

CIVIL FORFEITURE UNDER ANTI-MONEY LAUNDERING LEGISLATION IN MALAYSIA

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ABSTRACT

The Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [AMLAFTA] empowers the Malaysian Courts to forfeit any property that is the subject of a money-laundering offence via sections 55 and 56 of the AMLAFTA. The rationale of this empowerment is to ensure that all property used in the commission of a money laundering offence is forfeited. Hence, the criminals do not gain any benefits from their crimes. However, it is observed that the provision related to civil forfeiture, specifically under section 56 of the AMLAFTA appears problematic in many instances due to the requirement attached and the civil standard of proof. As such, this article intends to detail the civil forfeiture mechanisms under the AMLAFTA. This article used the qualitative method in doctrinal legal research to collect and analyse all the information related to the topic from various primary and secondary data such as legal provisions, case laws and secondary sources, namely journals and articles on civil forfeiture, especially when applying the standard of proof. The article analyses the substantive law and procedural requirements for civil forfeitures based on Malaysia's relevant legal provisions and cases. This article also examines the Malaysian Courts' trends in deciding civil forfeiture cases and analyses the standard of proof for civil forfeiture. This article

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suggests amendments to section 56 of the AMLAFTA to introduce a provision on the rebuttable presumption to ensure that the objective of creating the civil forfeiture provision can be achieved.

Keywords: AMLAFTA, civil forfeiture, Malaysia, Money laundering, unlawful activities, criminal forfeiture

PELUCUTHAKAN SIVIL DI BAWAH PERUNDANGAN PENCEGAHAN PENGUBAHAN WANG HARAM DI MALAYSIA

ABSTRAK

Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [AMLAFTA] memberi kuasa kepada mahkamah Malaysia untuk melucut hak mana-mana harta yang menjadi subjek kesalahan pengubahan wang haram melalui seksyen 55 dan 56 AMLAFTA. Rasional dari pemerkasaan ini adalah untuk memastikan bahawa semua harta yang digunakan dalam melakukan kesalahan pengubahan wang haram dilucuthakkan. Oleh itu, penjenayah tidak mendapat apa-apa faedah daripada jenayah mereka. Walau bagaimanapun, telah diperhatikan bahawa peruntukan berkaitan dengan pelucuthakan sivil, khususnya di bawah seksyen 56 AMLAFTA, kelihatan bermasalah dalam banyak keadaan kerana keperluan seksyen dan standard pembuktian sivil. Oleh yang demikian, Makalah ini berhasrat untuk memperincikan mekanisme pelucuthakan sivil di bawah AMLAFTA. Makalah ini menggunakan kaedah kualitatif dalam kaedah penyelidikan perundangan doktrin untuk mengumpul dan menganalisis semua maklumat berkaitan topik penyelidikan daripada pelbagai data primer dan sekunder seperti peruntukan undang-undang, undang-undang kes dan sumber sekunder, iaitu jurnal dan makalah mengenai pelucuthakan sivil, terutamanya apabila menggunakan standard pembuktian. Makalah ini menganalisis undang-undang substantif dan keperluan prosedur untuk pelucuthakan sivil berdasarkan peruntukan dan kes undang-undang Malaysia yang berkaitan. Makalah ini juga mengkaji trend mahkamah Malaysia dalam memutuskan kes pelucuthakan sivil dan menganalisis piawaian pembuktian bagi pelucuthakan sivil. Makalah ini mencadangkan pindaan kepada seksyen 56 AMLAFTA untuk memperkenalkan peruntukan mengenai anggapan boleh disangkal bagi memastikan objektif mewujudkan peruntukan pelucuthakan sivil dapat dicapai.

Kata Kunci: AMLAFTA, Pelucuthakan Sivil, Malaysia, Pengubahan Wang Haram, Aktiviti yang Menyalahi Undang-Undang, Pelucuthakan Jenayah.

INTRODUCTION

Money laundering is the process of disguising cash, funds, or other assets obtained through criminal activity. Cleaning ‘dirty’ money is a technique used to mask its illicit origin.¹ Money laundering offence is one of the most prevalent types of corporate offence and a global problem.²

Per the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (‘AMLAFTA’),³ Malaysian Courts can seize any property linked to a money-laundering offence under sections 55 and 56. The objective is to ensure that all property used in committing such an offence is forfeited, thereby preventing the criminals from benefiting from their wrongdoing. Nevertheless, the provision concerning civil forfeiture, particularly under section 56 of the AMLAFTA poses certain challenges due to the requirement of the section and the civil standard of proof.

This article intends to detail the civil forfeiture mechanisms under the AMLAFTA. The fundamental concepts related to this article are important, namely the definition of money laundering, existing domestic laws on money laundering, the concept of forfeiture of property and the right to property under the Malaysian Federal Constitution. The United Nations Convention against Transnational Organized Crime⁴ defines money laundering as converting or transferring criminal proceeds to disguise their illicit origin. In *Ong Seh Sen vs. Public Prosecutor*,⁵ the judge categorised money laundering as

¹ See “What is Money Laundering?” Bank Negara Malaysia, accessed May 22, 2023, <https://amlcft.bnm.gov.my/what-is-money-laundering>.

² Maruf Adeniyi Nasir, “Compatibility of Islamic Finance and Anti-Money Laundering Laws: A Myth or Reality?” *IIUM Law Journal* 26, no. 1 (2018): 55, <https://doi.org/10.31436/iiumlj.v26i1.344>.

³ Act 613.

⁴ United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the protocols thereto* (New York: United Nations, 2004).

⁵ *Ong Seh Sen v Public Prosecutor* [2010] 7 CLJ 220.

a white-collar crime where no physical violence is needed. In summary, money laundering is exchanging cash or other property resulting from criminal activity to give the impression that it was obtained from a lawful source.⁶ For Malaysia, the AMLAFTA is the main legislation for criminalising money laundering and terrorism financing,⁷ preventive and investigative measures, and the forfeiture and seizure of property derived from unlawful activities. Other laws complement the AMLAFTA, i.e., the Penal Code⁸ via sections 411 until 414, the Dangerous Drugs (Forfeiture of Property) Act 1988⁹ and the Malaysian Anti-Corruption Commission Act 2009.¹⁰ The First Schedule of the AMLAFTA contains a list of reporting institutions. At the same time, the Second Schedule provides a list of serious offences, the commission of which will result in the procurement of unlawful proceeds. Part II of the AMLAFTA provides for money laundering offences via sections 4 and 4A. The same Act empowers the Court, among other things, to forfeit property derived from the illegal proceeds of serious crimes. The lack of regulation to combat financial crimes such as money laundering can lead to a loss of trust in the country's financial institutions, as criminals are free to invest and transfer illegal proceeds through the books.¹¹

⁶ See also Muhammad Saleem Korejo, Ramalinggam Rajamanickam and Muhamad Helmi Md. Said, "Financial Institutions and Anti-Money Laundering Violations: Who is to Bear the Burden of Liability?" *Journal of Money Laundering Control* 23, no. 3 (2021) 671-680, <https://doi.org/10.1108/JMLC-07-2021-0071>.

