ANTI-MONEY LAUNDERING LAW AS A LEGAL MECHANISM TO COMBAT CORRUPTION IN MALAYSIA

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DOCTOR OF PHILOSOPHY
UNIVERSITI UTARA MALAYSIA
2018

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A thesis submitted to the Ghazali Shafie Graduate School of Government in fulfillment of the requirements for the Doctor of Philosophy (Universiti Utara Malaysia)

Kolej Undang-Undang, Kerajaan dan Pengajian Antarabangsa
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ABSTRACT

Money laundering is a process of disguising proceeds from unlawful activities and has been a complex crime globally. Developed and developing countries establish anti-money laundering regimes in the view to combat this ever-challenging crime. Corruption is an act which involves abuse of power in return for illicit and private gains. Corruption is considered as one of the predicate offences which utilises the process of laundering those illicit gains. Both money laundering and corruption have immense impact on social, financial and economic sectors. In Malaysia, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA) and Malaysian Anti-Corruption Commission Act 2009 (MACCA) are primary legislations enacted to combat money laundering and corruption respectively. Little study or research has been carried out on the effectiveness of utilising forfeiture regime under anti-money laundering law to combat corruption in Malaysia. This study attempts to investigate whether the current forfeiture regime under AMLATFPUAA is effective in fighting corruption. A comparative analysis between AMLATFPUAA and MACCA forfeiture provisions is done. This study is a doctrinal research where the researcher relies mainly on case laws, legislations and published materials such as journal articles. Findings show that forfeiture provisions are tools to ensure criminals do not escape with the benefits from the unlawful acts. Forfeiture halts the financial system of criminal organisations. Hence, they may not be able to commit further crimes. A comparative analysis discovers that AMLATFPUAA is more comprehensive than MACCA in terms of punishment for the offences, duration of forfeiture, freezing and seizure, and procedure and circumstances covered. Several recommendations are put forward here such as combining enforcement plans for anti-corruption and anti-money laundering, increasing the implementation of extraterritoriality, providing adequate training for legal enforcers, and increasing punishment for non-compliance of forfeiture order as well as for corruption. The recommendations given are for the enforcement agencies to consider for future improvements.

Keywords: Money Laundering, Corruption, Predicate Offence, AMLATFPUAA, Malaysia.

ABSTRAK

Pengubahan wang adalah proses penyamaran dan pembersihan 'wang haram' hasil daripada aktiviti yang menyalahi undang-undang yang telah menjadi satu jenayah yang kompleks di seluruh dunia. Negara maju dan membangun menubuhkan rejim anti pengubahan wang haram dalam usaha untuk memerangi jenayah yang mencabar ini. Rasuah dianggap sebagai salah satu kesalahan predikat yang menggunakan proses pengubahan hasil daripada aktiviti haram. Kedua-dua pengubahan wang haram dan rasuah mempunyai kesan yang besar terhadap sektor sosial, kewangan dan ekonomi. Di Malaysia, Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 (AMLATFPUAA) dan Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (MACCA) adalah perundangan dan mekanisme utama yang digubal dalam memerangi pengubahan wang haram dan rasuah. Sedikit kajian atau penyelidikan telah dijalankan ke atas keberkesanan penggunaan rejim pelucuthakan di bawah undang-undang anti-pengubahan wang haram untuk memerangi rasuah di Malaysia. Kajian ini bertujuan untuk menyiasat sama ada rejim pelucuthakan di bawah AMLATFPUAA berkesan dalam memerangi rasuah. Analisis perbandingan antara peruntukan pelucuthakan AMLATFPUAA dan MACCA telah dibuat. Kajian adalah berdasarkan kepada penyelidikan doktrinal di mana statut, kes mahkamah dan bahan yang diterbitkan seperti artikel jurnal telah digunakan. Kajian menunjukkan bahawa peruntukan pelucuthakan adalah mekanisme untuk memastikan penjenayah tidak melarikan diri dengan hasil daripada aktiviti-aktiviti haram. Pelucuthakan memastikan sistem kewangan organisasi jenayah disekat. Oleh itu, mereka mungkin tidak dapat meneruskan aktiviti jenayah mereka lagi. Berdasarkan analisis perbandingan, ia dikenal pasti bahawa AMLATFPUAA adalah lebih menyeluruh daripada MACCA dari segi hukuman bagi kesalahan-kesalahan, tempoh pelucuthakan, pembekuan dan penyitaan, dan prosedur dan situasi yang diliputi oleh Akta ini. Penyelidik menyusulkan beberapa cadangan seperti menggabungkan pelan penguatkuasaan untuk anti-rasuah dan pengubahan wang haram, merangkumi kawasan luar negara bagi penguatkuasaan, menyediakan latihan yang mencukupi untuk penguatkuasa undang-undang, mengurangkan jumlah untuk urusniaga yang mencurigakan dan meningkatkan hukuman bagi yang tidak mematuhi perintah pelucuthakan dan juga yang terlibat dalam rasuah. Cadangan-cadangan ini adalah untuk agensi-agensi penguatkuasaan menambahbaikan tindakan pada masa depan.

