴ and Hadith of the Prophet (PBUH).²⁵ Some scholars emphasised the religious and moral obligation to repent and to relinquish possession of the illicit assets voluntarily; failure to eliminate it would lead to the repentance being

²¹ Gerry Ferguson, "Chapter 5 Asset Recovery And Mutual Legal Assistance" in *Global Corruption: Law, Theory & Practice*, "Chapter 5 Asset Recovery And Mutual Legal Assistance" (University of Victoria, 2018), 386–533.

²² Ibid.

²³ Waled Younes E. Alazzabi, Hasri Mustafa, and Ahmed Razman Abdul Latiff, "Corruption and control from the perspective of Islam", *Journal of Financial Crime*, vol. 27, no. 2 (2020): 355–368.

²⁴ "And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully" (Quran, *Al-Baqarah* (2):188); Buerhan Saiti and Adam Abdullah, "The legal maxims of Islamic law (excluding five leading legal maxims) and their applications in Islamic finance", *Journal of King Abdulaziz University, Islamic Economics*, vol. 29, no. 2 (2016): 139–151.

²⁵ The Prophet employed a man from the tribe of Al-Azd named Ibn Al-Lutabiyyahh to collect the Zakah. When he returned (to the Prophet with the collections), he said: "This is for you while this (other wealth) is a gift presented to me. (So, I t is mine)." So, the Messenger of Allah stood on the pulpit, praised Allah, extolled Him and then he said, "Why does an official whom I send (in a mission) say: 'This is for you, and this has been presented to me as a gift'? Why did he not stay in the house of his father and mother to see whether gifts would be given to him or not? By (Allah) in Whose Hand is the life of Muhammad, if any one of you takes anything (wrongfully,) he will bring it on the Day of Resurrection, carrying it on his neck..." "Then he raised his hands till we could see the whiteness of his armpits and repeated twice, "O Allah! Have I conveyed (Your Commandments)?" (Sahih Muslim) Muhammad Fathi, "15 Anti-Corruption Hadiths. Lets Make Society Honest", About Islam, <<https://aboutislamver2.aboutislam.net/shariah/hadith/hadith-collections/15-anti-corruption-hadiths/2/>> (accessed 4 October, 2022).

nullified, and the person would not be absolved from sin.²⁶ As this is discussed from a personal religious and moral obligation lens, there is less focus on the forfeiture of illicit wealth via state-initiated or state-sanctioned dispossession of illegal assets.

Nonetheless, some scholars have also identified practices, historically, where the ruling power has confiscated any unlawful revenues or gratification obtained by those in authority or public office.²⁷ Early records showed that corrupt official “asset” expropriation was eventually institutionalised under the Abbasid caliph, Ja‘far al-Mansur, when a department was established for handling expropriation matters in cases of unwarranted enrichment. Reports also indicate that vast amounts of properties were retrieved. The Abbasid caliph, al-Qahir, is thus reported to have expropriated the properties of the mother of his predecessor al-Muqtadir, which raised the assets of *Baitul Mal* by a substantial amount.²⁸ Further, the responsibility to prevent and deter corruption and bribery is viewed as an obligation on Muslims, particularly for someone with authority.²⁹ The practice creates the impetus for state-sanctioned or initiated forfeiture.

²⁶ Badruddin Hj Ibrahim and Muhammad Laeba, "Treatment of wealth acquired by unlawful means: An Islamic perspective", *Al-Shajarah*, vol. 24, no. 2 (2019): 185–207.

²⁷ Mahmood Mohamed Sanusi, "Money laundering with particular reference to the banking deposit transactions", *Journal of Money Laundering Control*, vol. 11, no. 3 (2008): 251–260; Ömer Düzbakar, "Bribery in Islam-Ottoman Penal Codes and Examples From The Bursa Shari‘a Court Records of 18th century", *Bilig*, vol. 51, no. 51 (2009): 55–84.

²⁸ Mohammad Hashim Kamali, "Fighting Corruption: An Islamic Perspective", International Institute of Advanced Islamic Studies (IAIS) Malaysia, <<https://iais.org.my/publications-sp-1447159098/dirasat-sp-1862130118/shariah-law-governance-halal/item/1062-fighting-corruption-an-islamic-perspective>> (accessed 5 January, 2022).

²⁹ Dr Zulkifli Mohamad Al-Bakri, "#356: Mediator in Bribery", Maktabah al Bakri, <<https://maktabahalbakri.com/356-mediator-in-bribery/>> (accessed 4 October, 2022). Citing a Hadith narrated from Abu Sa‘id al-Khudri RA, where he said, "I heard the Prophet PBUH said: "Whosoever of you sees an evil, let him change it with his hand; and if he is not able to do so, then [let him change it] with his tongue; and if he is not able to do so, then with his heart — and that is the weakest of faith."

According to Pavlidis, the amount of corruption proceeds traced and confiscated is alarmingly low because several factors hamper asset recovery.³⁰ Among the factors include the sophistication of money laundering techniques, the complexity of judicial proceedings, a lack of resources, and a lack of political will in the country where these proceeds are generated.³¹ The regulator, specifically the MACC, has also mentioned that corruption enforcement is becoming increasingly complicated as typology and modus operandi have evolved.³²

The onus of proof in a civil asset forfeiture case is a civil burden of proof, which is a much lower standard than criminal forfeiture, which requires fulfilling the standard beyond a reasonable doubt.³³ In the United States, the UK, Ireland, Italy, and Colombia, it is referred to as proof of a “preponderance of the evidence”. It may also be referred to as proof of “a balance of probabilities”.³⁴ In civil forfeiture, the prosecution must prove on the balance of probabilities the property in question is the result of or in connection with criminal activity and that the property was derived or used to commit the crime.

