

The Ramifications of Forfeiting Property in Money Laundering Cases: Some Evidence from Malaysia

Zaiton Hamin*, Normawati Hashim and Muhammad Muaz Abdul Hakim

Faculty of Law, UiTM, 40450 Shah Alam, Selangor, Malaysia

ABSTRACT

This paper aims at examining the implications of the asset forfeiture system in Malaysia on the property owners and third party in relation to its 2001 anti-money-laundering legislation. This is a qualitative research in which primary data is obtained from the semi-structured interviews with law enforcement personnel, which is triangulated with the data from Bank Negara. The source of secondary data is the 2001 Anti-Money Laundering Act and relevant literature. Preliminary findings showed the asset forfeiture system not only led to legal ramifications but also economic and financial ones for the law enforcement and property owners and the third party.

Keywords: Forfeiture, human rights, implications, money laundering, third party

INTRODUCTION

The Anti Money Laundering (AML) regime in Malaysia is regulated by the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUAA) 2001 (henceforth referred

to as the 2001 Act). This Act prevents money launderers from profiting (Hamin, Omar, & Abdul Hakim, 2015). It is also known as the asset recovery process which includes the identification, tracing, freezing and seizing, confiscating (also known as forfeiture in some countries including Malaysia) and returning the assets to the victim (ICAR, 2011). This paper highlights the implications of the application of the 2001 Act in relation to asset forfeiture. The first part of this paper examines the legal position of asset forfeiture in Malaysia as provided under the 2001 Act while the second part reviews the literature on the forfeiture system and its ramifications. The third part describes

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E-mail addresses:

zaiton303@salam.uitm.edu.my (Zaiton Hamin),

busuwati@yahoo.com (Normawati Hashim),

muazabdulhakim1@gmail.com (Muhammad Muaz Abdul Hakim)

* Corresponding author

the research methodology and the fourth part, which is the crux of the research, discusses preliminary findings. The fifth section discusses the relationship between the findings and those from the literature while the last section concludes the paper.

The Legal Position on Asset Forfeiture under the AML Regime

In 2001, the Anti-Money Laundering Act (AMLA) 2001, which was later amended to the Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) in 2003 was the law governing freezing, seizure and confiscation of property in Malaysia. Hamin, Omar, Rosli, and Razak (2015) noted that recently, AMLATFA was again modified and overhauled and is now known as the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUAA) 2001. Rahman (2008) observed that Part VI of the old 2001 Act provides for the standardised mechanisms applicable to all law enforcement agencies for freezing, seizure and also forfeiture of property purchased through money laundering activities.

Hamin et al. (2015) reported that the Malaysian legal position on the asset forfeiture is in line with the United Nations Convention and the FATF Recommendations. Furthermore, literature suggested that under the 2001 Act, there are two types of forfeiture namely criminal and civil forfeiture. For instance, Mohd Yasin (2007) explained that under the old 2001 Act, while the confiscation of property upon

prosecution (criminal forfeiture) came under section 55, confiscation of property of which there is no prosecution initiated against the accused (civil forfeiture) came under section 56. These provisions for criminal and civil forfeiture remain the same under the amended 2001 Act.

On the procedures for granting the Forfeiture Order, Mohd Yasin (2007) indicated that this happens after 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 old 2001 Act. Subject to section 61 of the same Act, the court would require any *bona fide* third party to prove their claims against the property and also to show cause why the property should not be forfeited by the government. The onus is on the third-party claimant to prove that: (a) he has a legitimate interest in the property; and (b) he did not participate, collude or involve with the anti-money laundering in question; and (c) he lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use; (d) and he did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and (e) he did all that could reasonably be expected to prevent the illegal use of the property.

The court would make issue Forfeiture Order as soon as the proceeding under section 61 of the old 2001 Act ends whether

the said property was to be returned to the *bona fide* third party or to be forfeited to the government (Mohd Yasin, 2007). After this, there are further procedures to be followed by the enforcement agencies. Justice Bant Singh remarked that when an Order for Forfeiture has been issued, the law enforcement agency could take the necessary action to forfeit such property. This process would take some time as they need to liaise with financial institutions, car dealers, and others for the auction and the disposal purposes. The money derived from it would be forfeited to the government. (Bant Singh, 2012). Likewise, the provisions that involve the process of granting Forfeiture Order and rights of the *bona fide* third party under the new 2001 Act remain the same based on the old law.

LITERATURE REVIEW

What is Asset Forfeiture?

Forfeiture has long been a useful law enforcement tool. The history of property forfeiture began in England. Doyle (2015) contended that the early English law is the precursor of the existing forfeiture law. It is reminiscent of three first English procedures i.e. *deodands*, forfeiture of estate or common law forfeiture, and statutory or commercial forfeiture (Doyle, 2015).

According to Dery (2012), forfeiture is commonly understood to be the divestiture without compensation of property used in a manner contrary to the laws of the sovereign. Likewise, Hamin et al. (2014) also highlighted that forfeiture is a divestiture of particular property without

compensation, which imposes a loss by taking away some pre-existing valid rights, without compensation.

