When Property is Guilty of a Crime: Civil forfeiture under the Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) 2001

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ABSTRACT: Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) was created not only to criminalise money laundering and terrorism financing, but also to allow freezing and seizure of assets that are the proceeds of the above-mentioned crimes. The 2001 Act was also aimed at providing for forfeiture or confiscation proceedings of assets or the evidence of such crimes by the government. Prior to the 2001 Act, confiscation cases almost exclusively centered on drug trafficking under the Dangerous Drug (Forfeiture of Property) Act 1988. The 2001 Act is concerned with two types of forfeiture namely, criminal forfeiture in which the forfeiture is upon prosecution and civil forfeiture when there is no prosecution. This conceptual paper which is drawn from an ongoing research, seeks to examine the latter type of forfeiture in order to understand its origin, the rationale and the manner in which such forfeiture could be subjected to abuse, as experiences in other jurisdictions have indicated. The authors contend that civil forfeiture law as contained in AMLATFA 2001 represents one of the most serious encroachments on private property rights. Not only that, such legal rule has made property and not the owner to be guilty until proven innocent. This paper employs a doctrinal legal analysis and secondary data, which analyse the primary source, which is the AMLATFA 2001 itself, and secondary sources including case law, articles in academic journals, books and online databases.

KEYWORDS: *Money Laundering, Terrorism Financing, Civil Forfeiture, Criminal Forfeiture, Anti-Money Laundering and Anti-Terrorism Financing Act 2001.*

INTRODUCTION

Money laundering is a major threat which can lead to devastating economic, social and political consequences to any nation around the globe. Initially, such crime was associated with drug trafficking and organized crimes and now it has expanded to the corruption and also financial crimes such as illegal deposit taking, tax evasion and breach of trust. After September 11, 2001, the link between money laundering and terrorism financing was recognized, and as a result, countries around the world took one step further to create and also implement the anti-money laundering and anti-terrorism financing laws in order to curb such crime. With such implementation of the laws, law enforcement and prosecutors are required to comply with specific process in order to deprive the money launderers and terrorism financiers from the unlawful assets. Such process involved is known as the asset recovery process that includes the identification, tracing, seizing and freezing, confiscating (also known as forfeiture in some countries) and also returning the assets to the victim jurisdiction. This conceptual paper seeks to examine the civil forfeiture which is a type of available forfeiture, in order to understand its origin,

the rationale and the manner in which such forfeiture could be subjected to abuse. The first part of this paper will explain the offences related to forfeiture which is money laundering and terrorism financing. The second part explains the origin of forfeiture, the concept of forfeiture, and the types of forfeiture. The third part which is the core of the paper, examines the application of AMLATFA to civil forfeiture in Malaysia and its possible abuses by the law enforcement agencies. The last part concludes the paper.

MONEY LAUNDERING

The literature on the definition on money laundering indicates a variation of the concept. Hamin and Wan Rosli (2013) suggest that the money laundering has been defined differently by different writers and international bodies. For instance, the International Centre for Asset Recovery (ICAR) (2011) indicates that a fuller definition of money laundering is dependent upon each country's legislation and legal tradition. ICAR defines such crime as the process by which criminals (including those involved in corruption) seek to conceal, disguise or hide the true origin, nature or ownership of property derived from, or involved in corruption or other criminal activity The definition also generally includes the act of acquiring, possessing or using assets known or suspected to have derived through unlawful means. Money laundering is defined by the Central Bank of Malaysia as to cover all activities and procedures to change the identity of illegally obtained money so that it appears to have originated from a legitimate source (BNM, 2006).

FATF defines money laundering as the processing of a large number of criminal acts to generate profit for individual or group that carries out the act with the intention to disguise their illegal origin, in order to legitimize the ill-gotten gains of crime (FATF, 2001). Besides, according to INTERPOL, money laundering can be interpreted as any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources (INTERPOL, 1995). Similar to Provost (2009) and Akopyan (2010), Hamin, et. al (2013) suggest that money laundering is the concealment of an illegal application of income to make it appear legitimate. Mandinger (2006) also suggest that money laundering is the use of money derived from illegal activity by concealing the identity of the individuals who obtained the money and converting it to assets that appear to have come from a legitimate source.