Forfeiture laws deal with the ownership of property.³⁵ Civil forfeiture cases are filed *in rem* or against the property purchased with

³⁰ Georgios Pavlidis, "Global sanctions against corruption and asset recovery: a European approach", *Journal of Money Laundering Control*, no. December 2021 (2021): 1–12.

³¹ Ibid.

³² Noor Atiqah Sulaiman, "SPRM kesan rasuah dalam pembelian berkaitan COVID-19", *Berita Harian*, <<https://www.bharian.com.my/berita/nasional/2022/05/958870/sprm-kesan-rasuah-dalam-pembelian-berkaitan-covid-19>> (accessed 27 May, 2022).

³³ The term ‘beyond a reasonable doubt’ connotes that evidence establishes a particular point to a moral certainty and that it is beyond dispute that any reasonable alternative is possible; See Yakov Ben-Haim, "Assessing beyond a reasonable doubt' without probability: An info-gap perspective", *Law, Probability and Risk*, vol. 18, no. 1 (2019): 77–95.

³⁴ Shalini O. Soopramanien, "Explaining the unexplained wealth orders: (Mauritius) Good Governance and Integrity Reporting Act", *Statute Law Review*, vol. 39, no. 1 (2018): 46–62.

³⁵ Caleb Nelson, "The constitutionality of civil forfeiture", *Yale Law Journal*, vol. 125, no. 8 (2016): 2446–2518.

illegal funds.³⁶ In *in rem* forfeiture, the property is forfeited because of its relation to the crime.³⁷ They do not represent a punishment against a person for an offence, as they intend to compensate the government for lost revenue.³⁸ Criminal forfeiture, on the other hand, involves an order in *personam* or “against a person”.³⁹ Instead of imposing a criminal penalty, civil forfeiture serves preventive, reparative and deterrent functions.⁴⁰

There are, nevertheless, criticisms of civil forfeiture. Despite its growing support internationally, there are concerns about its potential abuse.⁴¹ It is said to infringe on property rights. In addition, the negative impacts on the respondent might range from financial loss to the stigma of being linked with a crime since a person whose assets are seized may be perceived as “convicted” in the public’s eyes.⁴² Forfeiture powers must be tuned to strike a fair balance between the public interest in crime prevention and private interests such as property rights.⁴³

³⁶ A. Aurasu and A. A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience", *Journal of Money Laundering Control*, vol. 19, no. 4 (2016): 337–345.

³⁷ David W. Banta, "Where, Oh Where Has My Property Gone?: The Case For Revising Iowa’s Recently Reformed Asset Forfeiture Law", *Iowa Law Review*, vol. 107, no. 2 (2022): 787–815.

³⁸ Booz, Allen, and Hamilton, *Comparative Evaluation of Unexplained Wealth Orders Prepared For The U.S. Department of Justice National Institute of Justice*, (2011).

³⁹ Stefan D. Cassella, "The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime", *Journal of Money Laundering Control*, vol. 11, no. 1 (2008): 8–14.

⁴⁰ Collins and King, The disruption of crime in Scotland through non-conviction based asset forfeiture.

⁴¹ S. Williams, M.R., Holcomb, J.E., Kovandzic, T.V., Bullock, *Policing for Profit The Abuse of Civil Asset Forfeiture*, (Institute for Justice, 2010).

⁴² Tromme, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law*.

⁴³ Rhimes Michael, "Forfeiting proceeds: Civil forfeiture, the right to property and the Constitution", *South African Law Journal*, vol. 138, no. 2 (2021): 325–368.

It is also subject to political will.⁴⁴ Studies have shown a 'modest' success when it comes to freezing or returning stolen assets.⁴⁵ Further, forfeiture is only permitted over property obtained via illicit means, as the court cannot order the forfeiture of more property or funds to replace a lost asset.⁴⁶

RESEARCH METHODOLOGY

The study employs doctrinal analysis from authoritative sources such as existing rules, principles, precedents, and academic works.⁴⁷ The study's framework includes a legal evaluation of primary sources of law, comprising legislation, pertinent cases, rules, and legal principles. Secondary legal sources such as books, theses, journal articles, law reports, news reports, and credible websites are reviewed when necessary. Additionally, online databases like Web of Science (WoS), Scopus, Lexis Nexis, and HeinOnline are reviewed.

In the study, data analysis is carried out by using a comparative method. Comparing the similarities and dissimilarities between the laws of different nations is the crux of comparative law.⁴⁸ The study uses this method to gain insight and knowledge from the practice in the UK, which introduces the UWO as a precursor to civil forfeiture, known as a Civil Recovery Order (CRO) and produces a suggestion for Malaysia to consider adopting the same. The comparative approach is undertaken by explaining the data using the thematic analysis technique and the paper's keywords. The findings demonstrate the comparative approach of Malaysia and the UK's legal positions in enforcing the civil forfeiture provisions to recover corrupt assets.

⁴⁴ Tromme, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law.*

⁴⁵ Jackie Harvey, "Tracking the International Proceeds of Corruption and the Challenges of National Boundaries and National Agencies: the UK example", *Public Money and Management*, vol. 40, no. 5 (2020): 360–368.,

⁴⁶ Saba Hailu Gebremeskel, "A Case for Civil Forfeiture in Ethiopia", (LLM, The University of the Western Cape, 2014).