There are various types of forfeiture. For example, Doyle (2015) remarked that modern forfeiture follows one of two procedural routes, namely criminal or civil depending on the nature of the judicial procedure which ends in confiscation. For criminal forfeiture, Byrnes and Munro (2011) argued that criminal forfeiture is *in personam* proceeding, and it is tied to the criminal conviction of an individual. Welling and Hord (2012) opined that criminal forfeiture is a sanction that can be imposed on defendants only after they are convicted of an authorising substantive crime. On the other hand, Vincent, Levin, Sallah, and Reid, (2011) suggested that civil forfeiture is an *in rem* proceeding in which the property that was derived from or used to commit a crime is treated as the offender. Carpenter and Salzman (2015) also observed that civil forfeiture is the government's power to take property implicated in a crime, and this type of forfeiture is based on the fiction that the property itself is "guilty."

Implications of the Asset Forfeiture System

Encroachment on Human Rights and Rights to Property

Human rights relate to fundamental rights and freedoms that belong to every person in the world regardless of his or her circumstances. Such rights cannot be given away or taken away by anybody although some rights can be limited or restricted in

certain circumstances (Equality and Human Rights Commission, 2015). According to Transparency International (2013), the human rights include the right to an effective remedy and a fair trial, communicating the freezing order to the affected person as soon as possible after its execution, and immediate return of the frozen property which is not subsequently confiscated or forfeited.

In Malaysia, human rights have been incorporated in Part II of the Federal Constitution, namely Articles 5 to 13. The right of the person in forfeiture cases is provided on grounds of equality. Article 8(1) stated that all individuals are equal before the law and entitled to the equal protection of the law. On the other hand, Article 13 provides the rights to property, which states that no person shall be deprived of his property, save under the law. Zakaria (2012) contended that Article 13(2) implies the government should provide for adequate compensation if it acquires the property of an individual on compulsory grounds. Additionally, Seng (2015) opined that the equality principles and the right of ownership under the Federal Constitution emphasised that such rights and protection must not be directly abused.

Third Party Rights in the Asset Forfeiture System

Kennedy (2005) noted that third party right in the asset forfeiture system is one of the essential features of the *in rem* proceeding. If such right were not well preserved by the law, it might be prejudiced, jeopardised

or abused by such proceeding. The case of *PP v Lau Kwai Thong* (2009) illustrated such prejudice to *bona fide* third parties. This particular case indicates that it is quite difficult for the third party who claims to have any interest in the property to show that he acted in good faith since all the requirements provided under subsection 61(4) (a) -(e) of the AMALTF 2001 must be conjunctively fulfilled.

Rahman (2008) observed that the forfeiture provisions under the AMLATFA 2001 are subject to the notice being given to the third parties so that such people who have an interest in the property could make their claims in the Courts under section 61. This particular section is unchanged under the new 2001 Act. In exercising their rights under section 61 of AMLATFA, the burden of proof is on the third party to show that the latter is lawfully entitled to the property. Additionally, Rahman (2008) suggested that Section 61 places a heavy and unjust burden on the third party. Rahman (2008) further argued that all the requirements of Section 61 of the said Act must be reviewed to ensure that the claims by *bona fide* third parties are not prejudiced.

Management Agency on Seized and Forfeited Property

Mohd Yasin (2007) contended that the old 2001 Act is silent on the need for an agency to manage the seized and forfeited property. She further argued that in the absence of such agency, the moveable property such as motor vehicles are often left outside and exposed to the elements, so that when the

property is finally forfeited, it will fetch a very low price at the auction. Consequently, the government gains little monetary benefit and most likely such asset would not be in a fit state to be utilised by the enforcement agency either (Mohd Yasin, 2007). Hamin et al. (2015) also observed that such a storage mechanism is absent from the old or the new 2001 Act. Mohd Yasin noted that in the UK, Asset Recovery Agency (ARA) was responsible for such storage task. The ARA was merged with the Serious Organised Crime Agency (SOCA) and since 2013, it was renamed the National Crime Agency (NCA).

METHODS

This is a qualitative research and it provides a deeper and holistic understanding of the social phenomena (Silverman, 2013). Such method in this research enables the researcher to explore the views of the respondents about the implications of asset forfeiture system under the Anti-Money Laundering (AML) regime in Malaysia.

The first phase of data collection was the literature review in which all relevant studies on the implications of asset forfeiture involved money laundering activities were examined. These are considered secondary sources. The primary sources include the AMLATFPUAA 2001.

The second phase of data collection is the fieldwork, namely the semi-structured interviews with the respondents involved in asset forfeiture system. The total number of 16 respondents represent the regulatory body as well as judges, prosecutors and officers

from related law enforcement agencies as well as academicians. The face-to-face semi-structured interview method is chosen as it gives the researcher the opportunity to explore the participant's opinion of an issue in depth, rather than to test knowledge or only categorise it (Matt, 2000).