TERRORISM FINANCING

Similar to the money laundering, the existing literature also indicates a variation on the concept of terrorism financing. For instance, Dalyan (2008) emphasizes that terrorism financing is the financial support, in any form, of terrorism or of those who encourage, plan or engage in it. Mohd Yasin (2012) suggests financing of terrorism as carrying out transactions involving funds that may or may not be owned by terrorist, or that have been, or are intended to be, used to assist in the commission of terrorism. In addition, Allam and Gadzinowski (2009) refer to the definition by the EU's Third Money Laundering Directive as the provision or collection of funds, by any means directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part in order to carry out any of the offences that have been defined as terrorism. They then suggest as the definition underlines, the focus is on the purpose for using the funds and not on the cleaning process of money. In fact, funding to support terrorism may rely on both legitimate sources and criminal activities (Allam and Gadzinowski, 2009). Similarly, Nordin, et. al, (2012) stipulates the financing of terrorism is a simple concept that it is actually the financial support of terrorist acts or those who encourage, plan or engage in terrorism.

ORIGIN OF FORFEITURE

Commentators emphasize that the history of asset forfeiture commences in England. For example, Simser (2008) explains that the ancient roots of forfeiture can be traced into the word of "felony." He states that the Saxon words "fee" or landholding, and "lon" or price, combine to define forfeiture as an act or omission that could result in the loss of property. He traces the concept of forfeiture far back into the ancient history of the Saxon and the Scandinavian legal thought, which survived the Norman invasion of 1066 and played a role in the legal system of feudal England. During this period, a man convicted of treason against the King would forfeit not only his life, but also his interests in land and chattels, as well as his ability to pass the itle to his heirs (Simser, 2008). Mohd Yasin (2007) also highlights the history of forfeiture. She argues that the concept of forfeiture of the proceeds of crime has long existed in common law. She further suggests that the seizure and forfeiture of property are also practices long used by the governments and provides an example in the English common law, in which the value of an inanimate object could be forfeited to the English Crown if that object caused the death of a person. She argues that in this way, the forfeiture of property was generally justified as a penalty for carelessness. This tradition and justification has, over time, merged with a belief that the right to own property by the criminals could be denied (FBI, 2014).

CONCEPT OF FORFEITURE

The legal view on the concept of forfeiture shows that criminals cannot benefit from their crimes as illustrated in the case of *Irving v. National Provincial Bank* [1962] 2 QB 73 that the appellant sued for the recovery of money that had been ordered to be given to the bank on his conviction for a bank robbery. His conviction was overturned on appeal. It was held that as he had lost little to the money when the Court ordered it to be handed over to the bank; he had to prove to the Court that he was the lawful owner, and so he failed in this action. The literature also shows that modern developments in asset forfeiture have given the government almost unlimited power to seize nearly any assets related to illegal activity (Kim, 1997). However, Kim (1997) argues that historically, government could not seize any property without any constitutional restraints such as just compensation or due process of law. As such, he defines forfeiture as a divestiture of specific property without compensation, which imposes a loss by taking away some pre-existing valid right without compensation. Forfeiture is also synonymous with "confiscation" in civil procedure and criminal procedure, particularly, when it refers to the removal of direct advantage (European Commission, 2009).

Existing literature suggests the various types of forfeiture. For example, Gallant (2005) postulates that English law distinguishes four different types of forfeiture, namely, criminal forfeiture, the forfeiture of things related to convictions, the forfeiture of objects *malem in se*, and lastly the civil forfeiture. He explains that commonly, the first two types are described as the instrument of the criminal law because the forfeiture in each case is triggered by a criminal conviction. In contrast, the latter two types are defined as civil devices because they are not contingent upon criminal convictions. Pursuant to such doctrine, upon conviction for a criminal offence, an individual relinquished his rights to property (Gallant, 2005). Doyle (2013) also emphasizes that modern forfeiture follows one of the two procedural routes. He suggests that although all crimes trigger all forfeitures, they are classified as civil or criminal forfeitures according to the nature of the procedure which ends in confiscation. He also suggests two principal asset forfeiture mechanisms- the criminal forfeiture which is an *in personam* proceeding, in which confiscation is only possible upon the conviction of the owner of the property.

As to criminal forfeiture, Williams, et. al (2010) suggest that such forfeiture is tied to the criminal conviction of an individual, where the government needs to show that an offender is guilty

beyond a reasonable doubt and the accused is afforded all the rights under the Constitution and also other relevant Acts. In regards to criminal forfeiture, the government must show to the courts that the property owner obtained his property illegally.