⁴⁷ Rob VanGestel and Hans-W Micklitz, "Revitalizing Doctrinal Legal Research in Europe: What About Methodology?", (2011).

⁴⁸ E. J. Eberle, "The Methodology of Comparative Law", *Roger Williams University Law Review*, vol. 16(1) (2011): 51–72.

LEGAL FRAMEWORK ON CIVIL FORFEITURE IN THE UK AND MALAYSIA

United Kingdom

In the UK, the CRO is governed under Part 5 Proceeds of Crime Act 2002 (Part 5 POCA). It allows the proceeds of crime recovery to be returned to the government or the victims.⁴⁹ Part 5 POCA enables the Serious Organised Crime Agency (SOCA) to recover, in civil proceedings, obtained through unlawful conduct (recoverable property) (Section 240). If there is or has been a link between the facts of the case and any part of the UK, the High Court may issue an order against any person or property, wherever they are domiciled or located.⁵⁰ Part 5 on POCA's objective can be understood as the state's reaction to the necessity to recover the proceeds of criminal activity from those who attempt to profit from it.⁵¹ In most cases, proceedings begin with a request for a property freezing order (FO).⁵² Subsequent demand for a CRO identifies the specific property and the circumstances for which it is deemed recoverable.⁵³

The POCA Guidance 2018 acknowledges that CROs can make an essential contribution to the reduction of crime when: (i) it is not feasible to secure a conviction, (ii) a conviction is obtained, but a confiscation order is not made, (iii) readily identifiable assets (including cash) can be seized and forfeited effectively, or (iv) the public interest will be better served by using those powers rather than

⁴⁹ Anastasia Suhartati Lukito, "Revealing the unexplained wealth in Indonesian corporation", *Journal of Financial Crime*, vol. 27 (2020).

⁵⁰ Anupreet Amole, Aisling O'Sullivan Francesca Cassidy-Taylor, and Brown Rudnick LLP, "The Practitioner's Guide to Global Investigations - Sixth Edition", Global Investigations Review, <<https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2022/article/extraterritoriality-the-uk-perspective>> (accessed 31 May, 2022).

⁵¹ *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6.

⁵² Ward Alan, Harriet Campbell, Justin McClelland, Ros Prince, and Stephenson Harwood LLP, "Snapshot: asset confiscation in United Kingdom", Lexology, <<https://www.lexology.com/library/detail.aspx?g=2bddb59f-aaf8-4921-98c5-63eb77e59151>> (accessed 7 October, 2022).

⁵³ *Ibid.*

by seeking a confiscation order (irrespective of there also being a connected criminal investigation/proceedings). In *Gale v. SOCA*⁵⁴ and *Director of Asset Recovery Agency (ARA) v. Walsh*,⁵⁵ the Court upheld Part 5 POCA as civil proceedings to recover proceeds of crime.⁵⁶

Malaysia

In Malaysia, the civil forfeiture law was introduced in 2015 via an amendment to the AMLATFPUAA under Section 56.⁵⁷ The AMLATFPUAA 2001 codified the FATF recommendations. According to the FATF Mutual Evaluation Report on Malaysia Anti-Money Laundering and Counter-Terrorist Financing Measures in 2015, Malaysia makes good use of non-conviction-based forfeiture provisions. They are beneficial when a suspect has absconded, cannot be found, or has died. Civil forfeiture provision also exists in Section 41 of the MACC Act. The High Court in *Ng Boon Ann v Public Prosecutor*⁵⁸ highlighted that Section 41 of the MACC Act and Section 56 of the AMLATFPUAA are not similar as normally there is a predicate offence preferred together with the money laundering charge or charges under Section 56 of the AMLATFPUAA. Nevertheless, a money laundering charge can still be a stand-alone, as provided in Section 4 of the AMLATFPUAA. The nature of civil forfeiture is quasi-criminal.⁵⁹ Due to the fact that the evidence in forfeiture proceedings involves affidavit evidence, specific rules applicable to civil proceedings insofar as the affidavit is concerned may be adopted with modifications.⁶⁰

⁵⁴ [2011] UKSC 49.

⁵⁵ [2004] NIQB 21.

⁵⁶ Hendry and King, Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids.

⁵⁷ Aurasu, A. and A. Rahman, Money laundering and civil forfeiture regime: Malaysian experience.

⁵⁸ [2020] MLJU 293.

⁵⁹ *Public Prosecutor v Barisan Nasional Bahagian Johor Bahru & Ors* [2020] MLJU 1111.

⁶⁰ *Sangker Sokinggam v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 7 CLJ 247.

COMPARISON OF BENEFITS AND DRAWBACKS OF MALAYSIA AND UK LEGAL FRAMEWORK

The advantages and disadvantages of employing civil forfeiture to recover proceeds of corruption in Malaysia and the UK are given below:

Benefits

(i) *Sufficiency of evidence based on the balance of probabilities*

In Malaysia and the UK, civil forfeiture requires a lower standard of proof than what is needed in criminal prosecution. The Court must be convinced that the assets are the proceeds from unlawful activities on the balance of probabilities. Although Section 41 of the MACC Act is silent on the standard of proof, judicial decisions have favoured the “balance of probabilities”.⁶¹ The cases of *Pendakwa Raya v Habib Jewels Sdn Bhd*⁶² and *Noor Ismahanum Mohd Ismail v Public Prosecutor*⁶³ highlighted that the standard of proof is on the balance of probabilities under Section 56 of the AMLATFPUAA. The Federal Court in *PP v Kuala Dimensi Sdn Bhd & 8 Ors*⁶⁴ stated the standard of proving on a balance of probabilities was a flexible test. The Court must be satisfied with the evidence, that the event’s occurrence was more likely than not.