The sampling method in this research is purposive sampling which means that the respondents were selected because they are likely to generate useful data for the research. Also, qualitative data analysis was conducted through thematic and content analyses, in which observations and the interview transcripts from the semi-structured interviews were examined. The process consisted of creating codes and categories, considering the themes and then creating hypotheses about the respondents' experiences. The primary data was triangulated with the semi-structured interview data obtained from all the respondents. The interviews were digitally recorded, and their contents transcribed and analysed using the Atlas qualitative research software.

RESULTS

Some preliminary findings are as below:

Infringement of the Right to Property

The findings suggested that rights of the property owners involved in the forfeiture cases were being infringed whereby the actual owner was not involved in such crimes. Such forfeitures led to injustice and unfairness to those property owners in which

their rights and enjoyment over the said property had been deprived. Additionally, majority of the respondents from the law enforcement believed that despite the concern about the infringement of human rights, they had no choice but to enforce the anti-money laundering law. The minority respondents from the judiciary, however, contended that despite the nature of the anti-money laundering law being a subversive law to the Federal Constitution, such law was imperative to maintain law and order in the country. They also opined that there must be a check and balance in implementing an effective forfeiture process.

Third Party Rights to Property Affected

The findings revealed that the majority of the respondents believed that the asset forfeiture process in money laundering cases adversely affected the rights of the third party such as investors in gold investment schemes or financial institutions and banks, which provide financial loans to the individuals or companies which were later investigated by the Bank Negara and the police for money laundering. The respondents agreed that the *bona fide* third party has an interest over the property and should be entitled to claim it under the 2001 Act. In other words, the respondent agreed that the law did not diminish the rights of the third party to apply for the property. However, findings revealed that third parties have encountered some difficulties in satisfying the Courts during the forfeiture hearing namely fulfilling all the five requirements under Section 61(4) the said Act. As a result of such failure, the

Courts have rejected their claims, and they had lost their properties, which were then forfeited by the Government.

Absence of Central Asset Management Agency and Costs Implications

The findings indicated that there was a lack of a central government agency to manage the seized and forfeited property by the law enforcement. The findings showed that law enforcement had to provide for their storage space for such property, which in most cases were already full or limited. As a result, they had to hire private companies for bigger storage spaces and had to incur high costs. The majority of the respondents were agreeable that there was a need for a central storage space for them to send the forfeited property.

DISCUSSION

On the infringement of human rights and the right to property, the findings confirmed Zakaria (2012) and Seng (2015) that the equality principles under Article 8 and the rights to property under Article 13 of the Federal Constitution must not be abused or deprived. Such was the position of the property owners who were not involved in money laundering activities but their property which was deemed to be used to commit such crime was forfeited. In other words, if the application of the 2001 Act on asset forfeiture regime were not correctly observed and in line with the Federal Constitution, such failure may encroach on the human rights of an individual and also his rights to property.

With regards to third party rights that may be affected by the asset forfeiture system, the findings confirmed Kennedy's (2005) who contended that third party rights may be jeopardised particularly *in rem* proceeding in which the property is guilty until it is proven innocent. Furthermore, the findings are in line with the decision of *PP v Lau Kwai Thong* (2009) that all five strict requirements under Section 61(4) of the 2001 Act will cause the failure of the third parties to claim their interests over the property even when they had acted in good faith. Also, the findings confirmed Rahman (2008) that the 2001 Act may cause an unfair burden on third parties who acted in good faith and had right to claim over the guilty property. The findings also supported those of earlier studies that all the requirements of Section 61 of the said Act must be reviewed to ensure that claims by *bona fide* third parties are not prejudiced and abused by this forfeiture law (Rahman, 2008).

The findings of the asset management agency confirmed the views of Mohd Yasin (2007) and Hamin et al. (2014) that until today, there is no agency to manage properly the properties that were seized and later forfeited. In fact, the findings are in line with the old and the amended 2001 Act that was still silent on this particular issue. The results also indicated that it is imperative for Malaysia to create an asset management agency such as that in the UK to ensure the proper storage of the seized and forfeited property and to maintain as well as preserve the conditions of such properties. Significantly, such agency would, in the

long run, save the costs of hiring private companies by various law enforcements to deal with such properties.

CONCLUSION

The AML regime provides for the full procedures for the forfeiture of property involved in money laundering activities. Nevertheless, findings of this study which are consistent with literature revealed that there are several legal and financial implications concerning such asset forfeiture system, which did not change under the old and also the new 2001 Act. Hence, the consequences of the forfeiture system involving the infringement of the human rights of the property owners, the problems of claiming their property by *bona fide* third parties and also the absence of the asset management agency to manage seized and forfeited property must be taken into consideration by the government to improve the forfeiture laws in Malaysia. This should be in line with those in advanced jurisdictions such as the UK and the USA. It is also crucial that the criminal justice players involved in the asset forfeiture system enforce and implement the forfeiture procedures and exercise their duties in good faith and in a transparent manner to ensure the effectiveness of the law and to prevent abuses in the system.

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