⁷ See also Aishat Abdul-Qadir Zubair, Umar Aimhanosi Oseni, and Norhashimah Mohd. Yasin, "Anti-Terrorism Financing Laws In Malaysia: Current Trends And Developments," *IIUM Law Journal* 23, no. 1 (2015): 151, <https://doi.org/10.31436/iiumlj.v23i1.163>.

⁸ Act 594.

⁹ Act 340.

¹⁰ Act 694. See Guru Dhillon, Rusniah Ahmad, Aspalela Rahman and Ng Yih Miin, "The Viability of Enforcement Mechanisms under Money Laundering and Anti-Terrorism Offences in Malaysia: An Overview," *Journal of Money Laundering Control* 16, no. 2 (2013): 183, <https://doi.org/10.1108/13685201311318511>.

¹¹ Trevor Millington and Mark Sutherland Williams, *The Proceeds of Crime*, 3rd ed. (Oxford: Oxford University Press, 2007).

Common law has long recognised the concept of forfeiture of property obtained by criminal activity.¹² The Black's Law Dictionary¹³ defines "forfeiture" as "the loss of a right, a privilege, or property because of a crime, breach of obligation, or neglect of duty. Esp. money or property lost or confiscated by this process." Forfeiture is the lawful procedure by which the government can take away property that is proved or suspected to be the evidence on the subject matter of a crime, terrorist property, the proceeds of unlawful activity or the instrumentalities of an offence.¹⁴ Forfeiture can be categorised into two types, namely civil forfeiture and criminal forfeiture. The same Black's Law Dictionary¹⁵ has defined civil forfeiture as "an in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." While criminal forfeiture is "a governmental proceeding brought against a person as punishment for the person's criminal behaviour."¹⁶ The rationale behind the forfeiture mechanisms under the AMLAFTA via sections 55 and 56 is that criminals should not benefit from the proceeds of the crime.

The right to property for a person is safeguarded and protected via Article 13(1) of the Federal Constitution. The fundamental principle in Article 13 is that no one can be dispossessed of property solely by executive order in the absence of a statute authorising such deprivation. The word 'law' in Article 13 of the Federal Constitution can only mean an enacted law.¹⁷ According to Article 13 (1), no person shall be deprived of property save in accordance with law. On the other hand, Article 13 (2) states that no law shall provide for the compulsory acquisition or use of property without adequate compensation. However, later in the case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*,¹⁸ the Federal Court was prepared to read "law" broadly to include rules of natural justice. Thus, it can be

¹² *Irving v National Provincial Bank* [1962] 2 QB 73.

¹³ Bryan A. Garner and Henry Campbell Black, ed., *Black's Law Dictionary*, 7th ed. (St. Paul: West Group, 1999).

¹⁴ Norhashimah Mohd Yasin and Mohd Yazid Zul Kepli, *Anti-Money Laundering and Counter Financing of Terrorism Law in Malaysia* (Petaling Jaya: LexisNexis, 2018), 163.

¹⁵ Black's Law Dictionary.

¹⁶ Black's Law Dictionary.

¹⁷ *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165.

¹⁸ [1982] 1 MLJ 204.

concluded that provisions on forfeiture, including civil forfeiture, are therefore constitutional. This is due to the fact that the AMLAFTA is a federal law passed by Parliament. Any forfeiture application should be per law, and any property right violation can be challenged in Court.¹⁹ In *Ketua Polis Negara & Anor v Gan Bee Huat & Other Appeals*,²⁰ the Court decided that the forfeiture of the property process had been carried out following the law and that, as a result, Article 13 of the Federal Constitution could not be invoked. It is important to note that the judge in this case had observed that Article 149 of the Federal Constitution provides for legislation against subversion, action prejudicial to public order, etc does not allow section 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988²¹ to be challenged on the ground of being inconsistent with the Constitution. Therefore, the Court ordered the property to be forfeited. In other words, the enactment of Act 340, including the powers of forfeiting the property without having a person be prosecuted, is justified to deprive the right to property under Article 149 of the Federal Constitution. Similarly, the same principles from this case may apply when there is any challenge against forfeiture provisions in the AMLAFTA.

METHODOLOGY

Prof. S. N. Jain has stated about doctrinal law research. He said: “Doctrinal research involves analysis of case law, arranging, ordering and systematising legal propositions and study of legal institutions through legal reasoning or rational deduction.”²² In addition, Ian Dobinson and Francis Johns also stated that “doctrinal research is also known as pure theoretical research. It consists of either simple research to find a specific statement of the law or a more complex and in-depth analysis of legal reasoning.”²³ Based on these definitions, the authors believe doctrinal legal research is a systematic study of existing law,

¹⁹ *Lim Hui Jin v CIMB Bank Bhd & Ors* [2018] 6 MLJ 724, p. 732.

²⁰ [1998] 3 CLJ 1; *Lim Hui Jin v CIMB Bank Bhd & Ors* [2018] 6 MLJ 724.

²¹ Act 340.

²² S.N. Jain., “Doctrinal and Non-Doctrinal Legal Research,” in *Legal Research And Methodology* (Indian Law Institute, 1982) 68.

²³ Ian Dobinson and Francis Johns, “Qualitative Legal Research,” in *Research Methods for Law*, ed. Michael McConville and Wing Hong Chui (Edinburgh University Press, 2017), 18-19.

Court cases and other sources, including secondary such as articles, to understand the issue more deeply and systematically to help assess the legal position holistically. Apart from that, qualitative research generates data distinct from quantitative research.²⁴ Qualitative data is divided into 3 data types: interviews, observations, and document analysis.²⁵ Data can be collected from primary²⁶ and secondary sources.²⁷ Interestingly, Webley says that:

“It is possible to use qualitative research for exploratory, explanatory and descriptive research and to draw causal inferences from the data – assuming of course that the researcher develops an appropriate research design, and adopts an appropriate data collection method and mode(s) of data analysis in order to answer the research questions posed.”²⁸

This article employed a qualitative method in doctrinal legal research to collect and analyse all relevant information related to the research topic. This information was sourced from a variety of primary and secondary data, including domestic law such as the AMLAFTA, international law, cases decided by the Court, official statements from the House of Representatives, writings from journals and other pertinent sources. The result of this research will assist in identifying the problems associated with civil forfeiture. Furthermore, Marie-

²⁴ Kamarul Azmi Jasmi, “Metodologi Pengumpulan Data dalam Penyelidikan Kualitatif,” in *Kursus Penyelidikan Kualitatif Siri 1 2012*, Institut Pendidikan Guru Malaysia Kampus Temenggong Ibrahim, 28-29 Mac 2012.

²⁵ Michael Quinn Patton, *Qualitative Research and Evaluation Methods*, 3rd ed. (London: Sage Publications, 2002); Michael Quinn Patton, *Qualitative Evaluation and Research Methods*, 2nd ed. (Newbury Park: Sage Publications, 1990); Tim May, *Social Research: Issues, Methods and Practices*, 2nd ed. (Buckingham: Open University Press, 2001); Keith Punch, *Introduction to Social Research* (London: Sage Publications Ltd, 1998).