Similarly in the UK, the assets to be confiscated must be proven on a balance of probabilities. The Court must decide whether it is established; (i) that any matters alleged to constitute unlawful conduct have occurred or (ii) that any person intended to use any property in unlawful conduct.⁶⁵ Where the High Court is satisfied on the balance of probabilities that property constitutes the proceeds of crime, it must make a CRO in respect of that asset.⁶⁶

⁶¹ *Mohd Arif bin Ab Rahman v Pendakwa Raya* [2020] MLJU 1115.

⁶² [2020] 12 MLJ 757.

⁶³ [2019] 2 MLJ 536.

⁶⁴ [2021] MLJU 14.

⁶⁵ Section 241(3) UK Proceeds of Crime Act 2002.

⁶⁶ Section 266 UK Proceeds of Crime Act 2002.

(ii) *Constitutionality and Human Rights*

Malaysian Courts have ruled that civil forfeiture of property is lawful, not unconstitutional⁶⁷ and does not violate the Federal Constitution.⁶⁸ The Court in *Public Prosecutor v UMNO Bahagian Pekan & Ors*⁶⁹ highlighted forfeiture proceedings affect property rights preserved under Article 13 of the Federal Constitution, which allows property deprivation saved under the law. Where the prosecution seeks to forfeit specific properties and thereby deprive a person of that guaranteed right, the forfeiture provisions must be stringently observed.⁷⁰ The strict forfeiture regime is critical to ensure the legality of the law enforcement conduct and to counter unfair practices.

In the UK, the Home Office carefully considered and incorporated human rights safeguards in POCA. The aim is to ensure consistency with the European Court of Human Rights (ECHR) standards and strike the right balance between the rights of the individual to enjoy the property and the right of society to reclaim illegally gained assets.⁷¹ The ECHR has repeatedly ruled that non-conviction-based confiscation mechanisms are consistent with human rights.⁷² In *Gogitidze v. Georgia*⁷³, the ECHR held (para. 126) that the property forfeiture under civil proceedings *in rem* without a determination of a criminal charge is not of a punitive but of a preventive and/or compensatory nature.⁷⁴

⁶⁷ *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* (2021] 2 MLJ 469; *Public Prosecutor v Thong Kian Oon and Ors* (2012) 10 MLJ 140.

⁶⁸ *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29.

⁶⁹ [2020] MLJU 2045 2.

⁷⁰ *PP v Thong Kian Oon* [2012] MLJU 637.

⁷¹ Booz, Allen, and Hamilton, Comparative Evaluation of Unexplained Wealth Orders Prepared For The U.S. Department of Justice National Institute of Justice.

⁷² Oscar Solorzano, *Navigating between non-conviction based confiscation and Mutual Legal Assistance (MLA)*, (2020).

⁷³ no. 36862/05, 12 May, 2015.

⁷⁴ Brun, Sotiropoulou, Gray, Scott, and Stephenson, *Asset Recovery Handbook A Guide for Practitioners*, Second Edition.

Drawbacks

(i) *Insufficient credible evidence to meet the standard of proof of balance of probabilities*

The civil standard of proof, the balance of probabilities, is “a standard which takes into account the nature and gravity of the issue to be investigated and decided”.⁷⁵ In *Pendakwa Raya v Habib Jewels Sdn Bhd*,⁷⁶ the prosecution failed to discharge the burden of proving on the balance of probabilities that the monies to be forfeited under Section 56 of the AMLATFPUAA are proceeds of unlawful activity or the subject matter or evidence relating to a predicate offence. The nexus between the proceeds attributed to the respondent from the predicate offence and the monies sought to be forfeited was not established. As forfeiture imposes a severe and harsh penalty on the respondents, sometimes even on innocent respondents, proper proof of the relevant facts utilising admissible evidence must be produced in determining whether there were satisfying grounds to justify forfeiture.⁷⁷

The Court found that the prosecution had also failed to establish on the balance of probabilities that the properties seized from the respondents were the subject matter of or were used in the commission of an offence under subsection 4(1) of the AMLATFPUAA in *Public Prosecutor v Mohd Bakri bin Samsu & Anor*.⁷⁸ The prosecution in that case merely tendered the exhibits, attached with affidavits, as evidence of overpayments without connecting relevant documents and items to show the overpayments and how the overpayments came about.

The prosecution was also unsuccessful in *PP v Kuala Dimensi Sdn Bhd (KDSB)*⁷⁹ as there was a failure to specify the nature and extent of the respondents' participation in the money laundering offence pursuant to Section 56 of the AMLATFPUAA. Proper proof of relevant facts supported by admissible evidence is required under Section 56 of

⁷⁵ Colin King, "Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction-Based Asset Forfeiture", *The International Journal of Evidence & Proof*, vol. 16, no. 4 (2012): 337–363.

⁷⁶ [2020] 12 MLJ 757.

⁷⁷ *Ngeranter Ripai v PP* [1990] 2 CLJ Rep 530.

⁷⁸ [2015] MLJU 1849.

⁷⁹ [2018] 6 MLJ 37.

the AMLATFPUAA⁸⁰ to enable the Court to arrive at a correct decision. The High Court in *Mohd Arif bin Ab Rahman v Pendakwa Raya*⁸¹ allowed the appellant's appeal as the prosecution's documentary evidence is insufficient under Section 41 of the MACC Act. No documentary evidence shows the nexus between the allegation of corruption and the money in question. The prosecution failed to detect or trail the movement of the money and merely relied on the witness statements.