Kata Kunci: Pengubahan Wang Haram, Rasuah, Kesalahan Predikat, AMLATFPUAA, Malaysia.

ACKNOWLEDGEMENT

Throughout my graduate education, Dr. Aspalella Abdul Rahman, my supervisor, has been an excellent mentor and teacher. She truly understands what hard work and dedication can bring to one's life. This thesis would not have happened without her support. Not forgetting my co-supervisor, Dr. Yuhanif Yusof, I thank her for all the valuable comments. I would also like to express gratitude to Dr. Chanteney Velu who encouraged in improving my skills in class and offered many comments during our meetups. If it were not for Ms. Puvaneswary Vickramasingam, my interest in law would have never developed into its current capacity. During my undergraduate studies, she was always a lecturer whom I looked up to and respected dearly. I will always owe a great deal of gratitude to these lecturers from my undergraduate days. Without the support and motivation provided by my family, especially my husband, Naveeyindren Thangarajah, life in graduate school would have been mundane. Their presence, patience, and emotional support made this doctoral study in UUM a smooth one.

DEDICATION

To my husband, Naveeyindren Thangarajah,

parents,

and my beautiful daughter, Kayalvizhy Abhiramii,

With love.

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The Labuan Offshore Trust Act 1996

The Penal Code

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LIST OF ABBREVIATIONS

ACAB	Anti-Corruption Advisory Board
ACA	Anti-Corruption Act 1997
AG	Attorney General
AGC	Attorney General's Chamber
AMEJ	All Malaysia Electronic Judgements
AML	Anti-Money Laundering
AML/CFT	Anti-Money Laundering and Counter Financing of Terrorism
AMLA	Anti-Money Laundering Act 2001
AMLAC	Anti-Money Laundering and Corruption
AMLATFA	Anti-Money Laundering and Anti-Terrorism Financing Act 2001
AMLATFPUAA	Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
AMR	All Malaysia Report
APG	Asia/Pacific Group on Money Laundering
ASEAN	Association of Southeast Asian Nations
AusTRAC	Australian Transaction Reports and Analysis Centre
BAFIA	Banking and Financial Institutions Act 1989
BCCI	Bank of Credit and Commerce International
BNM	*Bank Negara Malaysia*
BNP	*Banque Nationale de Paris*
CC	Complaints Committee
CCPP	Consultation and Corruption Prevention Panel
CDD	Customer Due Diligence
CLJ	Current Law Journal
CPC	Criminal Procedure Code
CPI	Corruption Perception Index
CRIM	Organised Crime, Corruption and Money Laundering
CTC	Counter-Terrorism Committee
CTR	Currency Transaction Report
CTR	Cash Threshold Report
DDA	Dangerous Drugs Act 1988

DDFP	Dangerous Drugs (Forfeiture of Property) Act 1988
DNAA	Discharge Not Amounting to Acquittal
DPP	Deputy Public Prosecutor
DTA	Drug Trafficking Act 1994
ESAAMLG	Eastern and Southern Africa Anti Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIU	Financial Intelligence Unit
FPO	Foreign Public Official
FSRB	FATF-Style Regional Bodies
FTRA	Financial Transactions Reports Act 1988
GAFI	*Groupe d'action financière*
GBP	Great British Pound
GDP	Gross Domestic Product
GLC	Government-Linked Companies
GTP	Government Transformation Programme
HSBC	Hong Kong Shanghai Banking Corporation
IMF	International Monetary Fund
IO	Investigation Officer
IOFC	Labuan International Offshore Financial Centre
IP	Investigation Paper
ISIL	Islamic State of Iraq and the Levant
ISP	Interim Strategic Plan (ISP)
LNS	Legal Network Series
MACA	Malaysian Anti-Corruption Agency
MACC	Malaysian Anti-Corruption Commission
MACCA	Malaysian Anti-Corruption Commission Act 2009
MACMA	Mutual Assistance in Criminal Matters 2002
ML	Money Laundering
ML / TF	Money Laundering / Terrorist Financing
MLJ	Malayan Law Journal
NBI	National Bureau of Investigation
NCC	National Coordination Committee

NFA	No Further Action
NGO	Non-Governmental Organisation
NKRA	National Key Results Areas
NRA	National Risks Assessment
OECD	Organisation for Economic Corporation and Development
OFC	Offshore Financial Centre
ORP	Operations Review Panel
PDRM	*Polis Diraja Malaysia*
POCA	Proceeds of Crime Act 2002
PP	Public Prosecutor
PPO	Pecuniary Penalty Order
RM	*Ringgit Malaysia*
RMC	Royal Malaysian Customs
RMP	Royal Malaysia Police
RMT	*Rancangan Makanan Tambahan*
SHTJ	*Setem Hasil Tanah Johor*
SCC	Special Committee on Corruption
SOP	Standard Operating Procedure
SPMA	Special Preventive Measures Act 1985
SPRM	*Suruhanjaya Pencegahan Rasuah Malaysia*
SSCC	Special Sessions Courts for Corruption
STR	Suspicious Transaction Report
TI	Transparency International
TOC	Transnational Organized Crime
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDCP	United Nations Drug Control Programme
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
US	United States
USD	United States Dollar
WEF	World Economic Forum

CHAPTER ONE

INTRODUCTION

"Earth provides enough to satisfy every man's need, but not every man's greed."
-Mahatma Gandhi.