²⁶ Mohd Zamre Mohd Zahir et al., “Prospect and Legal Challenges of Medical Tourism in Relation to the Advance Medical Directive (AMD) in Malaysia,” *Pertanika Journal of Social Sciences and Humanities (JSSH)* 29, Special Issue 2 (2021): 17-28, <https://doi.org/10.47836/pjssh.29.s2.02>.

²⁷ Tengku Noor Azira Tengku Zainudin et al., “Legal Exploration of Right to Health,” *Pertanika Journal of Social Sciences and Humanities (JSSH)* 29, Special Issue 2 (2021): 221-232, <https://doi.org/10.47836/pjssh.29.s2.15>.

²⁸ Lisa Webley, “Qualitative Approaches to Empirical Legal Research,” in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 926–950, <https://doi.org/10.1093/oxfordhb/9780199542475.013.0039>.

Luce, in her writing, states, “Comparative law aims at reaching ‘higher grounds ‘in the sense that it is not limited to the understanding of another legal system and the better understanding of the researcher’s own legal system.”²⁹ In line with the above views, this article also used a comparative research method to identify the position of other countries on civil forfeiture, specifically on the burden of proof to improve existing provisions in Malaysia.

CRIMINAL VS. CIVIL FORFEITURE

Generally, section 55 of the AMLAFTA provides for criminal forfeiture; meanwhile, section 56 of the same Act provides for civil forfeiture.³⁰ The use of the powers of forfeiture provided under sections 55 and 56 begins before a person is prosecuted for any offence under the AMLAFTA. Section 44 of the Act allows any enforcement agency, defined under section 3, to issue a freezing order against any person’s property upon fulfilling the requirements under section 44.³¹ This freezing order is different from the Mareva injunction issued by the Court.³² Until the outcome of the lawsuit between the plaintiff and the defendant is finalised, a Mareva injunction prevents the party being sued (the defendant) from selling off his or her assets. As the Court has noted:³³

“The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should

²⁹ Marie-Luce Paris,” The Comparative Method in Legal Research: The Art of Justifying Choices,” in *Legal Research Methods: Principles and Practicalities*, ed. Laura Cahillane and Jennifer Schweppe (Dublin, Clarus Press, 2016), 8.

³⁰ *PP v Thong Kian Oon & Ors* [2012] 10 MLJ 140.

³¹ In *Khor Peng Chai & Ors v Bank Negara Malaysia & Anor* [2011] 1 LNS 216, the Court stated that section 44 is to assist in the investigation process by the enforcement agencies. Hence, the Court will not interfere with the said process.

³² See also Zuraidah Ali, “Mareva Injunction as a Preventive Relief: The Malaysian Experience,” *IIUM Law Journal* 17, no. 2 (2012): 225-245. <https://doi.org/10.31436/iiumlj.v17i2.37>.

³³ *PCW (Underwriting) Agencies Ltd v Dixon & Anor* [1983] 2 All ER 158 (this was subsequently cited in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62).

it be successful, by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction.”

In *Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia & Anor*,³⁴ the then Supreme Court ruled that section 50 of the Specific Relief Act 1950, Order 29 of the High Court Rules 1980 (substantially replicated in Order 29 of the Rules of Court 2012), and paragraph 6 of the Schedule of the Courts of Judicature Act 1964 were all that were necessary to give Malaysian Courts the authority to issue a Mareva.

On the other hand, under section 45 of the AMLAFTA, any property that an investigating officer has reasonable grounds to think is the subject of a crime, is terrorist property, the proceeds of illegal activities, or the instrumentalities of an offence can be seized.³⁵ Ultimately these two sections are meant to prevent the accused person’s disposal of the property and take custody of the property.³⁶ Compliance with the procedure is necessary to forfeit assets under the AMLAFTA or any other legislation.³⁷

The Application of criminal forfeiture under section 55 of AMLAFTA

Subsection 55 (1) of the AMLAFTA states that the Court, subject to section 61 of the same Act, can make an order without any application for the forfeiture of any property which proves to be under any of these classifications under subsection 55(1) (a), (b), (c) and (d) of the AMLAFTA. Even if the offence is not proven, the Court has the power to forfeit any property if the Court is satisfied that the accused is not the true and lawful owner of the property and that no other person is entitled to the property as a purchaser in good faith for valuable consideration under subsection 55(1) (bb) of the AMLAFTA. Furthermore, in any case where the accused’s property has been

³⁴ [1988] 1 MLJ 97[1988] 1 MLJ 97.

³⁵ In the case of *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2005] 7 CLJ 422, The Court denied the application to review the Public Prosecutor’s judgement because the deputy Public Prosecutor was exercising his legal duties and hence could not be held accountable through judicial review.

³⁶ *Public Prosecutor v Dragcom Sdn Bhd & Ors* [2013] 5 MLJ 594.

³⁷ *Mehdi Dadashi Havadaragh v Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 MLJ 646.

disposed of, declined in value, or cannot be traced, the Court has the power to order the accused to pay a penalty sum equal to the value of the property under paragraph 55(2) of the AMLAFTA.³⁸ In the case of *Hamimah bt Idruss v Public Prosecutor*³⁹, the appellant is a medical doctor who co-founded a pharmaceutical company named Safire Pharmaceuticals Sdn Bhd ("Safire"). Safire took on a loan of RM35 million from Bumiputra Commercial Bank, but the business struggled, and accumulated up to 51 million in debt. The appellant connected with one Hendry Toon, who offered provision of funds via Siemens Financial Services Ltd ("SFA") on the condition that the appellant could show guaranteed promissory notes representing receivables. The appellant allegedly paid an employee to forge such promissory notes in exchange for RM 200,000 from the appellant. The SFA channelled the funds to Malaysia via a Hong-Kong based company, which eventually landed in accounts owned by:

- A) Hendry Toon (specifically his Medbridge group of companies);
- B) The appellant (under Azam Rahmat Sdn Bhd, which was under the appellant's control); and
- C) The appellant's daughter.

The Court of Appeal affirmed the session Court's decision on the application of subsection 55(2) of the AMLAFTA:

"The sessions Court did not impose a fine under s 4(1) of the AMLA but imposed a pecuniary penalty under s 55(2) of the AMLA. In the premises, the argument that the sessions Court exceeded its power by imposing a fine beyond the limit prescribed in s 4(1) of the AMLA was without merit. The submission of the prosecution that a large sum of over RM6m was not recovered was based on the evidence of the investigating officer. It was indisputable that the total laundered sum under eight charges was RM41,337,727.11 and only RM34,987,467.29 was recovered. In the premises, the total sum that could not be traced was ascertainable. Therefore, there was

³⁸ In the case of *Public Prosecutor v Gan Kiat Bend & Another Case* [2011] 8 CLJ 951, the penalty ordered under subsection 55(2) of AMLAFTA to be recovered by way of a warrant for the levy of the amount by distress and sale of any property belonging to the accused persons.