In the UK, the judges will also, at least, demand what is often described as "cogent evidence" before being willing to declare themselves satisfied that it is more probable than not that a piece of the property represents the proceeds of unlawful activity or conduct. The leading UK case on the point is *R (on the application of the Director of ARA) v Jia Jin He and Dan Dan Chen*.⁸²

In *Director of ARA v Jeffrey David Green*,⁸³ the Court ruled that in civil proceedings for a CRO, it was necessary to set out the matters that were alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property had been obtained. A claim for CRO could not be sustained merely upon the foundation that a defendant had no identifiable lawful income to deserve the lifestyle and purchases of that defendant. The Court ruled that the purpose of the POCA had been to strike a fair balance between the interests of the state and society in general against the individual's civil rights.

(ii) Bona fide third-party rights to property

Section 41 of the MACC Act and Section 56 of the AMLATFPUAA recognise the third party's interest in the property seized. The Court would require any bona fide third party to prove their claims against the assets and also to show cause why the assets should not be forfeited.⁸⁴ The forfeiture application will fail if the third party's rights

⁸⁰ *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140.

⁸¹ [2020] MLJU 1115.

⁸² (2004) EWHC Admin 3021; Project On Criminal Assets Recovery In Serbia, *Impact study on civil forfeiture*, Vol. 3, (Council of Europe, 2013).

⁸³ [2005] EWHC Admin 3168; Ibid.

⁸⁴ Zaiton Hamin, Normawati Hashim, and Muhammad Muaz Abdul Hakim, "The ramifications of forfeiting property in money laundering cases:

are upheld. Hamin highlighted that the non-conviction-based system in Malaysia raises a few implications for law enforcement, the property owner and the innocent third party.⁸⁵ Firstly, civil forfeiture makes the property the subject matter in the case. Unless the law provides otherwise, the innocence of the owner is irrelevant. Secondly, it is difficult for the property owners to prove that they acted in good faith *vis-à-vis* the property. Thirdly, the standard of proof in civil forfeiture, which is on the balance of probabilities, does not seem to favour the property owners.

All the requirements of Section 61 of the AMLATFPUAA must be fulfilled⁸⁶ to ensure that the claims by bona fide third parties are not prejudiced.⁸⁷ The Court in *PP v Lau Kwai Thong*⁸⁸ stressed all the five strict requirements under Section 61(4) of the AMLATFPUAA will cause the failure of the third parties to claim their interests over the property even when they had acted in good faith.⁸⁹ Subsection 61(4) (a) until (e) of the AMLATFPUAA have to be fulfilled conjunctively, which means that bona fide third parties have to fulfil all requirements therein on the balance of probabilities.⁹⁰ Although the AMLATFPUAA allows the bona fide third parties to contest the forfeiture order, such rights are difficult to enforce.⁹¹

Some evidence from Malaysia", *Pertanika Journal of Social Sciences and Humanities*, vol. 25, no. S (2017): 71–80.

⁸⁵ Zaiton Hamin, Normah Omar, and Muhammad Muaz Abdul Hakim, "When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing in Malaysia", vol. 31, no. 15 (2015): 789–796.

⁸⁶ A. Aurasu and A. Abdul Rahman, "Money laundering and civil forfeiture regime: Malaysian experience", *Journal of Money Laundering Control*, vol. 19, no. 4 (2016): 337–345.

⁸⁷ Hamin, Hashim, and Abdul Hakim, The ramifications of forfeiting property in money laundering cases: Some evidence from Malaysia.

⁸⁸ [2012] MLJU 1515.

⁸⁹ Hamin, Hashim, and Abdul Hakim, The ramifications of forfeiting property in money laundering cases: Some evidence from Malaysia.

⁹⁰ *PP v Raja Noor Asma Raja Harun* [2013] 5 CLJ 656.

⁹¹ Aspalella A. Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and their Impact on Banking Institutions", (Doctor of Philosophy of The University of Western Australia, 2008).

In the UK's CRO, the Court is specifically directed to regard the rights of the appellant and innocent third parties.⁹² In *Crown Prosecution Service v Aquila Advisory Ltd*,⁹³ the Court stated the overarching principle of Part 5 POCA is that it does not interfere with existing third-party property rights. Under Section 281 POCA, a person who claims that any property alleged to be recoverable property belongs to him may apply for a declaration to that effect. The Court in *Sanam (formerly Kalsoom Amir) v National Crime Agency (NCA) (formerly the SOCA)*⁹⁴ recognised that a third party may have a defence under Sections 266(3)(a) and 266(4) POCA 2002 if he obtained the recoverable property in good faith and without notice.⁹⁵ In the Scottish case *Her Majesty's Advocate Prosecutor v Thomas Fowler Burns Accused*,⁹⁶ the Court stated that the gift recipient could exclude property from the scope of recovery based on proof of the factors identified in Section 6 of the Proceeds of Crime (Scotland) Act 1995.

(iii) Tracking the assets and access to information

In Malaysia, limited access to information is the major impediment to conducting an effective money laundering inquiry.⁹⁷ The difficulty arises in identifying money laundering and tracking its money trail due to the complexity of money laundering operations and demonstrating the connection between the unlawful proceeds and the criminal offence. Technology innovation and globalisation have made it easier

⁹² *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6.

⁹³ [2022] 2 All ER 864.