1.1 Background of the Study

Money laundering is a process of 'cleaning' 'dirty' monies and technological mechanisms assist the launderers in concealing the trail of the monies which lead back to the predicate crime. The crime of money laundering has been illustrated as the means of support for many other crimes and is the main threat to the economic and social security of societies. These activities have become global problems in the late twentieth century similar to the increase in drug trade. The term has been widely acknowledged and popularly being employed.[1]

As the origins of criminal proceeds were regularly from drug trafficking, many law enforcers have now expanded their applications to offences such as human trafficking, cybercrime, illegal arms sale and smuggling. Many countries such as Malaysia, the United Kingdom (UK), Australia, United States of America (US) and Switzerland

[1] Anusha Aurasu and Aspalella Abdul Rahman, "Forfeiture of criminal proceeds under anti-money laundering laws: a comparative analysis between Malaysia and United Kingdom (UK)," *Journal of Money Laundering Control* 21, no. 1 (2018): 104.

have given due consideration over prevention of money laundering, especially about corruption.[2]

The process of money laundering has three stages, namely: placement, layering, and integration. At the first phase, the illicit monies placed into the financial system, and the pool of monies is divided into smaller amounts. This process is done by the launderers to elude transactions which are deemed suspicious by the banks. Next, during the layering stage, illegal funds will then be transferred into accounts of bearer shell that are typically from a country which has less stringent laws and regulations. The final stage of this process is integration where those 'dirty' monies are converted into 'clean' monies where there is no association with any criminal activities. The cycle is illustrated in figure 1.0:

Figure 1.0 : The Money Laundering Cycle[3]

[2] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4 (2016): 337.
[3] "The Money Laundering Cycle," United Nations Office on Drugs and Crimes, accessed November 20, 2015, https://www.unodc.org/unodc/en/money-laundering/laundrycycle.html.

Generally, money laundering is described as the use of money gained from unlawful activities by obscuring the true identity and 'cleaning' it to have an appearance from legitimate sources. The United Nation's Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance which is also known as the 1988 Vienna Convention has purported the first official definition.[4]

"The United Nations Office on Drugs and Crime (UNODC) shown a study to govern the magnitude of illicit funds through drug trafficking and organised crimes and to investigate to what extent these funds are laundered. The report estimates in 2009 that unlawful criminal proceeds were 3.6% of the global Gross Domestic Product (GDP), with 2.7% (or 1.6 trillion USD) being laundered by criminal organisations."[5]

The above statistics have been within the extensively mentioned approximation by the International Monetary Fund (IMF), in 1998 that "the aggregate size of money laundering in the world possibly will be anywhere between 2 and 5% of the world's GDP." Using the 1998 statistics, "these percentages point out that money laundering fluctuated between 590 billion USD and 1.5 trillion USD. During that time, the lower figure was roughly equivalent to the value of the total output of an economy the size of Spain."[6]

Forfeiture of criminal proceeds stands to be the most vital mechanism in fighting against money laundering through effective implementation of the relevant laws. In

[4] "The 1998 Vienna Convention," Exeter, accessed November 15, 2014, http://people.exeter.ac.uk/watupman/undergrad/rtb/global1.htm.
[5] "UNODC and Money-Laundering/Countering the Financing of Terrorism," United Nations Office on Drugs and Crime, accessed February 12, 2015, http://www.unodc.org/unodc/money-laundering.
[6] United Nations, "Money Laundering."

this context, forfeiture is a tool to deprive the benefits gained by a person from a crime committed. This tool is divided into civil and criminal where each has different nature and effects. Criminal forfeiture refers to the court going after the suspect using the evidence gathered while on the other hand, civil forfeiture is a court order to forfeit the properties acquired through the committing of predicate offence(s). For civil forfeiture, there may not be convictions.[7]

While money laundering involves the process of 'masking' the money gained through criminal acts, it is clear that corruption is considered a serious offence, which facilitates money laundering. Corruption may be defined as "dishonest or fraudulent conduct by those in power."[8] In other words, corruption involves breaking of trusts by persons who are generally under fiduciary duties, for their gain.

Over a long period, corruption has been the focal point of every government, media, and academics globally. Through money laundering, proceeds of crime can be disguised. Criminal proceeds can be defined as money gotten from organised crimes. The launderers use various methods which are technical in nature. Corruption is one of the organised crimes which is said to be primarily associated with the laundering of proceeds.