³⁹ [2020] 5 MLJ 161.

no reason why the pecuniary penalty provision in s 55 of the AMLA could not apply.”⁴⁰

While according to subsection 55(3) of the AMLAFTA, the Court was required to apply the civil standard of proof in determining the case under subsection 55 (1). In *PP v Thong Kian Oon & Ors*,⁴¹ the judge said that in sections 55 and 56 of the AMLAFTA, the applicable standard of proof is proof on the balance of probabilities.

The Application of civil forfeiture under section 56 of the AMLAFTA

Subsection 56 (1) of the AMLAFTA deals with forfeiture of the property where there is no prosecution.⁴² A non-conviction-based forfeiture is permissible if the forfeiture is made consistent with domestic law. The Act 340⁴³ and the Malaysian Anti-Corruption Commission Act 2009⁴⁴ have a similar provision for non-conviction-based forfeitures. The non-conviction-based forfeiture approach has the potential to be extremely effective, especially in cases where the property owner may have died; there has been an acquittal in criminal proceedings; there has been a criminal conviction, but the name of the property owner is unknown, or confiscation hearing has failed; the defendant is not within the jurisdiction, and there is insufficient

⁴⁰ Ibid, 182 and 183.

⁴¹ [2012] 10 MLJ 140.

⁴² *Public Prosecutor v Abd Latif bin Bandi @ Nor Sebandi & Ors* [2019] MLJU 18.

⁴³ Section 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 (Act 340) provides for forfeiture of property seized under the Act 340 where there is no prosecution, or no proceedings under Part III or no claim thereto.

⁴⁴ Act 694. Section 41 of the Act 694 provides for forfeiture of the property where there is no prosecution for an offence before the expiration of eighteen months from the date of the seizure.

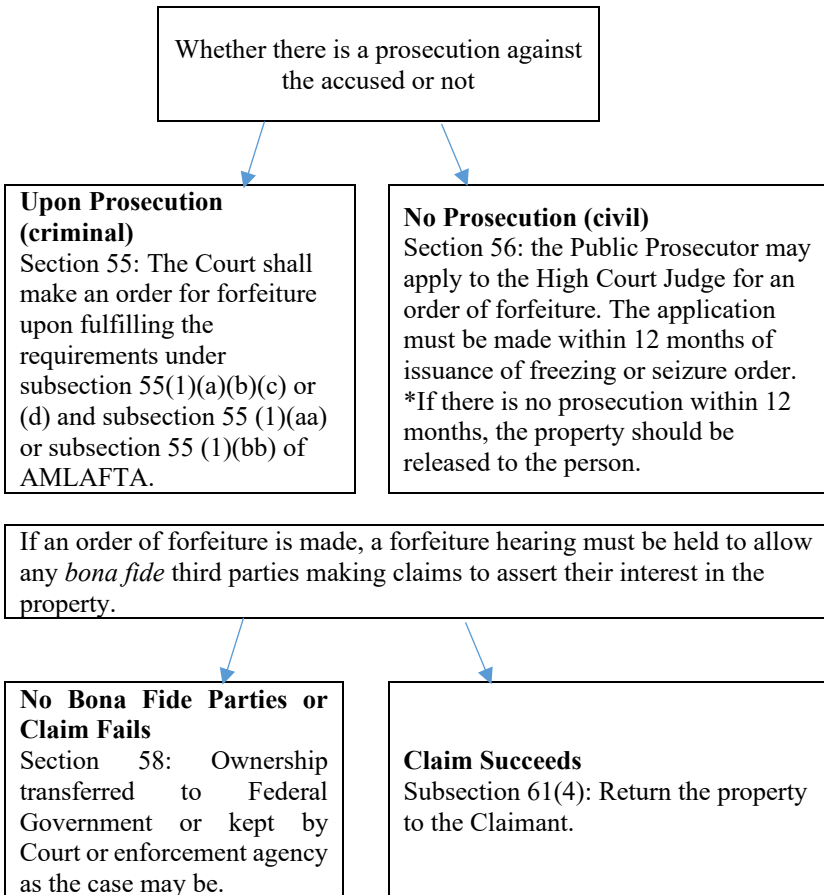
evidence⁴⁵ to prosecute for a criminal offence.⁴⁶ Some authors⁴⁷ are of the view that section 56 should be accepted because it can be used by enforcement agencies, especially the Royal Malaysia Police, Malaysian Anti-Corruption Commission and Royal Malaysian Customs Department, to recover the unlawful proceeds even though the criminals cannot be prosecuted for money laundering offences as these types of offences are normally hard to prove in the Court due to complex nature of the cases. According to section 56, the forfeiture procedure can be started by filing an action against the property itself, separate from any criminal action against the property owner.⁴⁸ Figure 1 below shows the flows of forfeiture under section 56 respectively:

⁴⁵ See also Zakiah Muhammaddun Mohamed and Khalijah Ahmad “Investigation and Prosecution of Money Laundering Cases in Malaysia,” *Journal of Money Laundering Control* 15, no. 4 (2012): 421-429, <https://doi.org/10.1108/13685201211266006>.

⁴⁶ Anthony Kennedy, “An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom,” *Journal of Money Laundering Control* 10, no. 1 (2007): 37, <https://doi.org/10.1108/13685200710721854>; Norhashimah Mohd Yasin and Mohd Yazid Zul Kepli, *Anti-Money Laundering & Counter Financing of Terrorism Law in Malaysia* (Singapore, Malaysia, Hong Kong & India: LexisNexis, 2018), 169-170.

⁴⁷ Mohd Yasin and Zul Kepli, *Anti-Money Laundering*, 170.

⁴⁸ Mohd Yasin and Zul Kepli, *Anti-Money Laundering*, 169.

Figure 1

Section 56 allows the Public Prosecutor to apply for an order to forfeit the property to the High Court within 12 months of the seizure or the date of a freezing order. Any property seized at the expiration of twelve months from its seizure is released to the person from whom it was seized.⁴⁹ In *Kekatong Sdn Bhd vs. Bank Bumiputra Malaysia Bhd*⁵⁰, the Court of Appeal stated that the term “may,” which appeared in the provision, is not permissive but is mandatory where the word

⁴⁹ Subsection 56(3) of AMLAFTA.

⁵⁰ [1998] 2 MLJ 440.