⁹⁴ [2015] EWCA Civ 1234.

⁹⁵ Practical Law Business Crime and Investigations, "Article 1 Protocol 1 applies to determination of a civil recovery order (Court of Appeal, Civil Division)", Thomson Reuters Practical Law, <<https://content.next.westlaw.com/practical-law/document/1f442e9b7996111e598dc8b09b4f043e0/Legal-update-Article-1-Protocol-1-applies-to-determination-of-a-civil-recovery-order-Court-of-Appeal-Civil-Division?viewType=FullText&originationContext=document&tra>> (accessed 8 October, 2022).

⁹⁶ 2001 JC 1, 2000 SCCR 884.

⁹⁷ S. Zolkafli, N. Omar, and S. N. F. S. M. Nazri, "Implementation evaluation: a future direction in money laundering investigation", *Journal of Money Laundering Control*, vol. 22, no. 2 (2019): 318–326.

for money launderers to stay undetected and untraceable. More advanced investigative techniques may be needed to deter crime.⁹⁸

The CRO in the UK never really achieved the scale that was intended.⁹⁹ The difficulty in acquiring evidence impedes the proper implementation of the CRO because there is little information accessible regarding an individual's wealth source.

(iv) Difficulty in evidence-gathering for cross-border illicit assets

Where money laundering or corruption involves international transactions, one difficulty is meeting the legal requirement in those other countries regarding what conduct amounts to an offence.¹⁰⁰ Ineffective co-operation among countries to track, freeze and confiscate assets is also a concern. Successful tracing and recovery attempts frequently require co-operation from other countries. This process can be slowed down and made more difficult by variances in legal traditions, rules and procedures, languages, time zones, and capabilities.¹⁰¹ The complexity of corrupt finances does not respect boundaries, and the diversity of flows and exchangeability of money allow the proceeds of corruption to blend in with other legal payments.¹⁰²

⁹⁸ Gavin Stevenson, "The Policy Diffusion of Civil Asset Forfeiture in Canada", (2022).

⁹⁹ Cullen Commission, *Cullen Commission Proceedings at Hearings of December 15, 2020*, (2020).

¹⁰⁰ Aurasu, A. and Abdul Rahman, Forfeiture of criminal proceeds under anti-money laundering laws: A comparative analysis between Malaysia and United Kingdom (UK).

¹⁰¹ Brun, Sotiropoulou, Gray, Scott, and Stephenson, *Asset Recovery Handbook A Guide for Practitioners*, Second Edition.

¹⁰² Harvey, *Tracking the International Proceeds of Corruption and the Challenges of National Boundaries and National Agencies: the UK example*.

(v) *Transnational nature of the offence and Mutual Legal Assistance*

In Malaysia, although The Mutual Assistance in Criminal Matters Act 2002 (MACMA) exists, in certain circumstances, assistance may not be given through the MACMA. Among the factors include failure to comply with the terms of a treaty, offence relating to politics, discrimination as to a person's age, sex, religion, ethnic origin, or nationality, and if the investigation can be conducted via other approaches.¹⁰³

In the UK, enforcement authorities have noted the particular complexities in obtaining evidence from overseas, and delays, bureaucracy and lacks of co-operation often frustrate the functioning of mutual legal assistance and less formal police agency co-operation processes.¹⁰⁴ Even if a jurisdiction wants to assist, they may be constrained in what they can do or supply by domestic legal frameworks, as organised crime and large-scale corruption are worldwide. Securing international collaboration to gather evidence may be challenging and time-consuming.

(vi) *Grand corruption*

In instances involving grand corruption, any corruption laws would be rendered ineffective and could even be subverted. Politicians and senior officials who hold immense influence and authority and have access to significant amounts of money are susceptible to grand corruption.¹⁰⁵ The Malaysian 1MDB case is an illustration of grand corruption. The stolen money was laundered through a complex web of opaque transactions and shell companies with bank accounts in several jurisdictions.¹⁰⁶

¹⁰³ Aurasu, Anusha, Anti-Money Laundering Law As A Legal Mechanism To Combat Corruption in Malaysia.

¹⁰⁴ Áine Clancy, "A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption", *Criminal Law Forum*, no. March (2022).

¹⁰⁵ Noore Alam Siddiquee and Habib Zafarullah, "Absolute Power, Absolute Venality: The Politics of Corruption and Anti-corruption in Malaysia", *Public Integrity*, vol. 24, no. 1 (2022): 1–17.

¹⁰⁶ Ibid.

In the UK, grand corruption is tracked only in respect of assets owned by individuals or those connected to individuals, either against whom parallel criminal proceedings have been instituted and/or concluded in the affected States.¹⁰⁷ Insufficient recovery can also occur in grand corruption settlement scenarios, which raise problems about whether enforcement authorities should have jurisdiction to offer asset holders concessions in return for co-operation.¹⁰⁸

THE UK'S UNEXPLAINED WEALTH ORDER (UWO)

(i) Scope

The UWO was introduced in 2017 into Part 8 POCA through the Criminal Finances Act 2017 (CFA) as a new investigative tool to combat organised crime and other forms of criminality.¹⁰⁹ The UWO is implemented mainly in the UK to combat “grand corruption” and its proceeds. The UWO is akin to a preliminary disclosure order in that it can be used to compel someone to reveal information under specified conditions.¹¹⁰ This information may then help authorities decide whether to pursue a separate civil recovery process.¹¹¹

(ii) Rationale

Individuals involved in grand corruption overseas or serious crime may seek to launder their crime proceeds in the UK. Law enforcement agencies may not have sufficient evidence to take action against those assets, particularly if they need proof from overseas,¹¹² although they have reasonable grounds to suspect that a particular asset was obtained

¹⁰⁷ Clancy, A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption.