Extant literature on civil forfeiture also explains the nature of such forfeiture. For example, Simser (2008) suggests that it is an *in rem* proceeding in which the property is the defendant in the case. He also contends that such forfeiture is a remedial statutory device designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. Doyle (2013) later argues that unless the statute provides otherwise, the innocence of the owner is irrelevant, it is enough that the property was involved in a violation to which forfeiture attaches.

The literature is also concerned with the justification of such forfeiture. Simser (2008) suggests two policy rationales for civil forfeiture. Firstly, the benefits from unlawful activity should not be given to those who commit unlawful activity. He also observes that such individuals should not to be given the rights and privileges normally present in civil property law. Secondly, as a matter of policy, the state should suppress the conditions that lead to unlawful activities. He then suggests that otherwise, the proceeds should be forfeited and distributed back to the victims or forfeited by the State.

LEGAL ASPECT OF FORFEITURE OF PROPERTY

Types of forfeiture

The existing literature in Malaysia suggests that under AMLATFA 2001, there are two types of forfeiture namely criminal and civil forfeiture. For example, Mohd Yasin (2007) contends that there are forfeiture of property upon prosecution (criminal forfeiture) under section 55 and the forfeiture of property when there is no prosecution initiated against the accused (civil forfeiture) under section 56. She also explains the main difference between these two sections is upon the preference for prosecution by the Public Prosecutor against the suspect. Section 55 of the AMLATFA 2001 deals with the forfeiture of property upon prosecution against the accused for an offence committed under Subsection 4(1) of the same Act. In contrast, section 56 of the AMLATFA 2001 deals with civil forfeiture in which the forfeiture of property when there is no prosecution initiated against the accused under Subsection 4(1) of the AMLATFA 2001. The literature also indicates the time period involved in civil forfeiture. For example, Mohamed and Ahmad (2012) observe that section 56 allows the prosecution to forfeit the illegal property although no criminal charges had been made against the accused within 12 months of the date of the freeze or seizure order for a forfeiture order, even if the accused was not prosecuted.

Similarly, Byrnes & Munro (2011) suggest that criminal and civil forfeiture exist in Malaysia in the following situations which are (a) Where a person has been prosecuted for and convicted of an offence under subsection 4(1) of AMLATFA; (b) Where a person has been prosecuted for an offence under subsection 4(1) but the offence has not been proven. The court may make a forfeiture order if satisfied that the accused is not the true and lawful owner of such property and no other person is entitled to the property; (c) Where there has been no prosecution or no conviction for such an offence. They also argue that the court may make a forfeiture order if satisfied that the property is the subject matter of a subsection 4(1) offence, or has been used in the commission of such offence (Byrnes & Munro, 2011).
Byrnes & Munro (2011) also postulate that the "property" here means assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however required or legal documents or instruments in any form, including electronic or digital,

evidencing title to, or interest in such assets including bank credits, traveller's cheques, money orders, shares, securities, bonds, drafts and letters of credit. They later emphasize that from the above definition under Section 3 of AMLATFA 2001, it is clear that the property includes property that is directly derived from unlawful activity. In addition, where the property has been disposed of or cannot be traced, the accused is liable to a penalty equivalent to the value of the property. Property is liable to forfeiture regardless of whether it is held by a third party (Byrnes & Munro, 2011).

Forfeiture Order Procedures

The legal literature further explains the procedures involved in granting the Order for Forfeiture. Mohd Yasin (2007) explains that once the court is satisfied that the property is the subject matter of the offence of money laundering as prescribed in both subsections 55 and 56 of the AMLATFA 2001, and subject to Section 61 of the AMLATFA 2001, the court may require any bona fide third parties to prove their claims against the property and also to show cause why the property should not be forfeited to the government. She further explains that the court will make an Order for Forfeiture as soon as the proceeding under Section 61 AMLATFA 2001 has ended, whether the said property to be returned to the bona fide third parties or to be forfeited to the government.