As the concept of corruption is broad, the United Nations Convention Against Corruption (2003) (UNCAC) has provided a guideline as to the circumstances that

[7] Chew Tham Soon, "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering," accessed 23 October, 2015, http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P104-109.pdf.
[8] "Corruption," Oxford Dictionaries, accessed 25 March, 2016, http://www.oxforddictionaries.com/definition/english/corruption.

should be considered as corruption through Articles 15 to 22 of the Convention. They are: "bribery of domestic public officials, bribery of foreign public officials and officials of public international organisations, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, colloquially termed influence peddling, abuse of functions, illicit enrichment, bribery in the private sector and embezzlement of property in the private sector."[9]

Corruption creates a lot of money that will need to be disguised through the process of laundering. Concurrently, to conceal ill-gotten proceeds, corruption causes money laundering activity by bribing individuals who are involved in carrying out their duties for anti-money laundering (AML) systems. Due to the existence of proximity between corruption and money laundering, effectiveness will increase if AML law to be employed to fight against corruption.

In support of the notion that there is a close nexus between money laundering and corruption, the relationship between corruption, money laundering, and economic development was examined by the World Bank together with the Financial Intelligence Unit (FIUs) in Malawi and Namibia,[10] with the former being a lower income country than the latter. They have concluded that "the crime of corruption can be a significant cause of illegal money within a country." It is also agreed through analysis, "it is the largest source of ill-gotten money."

[9] "Legislative Guide for the Implementation of the United Nations Convention against Corruption," The United Nations Convention against Corruption (UNCAC), accessed 23 November, 2015, https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf.

[10] "Ill-gotten Money and the Economy- Experiences from Malawi and Namibia," The World Bank, accessed 23 November, 2015, http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Ill_gotten_money_and_economy.pdf.

Legal and regulatory mechanisms are formed to oversee these illegal activities and control them locally or even internationally. These mechanisms exist in different forms. A few prominent, internationally recognised ones are the Financial Action Task Force (FATF), Organization for Economic Corporation and Development (OECD), IMF and the World Bank.

In Malaysia, AML and anti-corruption laws play essential roles as part of the systems of control over the flow of money and its authentication. The Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA) and the Malaysian Anti-Corruption Commission Act 2009 (MACCA) are key legislations for money laundering and corruption respectively. These legislations are enacted separately. Superficially, there is connection seen between money laundering and corruption in these Acts.

Money laundering under the AMLATFPUAA involves any dealings, be it direct or indirect which include proceeds relating to a serious local or foreign offence. AMLATFPUAA recognises sections 16 to 23, 26 and 28 of the MACCA[11] in the list of serious offences under the Second Schedule. Sections 33 to 49 under part V of the MACCA involves forfeiture of assets gained from corrupt practices.

Alongside these legislations, Bank Negara Malaysia (BNM) and Malaysian Anti-Corruption Commission (MACC) are the major regulatory bodies which implement

[11] Sections 16 & 17 (a): soliciting or receiving Bribe, section 17 (b): offering or giving bribe, section 18: intending to deceive (false claim), section 20: procurement of withdrawal of tender, section 21: gratification relating to a public body, section 22: bribery offence committed by foreign public officials, section 23: using office or position for gratification where abuse of power or position takes place and section 28: a criminal conspiracy to commit any offences under the MACCA.

several initiatives involving money laundering and corruption. Here, the National Anti-Money Laundering/Counter Financing of Terrorism (AML/CFT) regime is put into practice by BNM, other related government agencies and authorities. The focus of the AML/CFT programme is to protect financial institutions as well as the non-financial businesses and professions from being targeted as the channel for money laundering and financing of terrorist activities.

By and large, it has been recognised that just like every other country, the Malaysian government, as their ultimate plan of reforms, has created a platform to fight against corruption and uphold morality. While the Anti-Corruption Agency (ACA) was formed in the early 60s, it was acknowledged that fighting corruption had been the plan of the government where various new initiatives and strategies had been formulated and put into practice.

These mechanisms can be considered to have been formed to tackle issues relating to money laundering and corruption. While research has been conducted on the impact of corruption on money laundering, little attention is given to the usage of AML law as a legal tool, especially forfeiture, to fight corruption and why mechanisms on corruption alone are insufficient. The adequacy of the legal framework and regulatory mechanisms for corruption is the primary concern of this study.

Overall, this study scrutinises into the various tools in Malaysia. The close-linkage between money laundering and corruption are observed, and the researcher provides possible recommendations and suggestions on how to further improve the implementation of AML law in combating corruption. The link is to sustain the

adequacy of the legal framework and regulatory mechanisms over these two concerned areas of law together.

As international body such as FATF has given its acknowledgement on the corruption-money laundering link, this study attempts to provide insights into employing AML mechanisms in fighting against corruption by examining existing legal framework and regulatory tools in Malaysia.