¹⁰⁸ Ibid.

¹⁰⁹ The Honourable Austin F. Cullen, *Commission of Inquiry into Money Laundering in British Columbia Final Report*, (2022).

¹¹⁰ Andrew Dornbierer and Jeffrey Simser, *Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia Working Paper 41*, Basel Institute on Governance, (2022).

¹¹¹ Ibid.

¹¹² GOV.UK, "Impact Assessment (IA) Unexplained Wealth", (2016): 1–10.

or derived from the commission of a criminal offence.¹¹³ According to the Explanatory Notes to the CFA, paras 12-13, UWOs aim to facilitate illegal assets recovery when authorities cannot employ conventional freezing or recovery methods due to insufficient evidence.¹¹⁴

(iii) Legal Framework

The UWO provisions are in Part 8 of Sections 362A to 362H POCA (England & Wales) and Sections 396A to 396U (Scotland). The UWO requires an individual to explain the nature and extent of his interest in the property and how they obtained that property.¹¹⁵ The Code of Practice¹¹⁶ highlights the UWO is specifically designed to support the building of a case for Part 5 POCA but can also be used for other reasons, both criminal and civil, provided there is a legal basis for using such information. However, although this is not a strict necessity, the applicant may utilise alternate investigational techniques to gather all pertinent information.¹¹⁷

The High Court will have to be satisfied on reasonable grounds that the respondent's lawfully obtained income would have been insufficient to acquire the property.¹¹⁸ The authorities can act if the individual or company has links to serious crime or access to public money. If a person fails to "comply" or "purport to comply" with the initial order to give information, a rebuttable presumption will be

¹¹³ The Honourable Austin F. Cullen, Commission of Inquiry into Money Laundering in British Columbia Final Report.

¹¹⁴ Dr Marnie Lovejoy, "Unexplained Wealth Orders and the Right Not To Self-Incriminate" in *Analysing Organised Crime, Financial Crime and Criminal Justice: Theoretical Concepts and Challenges Vol. 11*, "Unexplained Wealth Orders and the Right Not To Self-Incriminate" (2021).

¹¹⁵ S.Yakubu, "A Critical Appraisal of the Law and Practice Relating To Money Laundering in the USA and UK", (PhD Degree in Law, University of London, 2017).

¹¹⁶ UK Attorney Generals Office, *Code Of Practice Issued Under Section 377A Of The Proceeds Of Crime Act 2002 Investigative Powers Of Prosecutors*, (2021).

¹¹⁷ Ibid.

¹¹⁸ Cullen Commission, Cullen Commission Proceedings at Hearings of December 15, 2020.

created that the relevant assets are criminally tainted. This presumption may be utilised in the later CRO process.¹¹⁹

If the individual complies, or purports to comply, and the property in issue is subject to an interim FO along with the UWO, the agency that requested the order has a maximum of 186 days to determine whether to pursue additional actions before the FO is removed. If there is no such FO in effect, the decision-making period is not constrained.¹²⁰

The enforcement agencies could try and recover the property through the existing CRO if the individual cannot respond to the UWO furnished to him.¹²¹ Section 362 POCA lists requirements to be met before the High Court makes the order. There is reasonable cause to believe that the respondent holds the property. The property value is more than £50,000. There are also reasonable grounds to suspect the respondent's lawfully obtained income is insufficient to acquire the property.

The UWO applies to a foreign politically exposed person (PEP) who holds prominent public functions outside the UK or the European Economic Area (EEA), suspects of serious crimes and persons connected to them. The UWO can be issued against individuals and other entities that hold property, such as companies and trusts.¹²² If the order is issued, the respondent must respond within the specified time frame.¹²³ If the recipient of a UWO fails to respond without "reasonable excuse", the property is presumed to be "recoverable property" for any CRO sought.¹²⁴ A claim can be made to the Court to confiscate the

¹¹⁹ Dornbierer and Simser, Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia Working Paper 41, Basel Institute on Governance.

¹²⁰ Ibid.

¹²¹ Esoimeme, Institutionalising the war against corruption: new approaches to assets tracing and recovery.

¹²² Lukito, Revealing the unexplained wealth in Indonesian corporation.

¹²³ Proceeds of Crime Act 2002", <<https://www.legislation.gov.uk/ukpga/2002/29/section/362C>> (accessed 6 August, 2021).

¹²⁴ Clancy, A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption; Ali Shalchi, *Unexplained Wealth Orders, Briefing Paper Number CBP 9098*, (House of Commons Library UK, 2021).

property because it constitutes the crime proceeds. The Court will presume that the property is the proceeds of unlawful conduct and make an order that it be confiscated unless the respondent can satisfy the Court that it is not on the balance of probabilities.¹²⁵ A false, misleading, reckless statement amounts to an offence under Section 362E POCA. The interim FO can be simultaneously applied with the UWO, prohibiting the respondent from dealing with them.¹²⁶

(iv) Case Law

From its inception until 2022, UWOs have been granted in four cases involving assets worth a total of £143 million.¹²⁷ The first case concerned a PEP. In *NCA v Hajiyevea*,¹²⁸ the UWO required the respondent to explain how she purchased her luxury home in London.¹²⁹ The UWOs were then successfully obtained against eight properties owned by Mansoor Mahmood Hussain in 2019, suspected of being involved in serious crime in connection with the activities of violent gangs in Leeds.¹³⁰ The UWOs compelled him to explain the legitimate sources of his wealth. The NCA failed in *NCA v Baker and others*.¹³¹ The Court held that the use of complex offshore corporate structures or trusts was not grounds for believing that they had been set up or used for unlawful purposes. There had to be some other evidential basis for such a belief. On 7 June 2023, the NCA obtained the UWO against Yaqub Younis of Birmingham and his company, Regal Capital

¹²⁵Shalchi, Unexplained Wealth Orders, Briefing Paper Number CBP 9098.