“may” be held to be “imperative.” Bindra explained that the word “may” ought to be interpreted in the following manner:

“It is well settled that the use of the word may in a statutory provision would not by itself show that the provision is a directory in nature. In some cases, the Legislature may use the word ‘may’ as a matter of pure conventional Courtesy and yet intend a mandatory force...It is equally well settled that where the word ‘may’ involve a discretion coupled with an obligation...”⁵¹

Nonetheless, the word ‘may’ in this section represents the general discretionary power of the Public Prosecutor to commence with forfeiture proceedings or to return the property. The issues on the word “may” and the time limit for forfeiture application had been deliberated in the case of *Public Prosecutor v Dragcom Sdn Bhd & Ors*,⁵² where the High Court stated that:

“It must be noted that the permissive ‘may’ is employed in sub-s (1). However, my view is that the 12 months time stipulated in s 56 of AMLAFTA is mandatory and not permissive. My reasons are as follows.[12] Firstly it is obvious that the word ‘may’ is used in the sense that it is up to the Public Prosecutor to apply for forfeiture. In other words, the use of the word ‘may’ refers to the general discretionary power of the Public Prosecutor to proceed with forfeiture proceedings or to return the property. Assuming ‘may’ is interpreted to mean that the Public Prosecutor has the discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless.”⁵³

The same case also stated that the objective of the time limit of 12 months in section 56 is to protect against the arbitrary use of the broad powers granted by Parliament to the enforcement authorities and the Public Prosecutor.⁵⁴ The application for forfeiture may be made by the Public Prosecutor only in respect of properties falling within any of the classifications specified in paragraphs (a) to (d) of section 56(1).⁵⁵ Under section 56(2), the judge to whom an application is made under

⁵¹ Rule of Construction. N.S Bindra’s Interpretation of Statutes, Tenth Editions (2007), 1027.

⁵² [2013] 5 MLJ 594.

⁵³ Ibid, 601.

⁵⁴ *Public Prosecutor v Dragcom Sdn Bhd & Ors* [2013] 5 MLJ 594.

⁵⁵ *Public Prosecutor v JJ Power Groups Enterprise & Ors* [2020] MLJU 375.

subsection (1) can make an order for forfeiture of the property if he has satisfied the requirements provided under sections 56(2)(a) and 56(2)(b). In the case of *PP v Kuala Dimensi Sdn Bhd & Ors*,⁵⁶ the word ‘satisfaction’ was deliberated. The judge stated as follows:

“In the case of *PP lwn Abdul Razak Khan Abdul Aziz Khan & Ors* [2009] 1 LNS 322, the judge accepted that “satisfied” must mean “being reasonably satisfied on the facts of the case. It cannot import an arbitrary or irrational state of being satisfied. Satisfaction must be honest, careful and deliberate, arrived after exercising due care and caution. The question of satisfaction is, however, a question of fact.”⁵⁷

Thus, the ‘satisfaction’ envisaged here cannot be arbitrary or irrational. It has to be based on adequate proof. The mechanics of subsection 56(2) of the AMLAFTA have been identified in the case of *Public Prosecutor v Jakel Trading*.⁵⁸ The attempt by the Public Prosecutor to delay the High Court’s decision to dismiss their case for confiscating RM628,314 seized from Jakel Trading, a textile wholesaler, has failed. The money, seized by the Malaysian Anti-Corruption Commission (MACC), was believed to have come from Datuk Seri Najib Razak, the former Prime Minister implicated in the 1Malaysia Development Bhd (1MDB) scandal. Ahmad Shahrir Mohd Salleh, the Judicial Commissioner, stated that in considering an application under subsection 56(1), it is the duty of the Court under subsection (2) to be satisfied that the seized property falls under any of the disjunctive classes provided for under sub-paragraphs (i) to (iv) of section 56(2)(a) and that there is no purchaser in good faith for valuable consideration in respect of the properties according to section 56(2)(b) of the Act.

MALAYSIAN’ COURTS TRENDS IN DECIDING THE CASES BEFORE GRANTING THE CIVIL FORFEITURE ORDER

Several recent civil forfeiture cases from the years 2018 until 2021 relating to section 56 of the AMLAFTA have been identified in order

⁵⁶ [2019] 3 CLJ 650.

⁵⁷ Ibid, 684-685.

⁵⁸ [2020] MLJU 1206.

to analyse the trends of the Malaysian Courts in granting the order of forfeiture, particularly on the application of the standard of proof.

In the case of *Public Prosecutor v Awalluddin Sham Bokhari*,⁵⁹ the appellant's main argument was that the properties were gained through the profits of illegal conduct. The Federal Court allowed the appellant to confiscate the respondent's property after the Public Prosecutor successfully proved the case on the balance of probability.⁶⁰ In *Abdul Mudtalib bin Ismail v Public Prosecutor*,⁶¹ the appellant filed an appeal with the Court of Appeal against the High Court's decision, which had granted the Public Prosecutor's application for an order of forfeiture of particular assets belonging to each of the respondents in the High Court, among other matters. The appellant argued that the learned High Court judge erred in concluding that the prosecution had met its burden of demonstrating that all goods sought forfeited were proceeds of the predicate offence under section 420 of the Penal Code.⁶² The Court of Appeal agreed with the learned High Court judge that the conditions set out in subsection 56 (1) and section 61 of the AMLAFTA had been met. The High Court judge examined the property's legal status and concluded it was obtained illegally. The Court has also carefully reviewed the appeal record, and the Court was satisfied that sufficient evidence is presented in the High Court to show that the property was obtained illegally rather than lawfully.⁶³

In *Public Prosecutor v Sim Sai Hoon*,⁶⁴ the Public Prosecutor referred to subsection 56(1) of the AMLAFTA to confiscate money from the respondent and all accumulated interest placed in the respondent's RHB Bank Bhd current account. According to the Public Prosecutor, a person who exploits his or her office or position for bribery, as defined by subsection 23 (1) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694), has committed a predicate offence that is related to this forfeiture application. The Public Prosecutor has proven that a predicate offence under section 23 (1) of Act 694 was committed on the balance of probability. However,

⁵⁹ [2018] 1 CLJ 305.

⁶⁰ *Ibid*, 317.

⁶¹ [2021] 1 MLJ 252.

⁶² Section 420 of the Penal Code [Act 574] provides for the offence of cheating and dishonestly inducing delivery of property.

⁶³ *Abdul Mudtalib bin Ismail v Public Prosecutor*, p. 265-265.

⁶⁴ [2020] 12 MLJ 684.

the item or evidence relevant to the conduct of an offence under subsection 4 (1) (a) of the AMLAFTA is no longer in the Respondent's bank account, in whole or in part. As a result, a forfeiture application will not be possible in this case. According to the Court, the respondents should not be compelled to bear the burden when the offence no longer exists. On the balance of probabilities, the Public Prosecutor has lost his case against the respondent.

In the case of *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors*,⁶⁵ the Public Prosecutor applied, according to subsection 56(1) of the AMLAFTA to forfeit the seized money and property. The main issue was whether the Public Prosecutor has the basis and/or fulfilled all the requirements to forfeit the respondents' properties according to subsection 56(1). The Federal Court decided that for the first issue, there was no documentary evidence to support the allegation that the former Managing Director acted beyond her authority. While for the second issue, the Court stated that the prosecution failed to provide the names, identities, sources of information and the involvement of each respondent to the charges. The Court further stated that the prosecution must explicitly say the manner the respondents abetted them or participated in the illegal activity. Hence, the Court concluded that the prosecution failed to identify the nature and extent of the participation of the respondents with the offence of money laundering or linking the procurement of the properties to the predicate offence. On a balance of probabilities, the prosecution failed to establish that the properties seized had been obtained because of or in connection with an offence under subsection 4(1). As such, the Federal Court upheld the decisions of the High Court and Court of Appeal to release the properties back to the respondents.