1.2 Problem Statement

Financial crimes such as money laundering and corruption have been unresolved issues and serious concern in a world where everything is moving fast with the refined digital connection. With this known fact, combating crimes has been a constant challenge for enforcers to detect and impose appropriate sanctions on those who are involved.[12] Legal framework and regulatory mechanisms, be it regulatory and enforcement bodies or set of laws, have to subsist to observe adequately and if not eliminate, minimise the consequences of these illegal activities.

It is apparent that the proceeds of corruption would be rendered of no use if they do not go through the process of laundering as aforementioned. It is reasoned as individuals, or public officials who have committed the crime of corruption will put on 'mask' on the proceeds to indicate that they are 'clean' monies and hence, there is no association with any illegal activities.[13]

[12] Jarrod Haggerty and Harvey Lewis, "An integrated approach to tackling financial crime," *Multi-Jurisdictional Guide 2012/13, Corporate Crime, Fraud and Investigations,* accessed November 4, 2015, http://uk.practicallaw.com/8-520-4700.
[13] "Laundering the Proceeds of Corruption," Financial Action Task Force, *FATF Report 2011*, accessed 4 November, 2015. http://www.fatfgafi.org/media/fatf/.

The crime of corruption is regarded as a serious offence not only in Malaysia but globally. This offence contributes mainly to the money laundering regime. Legal framework and regulatory mechanisms for both of these crimes are parted, distinctive and apparently, there is no overlap when implementation by legal enforcers takes place. [14] In most countries, the problem with some of the mechanisms is that they may not focus on the possible nexus exist between money laundering and corruption.[15]

Moreover, the lack of focus on the meeting point of money laundering and corruption may cause inefficient use of time as enforcement officers will need to glance at various mechanisms at one go and try to match with relevant provisions or regulations relating to money laundering and corruption distinctively.

As Malaysia is one of the developing Asian countries, corruption has been a common crime. Transparency International (TI) was established by a team of experts in 1993 to measure the corruption level globally. They established TI in efforts to put an end to corruption and the many ways it undermines positive progress in the world. It comprises of 100 chapters of independent, locally formed organisations that battle against corruption in their respective countries.

According to TI, "as of 2017, Corruption Perception Index (CPI) for Malaysia is a score of 52 out of 100 and is at the 50th rank out of 175 countries." Table 1.0 shows Malaysia's CPI between 2008 and 2017.

[14] "An Assessment of the Links between Corruption and the Implementation of Anti-Money Laundering Strategies and Measures in the ESAAMLG Region," Eastern and South African Anti-Money Laundering Group, accessed November 23, 2015, http://www.esaamlg.org/userfiles/Corruption_and_AML_Systems.pdf.
[15] Eastern, "An Assessment."

Table 1.0 : Corruption Perception Index for Malaysia from 2008 to 2017

Year	CPI Score	Ranking
2008	5.1/10	47/180
2009	4.5/10	56/180
2010	4.4/10	56/180
2011	4.3/10	60/182
2012	49/100	50/175
2013	50/100	54/176
2014	52/100	50/175
2015	50/100	54/168
2016	49/100	55/176
2017	47/100	62/180

Source: data adapted from Transparency International, "Corruption by country," accessed 23 December, 2017, http://www.transparency.org/research/cpi/overview.

Based on the survey by TI, without generalising, the researcher observes that corruption in Malaysia is still on the rise. Mechanisms should be combined with the AML regime to counter the increase in corruption. The unification of tools will strengthen the efforts of enforcers to combat corruption through AML law.

In 2012, "MACC received a total of 5496 information as compared to 6475 in 2011. The number picked up in 2014 from 6475 to 6584 where 2954 of them were corruption-related information compared to the previous year where the number of corruption-related information was higher." In 2015, "there was a decrease in the information received to 6343. The reason for the reduction in the information received is where the MACC only processes information that fulfils certain criteria to ensure that their operation is efficient and focused as well as avoiding taking into account non-authentic information."

In general, “information received was information that was either Pursuable or Traceable and required Investigation Papers (IPs) to be opened on them. The number of IPs opened in 2013 also rose to 24 % from 20 % in 2012. In 2015, there were 982 IPs where statistics show that there is an increase of 6.83 % compared to 2014.”

Also, “82 % of cases investigated were completed in 2013 as compared to 75 % in 2012. However, in 2012, the total arrests were 701 as compared to 918 in 2011 indicating a drop in the number. The percentage reduced further in 2014 where total arrests were only 509 and in 2015, it picked up a little to 552.” The slight increase in the number of total arrests was due to MACC’s operations on a larger scale in combating corruption.

About statistics on prosecution cases on the other hand, in 2015, “a total of 161 individuals from the public sector (professional, management and support groups), civil society, private sector, politicians and local enforcement were prosecuted in the Special Sessions Courts for Corruption (SSCC).” Table 2.0 indicates the trend from 2010 to 2015 on the total number of cases being heard in SSCC.