¹²⁶*Ibid.*

¹²⁷GOV.UK, "Fact sheet: unexplained wealth order reforms (web accessible)", GOV.UK, <<https://www.gov.uk/government/publications/economic-crime-transparency-and-enforcement-bill-2022-overarching-documents/factsheet-unexplained-wealth-order-reforms-web-accessible>> (accessed 17 October, 2022).

¹²⁸(Rev 1) [2018] EWHC 2534.

¹²⁹Tony Woodcock, Alan Ward, Ros Prince, and Galina Usorova, "Unexplained wealth orders-the latest developments", Stephenson Harwood, LLP, <https://www.shlegal.com/docs/default-source/news-insights-documents/2020/unexplained-wealth-orders---english-version---april-2020-final.pdf?sfvrsn=ee8f135b_0> (accessed 6 June, 2022).

¹³⁰ [2020] EWHC 432.

¹³¹ [2020] EWHC 822.

UK Limited.¹³² He and his company did not comply with the UWO's requirements.¹³³ Consequently, a statutory presumption exists that the assets subject to the UWO may be recoverable property.¹³⁴

(v) Reforms to the UWO

The UK Economic Crime (Transparency and Enforcement) Act 2022 (ECA), which comes into force on 15 March 2022,¹³⁵ has strengthened the UWO application. UWOs can now be issued to any of a corporate respondent's "responsible officers", including its directors, board members, managers and trustees, or partners where the body is a partnership. An UWO can now be made on the ground that the property has been obtained through unlawful conduct.

MALAYSIAN SCENARIO

Malaysia has in place civil forfeiture provisions via Section 41 of the MACC Act and Section 56 of the AMLATFPUAA. An examination of court cases reveals that enforcement officials continue to struggle to ensure the effective execution of the civil forfeiture regime.¹³⁶ The standard of proof in the form of the balance of probabilities is difficult to meet. Many hindrances have been outlined above. The UK has encountered the same predicament, and one of the tools created to overcome the hurdles of satisfying the standard of proof in civil forfeiture proceedings is via the UWO, which requires the respondent to explain the alleged property. The information is vital towards the success of the CRO.

¹³² UK National Crime Agency, "Failure to respond to Unexplained Wealth Order sets legal history", UK National Crime Agency, <<https://www.nationalcrimeagency.gov.uk/news/failure-to-respond-to-unexplained-wealth-order-sets-legal-history>> (accessed 7 December, 2023).

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Government of UK, *Economic Crime (Transparency and Enforcement) Act 2022*, (UK, 2022).

¹³⁶ A. Rahman, A., An analysis of the forfeiture regime under the anti-money laundering law.

The introduction of the UWO is essential as it might aid the prosecution in identifying and pursuing corrupt assets. In some instances, there may be probable grounds to suspect that assets were gained corruptly, but the prosecution lacks the evidence to prove on the balance of probabilities. Corruption and money laundering are typically conducted secretly and covertly. In practice, it would not be easy for the prosecution to uncover and show that all facts necessary to prove their cases are probably true. Via the UWO, the prosecution can require the property owner to provide information as regards the origin of the property. This may assist them to make decision whether to pursue civil forfeiture.

CONCLUSION AND POLICY RECOMMENDATION

Governments and institutions must commit to fighting corruption and tackling illicit financial flows. For Malaysia, The Twelfth Malaysian Plan aligns with the SDG, representing Malaysia's commitment to implementing the 17 SDGs, as reflected in the policies, programmes, and projects.¹³⁷ Civil forfeiture has played an essential role in addressing corruption and retrieving corrupt assets in several nations. Both Malaysia and the UK have a similar legal system of civil forfeiture, although both use different terminology.

For both Malaysia and the UK, a vital feature of the civil forfeiture case is the burden of proof on the “balance of probabilities”. This lower standard of proof is considered one feature that will spur the use of civil forfeiture. This standard is lower than the “beyond reasonable doubt” required to secure a conviction in criminal cases. However, the courts have construed the “balance of probabilities” very stringently, as discussed in the study.

¹³⁷Economic Planning Unit (EPU) Prime Minister’s Department, *Twelfth Malaysia Plan 2021-2025 a Prosperous, Inclusive, Sustainable Malaysia*, (2021).

The UK has introduced the UWO as a civil measure to bolster its efforts to combat corruption and recover corrupt assets. The UWO has overcome some of the challenges of the CRO. The information gathered through the UWO can be utilised to seize corrupt property through the CRO proceedings. Relevant legal safeguards and the right to a fair trial are retained. The ECA has further enhanced the applicability of the UWO, although not yet been tested in courts. The central proposition of this study is the establishment of the UWO as a precursor to civil forfeiture in Malaysia, as practised in the UK, which can alleviate the difficulty faced by the investigating officers in satisfying the standard of proof in the form of balance of probabilities in locating and going after corrupt assets. The UWO can accelerate enforcement actions.