In *Public Prosecutor v Habib Jewels Sdn Bhd*⁶⁶, the Public Prosecutor applied for a forfeiture order under section 56 of the Act against Habib Jewels Sdn Bhd, the respondent, for RM100,000. This amount was deposited into the respondent's bank account in 2014 through a cheque issued by the former Prime Minister, Dato' Seri Najib Razak, who was also the Chairman of the Board of Advisors of 1MDB and the Minister of Finance at the time. The Public Prosecutor contended that the former Prime Minister used his position to acquire

⁶⁵ [2019] 3 CLJ 650.

⁶⁶ [2020] 12 MLJ 757.

gratification, therefore violating section 23 of Act 694. The Public Prosecutor applied for a forfeiture order under section 56 of the AMLAFTA⁶⁷. The Public Prosecutor also claimed that the respondent was one of the recipients of the monies which were subject-matter or evidence relating to the commission of an offence of money laundering under subsection 4(1) of the AMLAFTA or proceeds of unlawful activity. Mohd Nazlan bin Mohd Ghazali, the judge, dismissed the Public Prosecutor's application and stated that:

“[35] ... although extensive and detailed, merely disclosed the movements of the monies deposited into and transferred out of the accounts of DSN and certain other entities. Do these sufficiently establish the commission by DSN of the predicate offence under s 23 of the MACC Act in order to establish the unlawful activity from which the proceeds was allegedly derived? [36]...the mere setting out of the movement of monies is not sufficient evidence to prove that the property sought to be forfeited is proceeds from an unlawful activity (the predicate offence).”⁶⁸

Respectively, in *Pendakwa Raya v Badan Perhubungan Umno Negeri Kedah*,⁶⁹ the Public Prosecutor also has applied under subsection 56(1) of the AMLAFTA for a forfeiture order against the respondent for the sum of money amounting to RM1,054,019.22 and the accrued interest thereon in the first respondent's RHB current account. The Public Prosecutor alleged that the then-former Prime Minister had committed the offence under section 23 of Act 694. The High Court dismissed the forfeiture application and stated that:

“[52] On whether the predicate offence under Section 23 of the MACC Act has been shown to have been committed by DSN, on a balance of probabilities, I find that the affidavits which have been affirmed by the investigating officers especially on the predicate offence of the said Section 23 in support of the forfeiture, although extensive and detailed, merely disclosed the movements of the monies deposited into and transferred out of the accounts of DSN and certain other entities. Do these sufficiently establish the commission of the predicate offence under Section 23 of the MACC Act in order to establish the unlawful activity from which the proceeds was allegedly derived from? [53] In this context, I am

⁶⁷ Section 23 of the Malaysian Anti-Corruption Commission Act 2009 [Act 694] provides for the offence of using office or position for gratification.

⁶⁸ *Public Prosecutor v Habib Jewels Sdn Bhd*, p. 769.

⁶⁹ [2020] MLJU 896.

assisted by the above-mentioned decisions of the Court of Appeal which held that merely setting out the movement of monies is insufficient evidence to prove that the property sought to be forfeited is proceeds from an unlawful activity (predicate offence).”[55] On the totality of the affidavit evidence deposed by the Deputy Public Prosecutor and both the investigating officers of the predicate and the money laundering offences, in my judgment, they appear to be lacking in substantiation and other extrinsic evidence. [56] The affidavits and the documents exhibited thereto merely demonstrate the evidence of the involvement of the DSN in matters pertaining to 1MDB. But there were no affidavits, for example, by any other parties involved in the management of 1MDB to enable a reasonable inference be made that DSN had in fact abused his position at the material times and thus committed an offence under Section 23 of the MACC Act.”

Similar grounds of decision had been used in the case of *PP v Pertubuhan Kebangsaan Melayu Bersatu*⁷⁰ and *Public Prosecutor v Sarawak United People’s Party & Ors*.⁷¹

In the case of *Simplex Sdn Bhd & Ors v PP*,⁷² the Public Prosecutor alleged that the first appellant had committed an offence under section 135(1)(g) of the Customs Act 1967 by under-declaring the value of the kitchen equipment imported and, therefore, fraudulently evading customs duties and taxes imposed on the goods at the time of import. The Public Prosecutor seized the money from the first appellant’s Maybank account, which was alleged to be the proceeds of the unlawful activity or offence committed during the period. Then, the Public Prosecutor proceeded to apply to the High Court, according to subsection 56(1) of the AMLAFTA to forfeit the seized property. The High Court allowed the respondent’s application. The appellant appealed, and the Court of Appeal unanimously allowed the appeal. It set aside the decision of the High Court as there was no sufficient judicial appreciation of the law and facts by the High Court. The judge misdirected himself as to the facts and law in ordering the forfeiture of the seized property under subsection (2) of section 56 when the respondent failed to prove in the first instance that an offence had been committed in respect of the goods imported and that the seized property

⁷⁰ [2020] 9 MLJ 702.

⁷¹ [2020] MLJU 1717.

⁷² [2021] 4 CLJ 595.

was related to the offence of under-declaration or evasion of duties and taxes of the said goods.

In *PP vs Tan Tiong Ann*,⁷³ the Public Prosecutor applied to forfeit 7 items against the first respondent and 3 items against the second respondent. The High Court ordered the 7 items to be forfeited in favour of the Government of Malaysia, while the 3 items to be released to the second respondent. Subsequently, the Public Prosecutor appealed against the decision which ordered the release of one of the items in favour of the second respondent. The Court of Appeal found that the Public Prosecutor had failed to discharge the requisite standard of proof required of it under subsection 56 (4) of the AMLAFTA and ordered for the freezing of the savings account to be uplifted immediately.

Based on the discussion, the Public Prosecutor must convince the Court that the property to be forfeited fits into one of four classes: subject matter or evidence related to the commission of the offence, terrorist property, proceeds of unlawful activity, or instrumentalities of the offence. If the Public Prosecutor succeeds in showing these conditions, the burden of proof shifts to the respondent to show that the property was obtained in good faith for valuable consideration. Apart from that, the Courts have emphasised directly and/or indirectly the importance of evidence, especially documentary evidence in proving the predicate offences for a civil forfeiture under section 56 of the AMLAFTA. Even if the standard is based on a balance of probability, the Court has taken a restrictive perspective to and scrutinise the available evidence, placing stress on the sufficiency and admissibility of evidence.⁷⁴

COMPARATIVE PERSPECTIVES: ANALYSIS OF THE STANDARD OF PROOF FOR CIVIL FORFEITURE

As decided from the above cases, the determination of whether the seized property should be forfeited under section 56(2) of the

⁷³ [2020] MLJU 1748.

⁷⁴ Lim Koon Huan and Siew Ka Yan, "Recent Cases on Civil Forfeiture of Property under Malaysia's Anti-Money Laundering Law," SKRINE, last modified July 1, 2021, <https://www.skrine.com/insights/alerts/july-2021/recent-cases-on-civil-forfeiture-of-property-under>.