Table 2.0 : Total Number of Cases in SSCC from 2010 to 2015

No	Courts Decision	2010	2011	2012	2013	2014	2015
1	Convicted	309	388	339	265	245	186
2	Acquitted	108	114	54	44	51	32
3	Discharge Not Amounting to Acquittal (DNAA)	15	18	8	6	17	23
TOTAL		432	520	401	315	313	241

Source: data adapted from the Malaysian Anti-Corruption Commission, “Annual Report 2012,” accessed November 23, 2015, http://www.sprm.gov.my/files/MACC%20ANNUAL%20REPORT%202012.pdf.

In addition, Table 3.0 indicates the number of corruption cases investigated and prosecuted under the AML regime from 2009 to 2013.

Table 3.0 : Corruption cases under AML regime

	2009	2010	2011	2012	2013	TOTAL
Investigations	138	94	124	230	235	821
Drugs	0	0	0	0	0	0
Fraud	34	30	34	105	47	250
Corruption	5	5	30	49	50	139
Tax	0	0	6	19	100	125
Smuggling	1	1	28	37	11	78
Other	98	58	26	20	27	229
Prosecutions	**22**	**16**	**19**	**15**	**60**	**132**
Drugs	0	0	0	0	0	0
Fraud	21	15	13	13	59	121
Corruption	1	0	2	2	1	6

Source: data adapted from FATF and APG 2015, "Legal systems and operational issues in AML and counter-terrorist financing measures," Malaysia, Fourth Round Mutual Evaluation Report FATF Paris and APG Sydney, accessed January 15, 2016, www.fatf-gafi.org/publications/mutualevaluations/documents/mer-Malaysia-2015.html.

Throughout many years, various initiatives have been commenced by the government with the view of eradicating corruption. Those combating steps have been undertaken through legal and regulatory mechanisms. In 2012, the Government of Malaysia had put forth comment on the seriousness of corruption by saying that "we continue to regard corruption as the number one enemy within the country and together we will combat corruption uncompromisingly. Corruption destroys the government's noble intentions on helping people and derails the implementation of policies that have been

carefully planned."[16] This points out that the government has acknowledged the impact of corruption on the growth of the country's economy which relates to all other growth. In 2013, "KPMG Malaysia[17] had conducted a survey relating to fraud, bribery, and corruption in relation to management and businesses. 80% of the respondents were of the opinion that bribery and corruption are on the rise for the last three years while 90% of the respondents have agreed that corruption is one of the major concerns for Malaysian management and businesses."[18]

While the issue of money laundering and corruption had been delicate, it has evolved into a more expensive, lengthy process and inherently dangerous. Through the transfer of proceeds into a bank account or other negotiable instrument, the account holder incurs tax liability and other obligations. It can eventually allow reporting institutions such as banks to discover those illegitimate origins of the proceeds.[19]

Reporting mechanisms that impose a duty on financial organisations and professions to declare suspicious transactions may serve as a useful additional tool in detecting potential offenders or criminal activities. Malaysia practices reporting obligations against possible money laundering and corruption activities.

[16] Eastern, "An Assessment."
[17] KPMG in Malaysia provides audit, tax and advisory services. Established in 1928, it is one of the oldest KPMG firm in the Asia Pacific region.
[18] "Fraud, Bribery and Corruption Survey 2013," KPMG Malaysia, accessed November 23, 2015, https://www.kpmg.com/MY/en/IssuesAndInsights/ArticlesPublications/Documents/2013/fraud-survey-report.pdf.
[19] "Thematic Paper on Money Laundering, Relationship between Money Laundering Tax Evasion and Tax Havens," Special Committee on Organised Crime Corruption and Money Laundering (CRIM), accessed November 23, 2014, http://www.europarl.europa.eu/meetdocs/2009_2014/crim/dv/tavares_ml_/tavares_ml_en.pdf.

Although the Malaysian corruption law is thought to be a piece of legislation that provides a hindrance to corruption, it may not be an adequate tool in preventing this activity entirely.[20] Besides depriving one's possession of criminal proceeds, the financial institutions have to carry out the reporting duties efficiently in order to assist law enforcers in fully curbing the illegal activity.[21] In this manner, institutions will have to differentiate between 'clean' and 'dirty' monies.

Malaysia has to focus on forming a set of laws or framework which can accommodate the link between money laundering and corruption. This can be undertaken by employing AML law in fighting corruption. Currently, Malaysia has primarily formed separate and distinct AML and corruption laws, and they include AMLATFPUAA and MACCA.

In succinct, there are two problems which motivate this study to be carried out and they include the lack of focus on the close-linkage between money laundering and corruption in Malaysia and to what extent will the Malaysian AML law contribute to the enforcement agencies' strategies in combating corrupt activities. A study which investigates the symbiotic relationship between money laundering and corruption could remedy the situation.