Post-Forfeiture Order Procedures

The literature also emphasizes further procedures to be followed by the enforcement agencies after the Forfeiture Order has been granted. Bant Singh (2012) contends that when an Order for Forfeiture has been granted, the enforcement agency must take the necessary action to forfeit such property. This process takes some times due to the need to liaise with the financial institutions, car dealers and others for auction and for disposal purposes. The money derived from that will be forfeited to the government. Nonetheless, Mohd Yasin (2007) argues that while this process in its progress, there is a need for a proper storage of the forfeited property as well as its maintenance to preserve the condition of such property. She observes that such a mechanism is absent from the AMLATFA 2001.

Abuses of Civil Forfeiture

The literature suggests that there are several factors that lead to the abuses of the modern forfeiture system. For instance, in the USA the profit motive when law enforcement agencies seize assets in forfeiture actions has been documented. Williams, et. al (2010) argue that the changes to civil forfeiture that gave law enforcement agencies a percentage of forfeiture proceeds while also giving them the upper hand in forfeiture proceedings, have created a powerful incentive: seize, forfeit and profit. However, they also contend that this pecuniary interest and the other advantages granted to the government under the civil forfeiture laws have not only distorted the law enforcement priorities, but also altered the officers' and prosecutors' behaviours and led to a number of police and prosecutorial abuses (Williams, et. al, 2010). The money obtained from such actions may be used for better equipment, nicer offices, newer vehicles, trips to law enforcement conventions and even police salaries, bonuses or overtime pay. This profit motive is regarded as the rotten core of forfeiture abuse (Simser, 2008; Bant Singh, 2012).

Another abuse is regarding the standard of proof in civil forfeiture. It is hard on property owners because they have to establish a lower "standard of proof" under which the government can take the property. The standard of proof in a criminal proceeding is "guilty beyond a reasonable

doubt" in which the government must demonstrate to the jury that the accused committed the crime beyond reasonable doubt. This high standard exists to protect the rights of innocent individuals who might be accused of a crime. But innocent property owners enjoy no such protections. This means that criminals seem to have more rights than innocent owners when it comes to this type of forfeiture of property (Simser, 2008; Bant Singh, 2012).

Further abuse relates to innocent owner burden, in which the burden of proof is shifted from the state to the owner to prove that he/she is innocent of the crime in forfeiture cases. In other words, with civil forfeiture, property owners are effectively guilty until proven innocent. The increased burden (including substantial legal costs) of proving one's innocence can result in owners abandoning their rightful claims to the seized property. If the owners do not fight civil forfeiture and the government wins by default, law enforcement agencies are more likely to engage in it. Apparently, the net effect of these three factors is to increase the use of forfeiture by law enforcement agencies by making it profitable for the agencies that engage in it, by making it easier to keep the seized property (by lowering the standard of proof) as well as by making it more expensive and difficult for property owners to challenge the action (by shifting the burden of proof to the innocent owner) (Simser, 2008; Bant Singh, 2012).

Third Party Rights

A glaring abuse that may arise in civil forfeiture relates to the rights of third party, which are not well preserved by the law. Kennedy (2005) suggests that the issue of third party rights is one of the essential features of civil forfeiture systems but also questions on how the proceeds of drug trafficking which is left to a widow by her deceased husband should be dealt with. Recent decision in the case of *PP v Lau Kwai Thong* (unreported) in 2009 indicates that it is quite difficult for the third party who claims to have any interest over the property to show that he acted in a good faith since all the requirements provided under subsection 61(4)(a)-(e) must be conjunctively fulfilled.

CONCLUSION

Apart from protecting the victims of money laundering, civil forfeiture system may represent some economic value to the government and the law enforcement. However, there are several trade-offs of such system. As discussed above, the ownership of private property is one the most cherished rights which have been encroached by modern civil forfeiture law. The nature of civil forfeiture that is *in rem* proceeding makes the property the defendant in the case and unless the law provides otherwise, the innocence of the owner is irrelevant, because it is enough that the property was involved in a violation to which the forfeiture attaches. Apparently, the civil forfeiture law as contained in AMLATFA 2001 represents one of the most serious encroachments on private property rights. Such legal rule has also made property and not the owner to be guilty until proven innocent. Furthermore, AMLATFA has made it difficult for the property owners to prove that they acted in good faith in the property involved in money laundering. Also the standard of proof in civil forfeiture does not seem in favour with the property owners. It is also unfortunate for property owners that under the civil forfeiture system, law enforcement agencies could benefit directly from the forfeiture actions of their property.

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