AMLAFSA hinges on establishing, on a balance of probabilities,⁷⁵ that the property falls within the scope of subsection 56(2)(a) and (b) of the Act.⁷⁶ It can be said that these circumstances arise because the offence of money laundering, unlike other criminal offences, has no direct victim who can give evidence against the perpetrator.⁷⁷ Abdul Rahman Sebli JCA stated in *Noor Ismahanum Mohd Ismail v PP*⁷⁸, a case involving an application under the AMLAFSA:

“In determining whether the property is “the proceeds of an unlawful activity,” the standard of proof to be applied by the judge is the civil standard of proof, i.e. proof on the balance of probabilities, as stipulated by section 56(4) and 70(1). This standard of proof must not be mistaken for proof beyond a reasonable doubt, which is the heavier standard of proof that the PP is required to discharge in order to bring home a criminal charge against any person, such as a charge under section 4(1)(a) of AMLAFSA.”⁷⁹

Further, in the case of *Public Prosecutor v Billion Nova Sdn Bhd & Ors*,⁸⁰ the issue to be determined is whether the sums seized were proceeds of unlawful activities from the sales of ‘*Malaysia Duty Not Paid*’ cigarettes allegedly transacted outside Labuan and thus could be forfeited under subsection 56(1) of the AMLAFSA. The Court of Appeal judge, Tan Sri Idrus Harun (*currently he is the Attorney General of Malaysia*) emphasised the standard of proof as:

“The Appellant had to prove their case only on a balance of probabilities. The standard of proof, for the purpose of the application under s. 56(1) of the AMLATFA, requires evidence of sales of cigarettes in the principal customs area, or proof of offence under s. 4(1) of the AMLATFA. In order to prove the offence under s. 4(1), the predicate offence under s. 135(1)(g) of the Customs Act must first be proved. Mere proof of payments from the principal customs area without more was not sufficient to prove the predicate

⁷⁵ Subsection 56(4) and subsection 70(1) of the AMLAFSA.

⁷⁶ Hisyam Abdullah @ Teh Poh Teik, *The Law on Money Laundering* (Johor Bharu: Hisyam Abdullah @ Teh Poh Teik, 2020), 84.

⁷⁷ Mohd Yasin and Zul Kepli, *Anti-Money Laundering*.

⁷⁸ [2019] 2 MLJ 536; See also *Public Prosecutor v. Taiko Fertiliser & Ors* [2017] MLJU 112; *Public Prosecutor v Sudesh Ratnarajah & Ors* [2021] 4 MLJ 607; *Public Prosecutor v Mokbul Hossain & Ors* [2021] MLJU 169; *Public Prosecutor v Jakel Trading* [2020] MLJU 1206.

⁷⁹ *Noor Ismahanum Mohd Ismail vs PP*, p. 544.

⁸⁰ [2016] 2 CLJ 763.

offence under s. 135(1)(g) of the Customs Act, hence, the offence under s. 4(1) of the AMLATFA.”⁸¹

Interestingly in *Walsh v Director of the Assets Recovery Agency*,⁸² the claimant argued that the forfeiture proceedings were criminal in nature, not civil, and therefore required the criminal standard of proof. The Court rejected this argument, which distinguished civil recovery proceedings from the criminal process. Rebuttable presumption in Malaysian domestic law can be seen in section 35 of Act 340. The case of *Lim Kok Chong & Anor v PP*⁸³ stated that:

“Under Part III of the FPA proceedings for forfeiture, the prosecution will be assisted in its task to forfeit illegal property by the s. 35 of the FPA presumption in having the evidential burden being placed against the affected party resisting the forfeiture of a seized or intended to be seized property under the FPA. Noting that this presumption is giving due recognition to the doctrine of *omnia praesumuntur rite esse acta*⁸⁴ embodied in s. 114(e) of the Evidence Act 1950 that all acts are presumed to have been rightly and regularly done. The process of initiating a proceeding by the PP is provided under ss. 8 and 9 of the FPA, which results in the affected person having to attend Court to show cause against forfeiture of the properties identified as illegal.”

In the case of *Kanagasavey a/l Sinayah vs Public Prosecutor*,⁸⁵ because the appellant had failed to rebut the presumptions of liable person and illegal property under section 35 of Act 340, the Court ordered the property to be forfeited. Article 12(7) of the UN Convention against Transnational Organized Crime and Article 5(7) of the Vienna Convention advocate for the reversal of the onus of evidence requirements like those included in section 35 of Act 340.⁸⁶

⁸¹ Ibid, 766.

⁸² [2005] NICA 6 at para. 41.

⁸³ [2012] 7 CLJ 66, p. 70.

⁸⁴ If there is no evidence to the contrary, it is presumed that (a) the necessary action has been taken or (b) the completed task was done following all relevant technical requirements. See “*Omnia praesumuntur rite esse acta* definition,” Glossary, LexisNexis, accessed May 22, 2023, <https://www.lexisnexis.co.uk/legal/glossary/omnia-praesumuntur-rite-esse-acta>.

⁸⁵ [1995] 2 MLJ 238, p. 243-244.

⁸⁶ Mohd Yasin and Zul Kepli, *Anti-Money Laundering*, 171.

Also, rebuttable presumptions have been implemented in numerous jurisdictions as part of their forfeiture laws. The Criminal Property Confiscation Act (2000) in Western Australia⁸⁷ and the Criminal Property Forfeiture Act (2002) in Northern Territory⁸⁸ provide that the burden of proof lies on the Respondent to justify the legitimacy of his property. These two laws do not require proof of committed offence. Criminal Property Forfeiture Act 2004 (Manitoba, Canada),⁸⁹ Seizure of Criminal Property Act 2005 (Saskatchewan, Canada),⁹⁰ Civil Forfeiture Act 2006 (British Colombia, Canada)⁹¹ and Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity Act 2007 (Quebec, Canada)⁹² provides for forfeiture of assets by reversing the burden of proof on the Respondent.

Interestingly in India, section 24 of the Prevention of Money Laundering Act 2002 places the burden on the accused to prove that the proceeds of the crime are untainted.⁹³ Dr M C Mehnathan,⁹⁴ referring to the case of *B. Rama Raju vs. Union of India, Ministry of Finance, Department of Revenue, represented by Secretary [Revenue], New Delhi*⁹⁵ stated that since camouflage and deception are strategies that are inherent and integral to money laundering operations, they may involve multiple transactions involving proceeds of crime with the intent to project the layered proceeds as untainted property. Legislative purposes are only achieved when the accused bears the burden of proving that the proceeds of crime are untainted property. This is exactly the rationale of section 24 of the Prevention of Money Laundering Act 2002, as stated in the *Rama Raju's* case above.

⁸⁷ Subsection 12 (2) Criminal Property Confiscation Act 2000.

⁸⁸ Subsection 71 (2) Criminal Property Forfeiture Act 2002.