[20] Bala Shanmugam, Mahendran Nair and R.Suganti, "Money laundering in Malaysia," *Journal of Money Laundering Control* 6, no. 4 (2003): 373.
[21] Shanmugam, Nair, Suganti, "Money laundering." 373.

1.3 Research Questions

This study intends to respond to the following questions:

1. What is the nature of money laundering and corruption?
2. What are the legal and regulatory mechanisms available in Malaysia relating to money laundering and corruption respectively?
3. What are the legal issues in utilising AML law to fight against corruption in Malaysia?
4. What are the proposed mechanisms to improve the implementation of AML law in combating corruption?

1.4 Research Objectives

In general, this study aims to examine the relationship between money laundering and corruption and the possibility of employing AML law for enhancement and practical approaches towards combating corruption in Malaysia. There are specific objectives that the researcher has formed, and they are:

1. To examine the nature of money laundering and corruption.
2. To examine legal and regulatory mechanisms relating to money laundering and corruption respectively.
3. To analyse legal issues in utilising AML law to combat corruption in Malaysia.
4. To recommend appropriate measures to improve the implementation of AML law in combating corruption.

1.5 Significance of the Study

Money laundering is an area of law that has not been much focused by law enforcers together with other offences, in most countries including Malaysia, this study aims to recognise the relationship between money laundering and corruption as close-linked and analyse the viability in utilising AML law in fighting corruption. It also acts as an add-on to the existing literature in relation to money laundering and corruption in Malaysia.

This study is regarded as exceptional as little research were carried out on the possibility of combined mechanisms for these serious offences. It is observed that most existing literature focuses on the legal framework and regulatory tools of AML laws in general, without focusing on the nexus that exists between money laundering and corruption, predominantly forfeiture of criminal proceeds. Given that the issue of money laundering, as well as corruption, is a serious concern in most countries, it can be submitted that this study provides some useful information or ideas on the subject matter aforementioned.

This study is also in line with the Malaysian government's National Key Results Areas (NKRA) initiative. NKRA introduced a number of strategies in the Government Transformation Programme (GTP) 1.0 to transform the way the monitoring and enforcement of corruption which addresses issues from the top-down.

The proposed study seeks to provide some insights and helps future researchers, educationists and also, law students as a guide. The study opens up the development of the legal framework and regulatory mechanisms towards combating corruption by

employing AML law in Malaysia. This study is also valuable in assisting the legal practitioners in the applicability of this mechanism relating to corruption.

Apart from contributing to the body of knowledge, this study benefits the enforcement authorities practically where the findings of this study should be utilised by them to ensure effective implementation of AML law in combating corruption as well as to increase transparency of the process in searching for trails of the laundering of the proceeds from corruption. Not only enforcement authorities, financial institutions, and other relevant agencies should take into account the findings of this study for the enhancement of the process of solving issues relating to corruption.

1.6 Research Methodology

1.6.1 Research Design

Legal research is divided into two types: doctrinal and non-doctrinal research.[22] Doctrinal research is concerned with legal problems and principles observed through analysis.[23] Doctrinal research is also identified as pure theoretical research where it mainly involves simple research or even rigorous study on legal reasoning. On the other hand, non-doctrinal research involves people, social values, and social institutions. The non-doctrinal approach permits the researcher to perform interdisciplinary research where he or she evaluates the law from the viewpoint of other branches of science and utilises these sciences in formulating the law.[24]

[22] "Understanding Legal Research," Faculty of Economics and Management, Universiti Putra Malaysia, accessed October 23, 2015, http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf.
[23] "Chapter Three: Legal research," Salford University, accessed October 23, 2015, http://www.sps.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf.
[24] "Understanding Legal Research," Faculty of Economics and Management, Universiti Putra Malaysia, accessed October 23, 2015, http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf.

Generally, research can be divided into four bases, namely: historical, analytical, comparative and philosophical. History is an archive of past events, and historical analysis is a technique of ascertaining evidence on what may have occurred in the past. Researchers consider various sources such as old case laws and legislations to look for reasoning for the current position of law which could be drawn from the reading of those case laws.[25]

Analytical research, on the other hand, relies heavily on critical thinking and application of an area of research and this acts as a tool to collect data. Observations are done and recorded for the purposes of analysis. Comparative research focuses on comparing two or more issues or problems. Through comparisons, the similarities and differences or strengths and weaknesses can be identified. The last type of research is philosophical where research is done based on the nature or existence of ideas of a particular area of study.[26]

If one looks into legal studies, there are three categories, and they are: descriptive, explanatory and exploratory. They differ from each other in terms of characteristics and how a researcher can employ them as per the aims and objectives of the research. Scrutinising into the descriptive study, it is a type of research where it merely explains and evaluates existing laws or principles. Explanatory study centres on questioning the existence of legal issues and principles[27] while exploratory study seeks to devise

[25]Anusha Aurasu, "Forfeiture of Criminal Proceeds under Anti-Money Laundering Laws: A Comparative Analysis between Malaysia and United Kingdom (UK)," (Project Paper, Northern University of Malaysia, 2013): 7.
[26] Anusha, "Forfeiture." 7.
[27] "What is Research Design: Part 1," New York University, accessed October 23, 2015, http://www.nyu.edu/classes/bkg/methods/005847ch1.pdf.

problems and hypotheses based on literature review, experts' views or opinions or case studies.[28]

The research design for this study was mainly based on doctrinal research where it was 'library-based research'. Here, library-based research generally relies on published material and they include case laws, legislations, treaties, academic journal articles, books as well as other relevant information that is available in the public domain (newspapers, magazines or reliable online resources). Additionally, qualitative research interviews were conducted in order to meet this study's third objective.

