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When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing in Malaysia

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Abstract

Since the creation of the Anti-Money Laundering Act (AMLA) in 2001, which is now known as the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (the 2001 Act), money laundering and terrorism financing have been criminalized. Other legal measures to disrupt the flows and incidence of such crimes were also introduced involving freezing, seizure and confiscation or forfeiture of the proceeds of such crimes by the authorities. Prior to the 2001 Act, confiscation cases were almost exclusively centred on drug trafficking cases under the Dangerous Drug legislation. The 2001 Act entailed two current types of confiscation of criminal property, namely, the criminal confiscation that is based upon the prosecution of the accused person and the civil confiscation when there is no such prosecution. This paper seeks to examine these confiscation systems in Malaysia to understand their origin, nature and the extent to which such confiscation systems could be governed at the international and local levels. Of significance, is the legal implications of the non-conviction based confiscation that indicates that such confiscation law represents one of the most serious encroachments on private property rights. It is worse when the rule of such confiscation is making the property and not the property owner, guilty until proven innocent.

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1. Introduction

As a global phenomenon, money laundering is considered as a major threat that could cause havoc to the economic, social and political fabric of life in any nation. Initially, such crime was associated with drug trafficking and

organized crimes but has now expanded to other financial crimes including corruption, illegal deposit taking, tax evasion and breach of trust. Since 1990, the FATF has been concerned with money laundering and in 2003 terrorism financing was included in its agenda. Such policy development led to the creation of international standards and anti-money laundering and anti-terrorism financing (AML/ATF) laws to curb such crimes. With the implementation of such laws, law enforcement and prosecutors are required to comply with a specific process 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) and also returning the assets to the victim jurisdiction. This paper seeks to examine the concept and process of confiscation to understand the extent of its governance at the international and local levels and, in particular, the legal implications of the confiscation system. The first part of this paper will explicate the offences related to confiscation, which is money laundering and terrorism financing respectively. The second part examines the concept of confiscation, in particular, its origin, nature and types of confiscation. The third part explores the international governance, which is followed by the fourth part of the legal position of confiscation in Malaysia by the virtue of the AML/ATF legislation. The fifth part examines the legal implications of the confiscation regime, and the last part concludes the paper.

2. What is Money Laundering and Terrorist Financing?

2.1 Money Laundering

Money laundering has been defined differently by different writers and international bodies (Hamin and Wan Rosli, 2013). 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). Similarly, the 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). Money laundering has been considered as the concealment of an illegal application of income to make it appear legitimate (Provost, 2009; Akopyan, 2010; Hamin, et. al, 2013). 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. Money laundering can also be defined according to the stages or process of the criminal activities. For instance, Hasan and Abd Murad (2010) suggest that the process of money laundering, it comprises of three main stages that are placement, layering of funds and integration.

2.2 Terrorism Financing

Similar to money laundering, there is a variation on the concept of terrorist financing. For instance, the Counter-Terrorism Implementation Task Force (CTITF) Working Group Report (2009) highlights that terrorist financing occurs when the primary motivation is not financial gain but, rather, the use of funds to encourage, plan, assist or engage in acts of terrorism. Dalyan (2008) contends that terrorist financing is the financial support, in any form, of terrorism or of those who encourage, plan or engage in it. Following the definition adopted by the EU's Third Money Laundering Directive 2006, Allam and Gadzinowski (2009) suggest that terrorist financing is 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. Such a definition underlines that the focus of such crime is on the purpose of 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). Likewise, Nordin, et. al (2012) suggest the financing of terrorism is the financial support of terrorist acts or those who encourage, plan or engage in terrorism. Mohd Yasin

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