⁸⁹ Subsection 17.15 (1) Criminal Property Forfeiture Act 2004 (Manitoba, Canada).

⁹⁰ Section 16 Seizure of Criminal Property Act 2005 (Saskatchewan, Canada).

⁹¹ Section 19.01 Civil Forfeiture Act 2006 (British Colombia, Canada).

⁹² Section 11 Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity Act 2007 (Quebec, Canada).

⁹³ Indian Prevention of Money Laundering Act 2002.

⁹⁴ M.C. Mehanathan, *Law on Prevention of Money Laundering in India*, 2nd ed. (Haryana: LexisNexis, 2017).

⁹⁵ 2011 (3) ALT 443: (2011) 108 SCL 491 (AP).

the Civil Recovery of Proceeds Act 2009 of New Zealand⁹⁶ on the other hand states that their Court would make a forfeiture order once it is satisfied on the balance of probabilities that the property is “tainted,” meaning that it has derived from unlawful activities.⁹⁷ If the Commissioner proves that a person has been involved in serious illicit acts over the past seven years and has profited from those activities, the profit will be forfeited.⁹⁸ The burden of proof then transfers to the respondent in the form of a chance to refute the Commissioner’s presumptions.⁹⁹ Similarly, in the United Kingdom, according to the Proceeds of Crime Act 2002, once the prosecution has established the illegal origin of assets, the burden of proof will then shift to the respondent.¹⁰⁰ Additionally, the United Kingdom presumes that any property acquired six years before the conviction is obtained illegally.¹⁰¹

FINDINGS AND RECOMMENDATIONS

The Public Prosecutor must prove that the property sought to be forfeited comes under one of the four classes under section 56 of the AMLAFTA. Proving the predicate offences and linking them to illegal proceeds made in section 56 seems problematic in achieving the objective. It is noted that under Act 340, the burden of proof is placed on the defendant during the civil forfeiture application to show that the property is not from the proceeds of crime¹⁰² unlike section 56 of the AMLAFTA, where the burden is placed on the Public Prosecutor to prove the requirements under the said section. The Malaysian Courts

⁹⁶ Section 53 Civil Recovery of Proceeds Act 2009 (New Zealand).

⁹⁷ Section 50 Civil Recovery of Proceeds Act 2009 (New Zealand).

⁹⁸ Sections 5 and 52 Civil Recovery of Proceeds Act 2009 (New Zealand).

⁹⁹ Booz Allen Hamilton, “Comparative Evaluation of Unexplained Wealth Orders,” U.S. Department of Justice, Appendix A-5., last modified October 21, 2011, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/comparative-evaluation-unexplained-wealth-orders>.

¹⁰⁰ Ibid, p. 179.

¹⁰¹ Subsection 10(8) Proceeds of Crime Act (United Kingdom); South Africa has a similar provision that applies for seven years via section 22 Prevention of Organised Crime Act Second Amendment 1999.

¹⁰² Section 35 of Act 340.

adopt a strict approach in evaluating the evidence on a balance of probabilities in allowing the civil forfeiture application under section 56. When applying the civil standard of proof on a balance of probabilities, merely stating facts with scanty documentary evidence is sufficient. Substantial documentary evidence is necessary to support and substantiate the case. It is also found that there is no rebuttable presumption under the AMLAFTA. Interestingly, the civil forfeiture statutes in Canada have been considered effective in reducing crime.¹⁰³

Therefore, the authors are of the view that with the rebuttable presumption in the AMLAFTA, the forfeiture legislation will work more effectively, especially in situations where the public prosecutor cannot prove through documentary evidence the predicate offence and associate it with illegal proceeds. In the absence of actual certainty, a presumption is an inference of the truth of a proposition or fact formed by a process of probable reasoning. When a presumption is raised, the party facing the presumption is responsible for proving that the assumption is unfounded using the applicable standard of proof. The argument for reversing the burden of proof is that the defendant has knowledge of the money's origin, and putting the burden of proof on the prosecution to prove its unlawful origin would be too cumbersome.¹⁰⁴ These concerns were raised by Prof. Dr. Norhashimah Mohd Yasin¹⁰⁵ and other authors regarding the potential negative consequences of civil forfeiture and reversed burden are certainly worth considering. Zaiton et al.'s¹⁰⁶ article underscores the significance of addressing these concerns seriously. The employment of these tactics by law enforcement and prosecution may result in unjust advantages gained through confiscated funds. The minimal evidence

¹⁰³ Hamilton, "Comparative Evaluation," Appendix A-4.

¹⁰⁴ R.E. Bell, "Abolishing the Concept of Predicate Offence," *Journal of Money Laundering Control* 6, no. 2 (2002): 53.

¹⁰⁵ Mohd Yasin and Zul Kepli, *Anti-Money Laundering*.

¹⁰⁶ Zaiton Hamin, Normah Omar, and Muhammad Muaz Abdul Hakim, "When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing in Malaysia," *Procedia Economics and Finance* 31 (2015): 789-796, [https://doi.org/10.1016/S2212-5671\(15\)01168-5](https://doi.org/10.1016/S2212-5671(15)01168-5); Zaiton Hamin, Normawati Hashim, and Muhammad Muaz Abdul Hakim, "The Ramifications of Forfeiting Property in Money Laundering Cases: Some Evidence from Malaysia," *Pertanika J Soc Sci & Hum* 25 (2017): 71-80.

requirement for civil forfeiture also burdens property owners, as they are expected to prove their innocence. It is also crucial to acknowledge that the rights of the third parties may only sometimes be adequately protected.

CONCLUSION

It can be concluded that the AMLAFTA provides sufficient procedures for the forfeiture of property names for criminal forfeiture under section 55 and civil forfeiture under section 56. Both of these provisions mandated a civil standard of proof for prosecution in seeking the forfeiture order. However, the civil standard of proof requirement for section 56 has made it difficult for the prosecution to succeed in the civil forfeiture application, amongst others, due to the lack of sufficient documentary evidence as the matter is purely within the defendant's knowledge. Thus, it is prudent for the prosecution to ensure that investigating officer has conducted a detailed investigation to gather all the documentary evidence to prove the application under section 56 before filling the application. The article is of the view that amendments to the AMLAFTA should involve the promulgation of specific provisions akin to section 35 of Act 340. Reference also should be made to the laws in Australia and Canada for a rebuttable presumption for forfeiture of property related legislation to ensure that the parties concerned will have to prove that the proceeds or money in the forfeiture proceedings are generated from legitimate sources. This facilitates the prosecution in ensuring that money derived from illegal sources cannot be utilised by criminals, as was the original intention of the enactment of the AMLAFTA.

This discussion sheds some light on the shortcomings of the substantive law and procedural requirements on civil forfeitures in Malaysia, as evidenced by recent Court decisions. It offers an examination of the standard of proof required for civil forfeitures and proposes the need for an amendment to section 56 of the AMLAFTA. This amendment should introduce a provision for a rebuttable presumption, which would strengthen the civil forfeiture provision and enhance its effectiveness.

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