This study employed a few approaches where each were matched with different objectives formed by the researcher. In respect to the first and second objectives which are (1) to analyse the nature of money laundering and corruption and (2) examine various legal and regulatory mechanisms relating to money laundering and corruption correspondingly, analytical approach was suitable to recognise the link between money laundering and corruption; and respectively, the nature and characteristics of legal framework and regulatory mechanisms available to combat these offences. By having to identify these issues, they contributed to the researcher's aims in analysing the possibility of utilising the Malaysian AML law in fighting against corruption, especially the use of proceeds from corruption. This method assisted in responding to research questions formed in this study.

For the third objective which to examine legal issues in utilising AML law to combat corruption in Malaysia, the researcher had employed an exploratory approach as the

[28] "Chapter 1: Introduction," Universiti Putra Malaysia, accessed October 23, 2015, http://www.sagepub.com/upm-data/44129_1.pdf.

relevant method of meeting this particular objective. This approach is opined to be suitable as it has aided to gather opinions from enforcement officers with regard to the impact of utilising AML law in fighting against corruption. Gauging into the views of relevant officers, be it positive or negative, was deemed to be fundamental for this study as it assisted in identifying the driving factors for the assimilation of approaches in combating corruption.

With regard to exploring the opinions of individuals pertaining to some issues in a research area, conducting interviews were appropriate. Interview is one of many qualitative research methods where relevant and in-depth information was obtained by questioning experts directly.[29]

For this study, this method of collecting data was also useful in giving the researcher the real experience dealing with ascertaining experts' opinions and insights into the seriousness of money laundering and corruption in Malaysia as well as problems faced by them in regulating laws and regulations relating to both money laundering and corruption. The respondents were enforcement officers of the MACC, and also officers in the Attorney General's Chamber (AGC).

In theory, there are four categories of interview: conversational, general interview guide approach, open-ended and fixed response.[30] "Conversational involves informality, and the process of interview goes with the flow, general interview guide approach has its focus in collecting the same kind of information with flexibility to a

[29] "Interview as a Method for Qualitative Research," Arizona State University, Southern Cross University and the Southern Cross Institute of Action Research (SCIAR), accessed October 27, 2015, http://www.public.asu.edu/~kroel/www500/Interview%20Fri.pdf.
[30] Arizona State, "Interview."

certain extent, open-ended interview includes same questions being asked to all respondents in order to analyse the outcome easier and on the other hand, fixed response category gives them restricted responses with a set of same questions being asked with answers fixed."[31]

As the third objective was supported by investigating the opinions of enforcement officers on legal issues in utilising AML law in fighting corruption, the general interview guide approach was suitable for this study. This type of interview allowed the researcher to gather information based on the opinions or views of the enforcement officer in a coherent manner with some flexibility. Responses were similar as similar questions were asked. Standardisation increased the reliability of interviews where the researcher was able to analyse, compare and identify patterns of responses more efficiently.

In relation to the fourth objective which was to recommend appropriate measures for further improvements upon assimilation, the proper approaches of the study were analytical and explanatory where they were based on the first to third objectives' review. This approach helped the researcher in establishing the possible recommendations for a more comprehensive legal framework and regulatory mechanisms by incorporating AML law often into combating corruption in Malaysia. By forming such grounds, the researcher was able to provide some suggestions based on the proposed system on how to further improve the tools of combating corruption which defeats the entire notion of good governance and stable financial system of a country.

[31] Arizona State, "Interview."

1.6.2 Research Scope

This study focused on employing Malaysian AML law to combat corruption as the researcher had proposed supra. The relevant laws were AMLATFPUAA, MACCA and Mutual Assistance in Criminal Matters 2002 (MACMA). Terrorism financing was not part of this study. Relevant case laws were analysed.

In relation to money laundering, the researcher scrutinised into this study based on the area of investigation and forfeiture (confiscation) of criminal proceeds. Matters pertaining to banking reporting obligations and financial intelligence were only referred to when they are necessary. To reiterate, the principal objective of this study was to invoke AML law, particularly forfeiture of criminal proceeds in combating corruption.

International documents in fighting against money laundering and corruption were additionally taken into account. This was because Malaysia had recognised and incorporated international standards into the legal framework. As such, the international documents initiated by the FATF[32] were analysed largely. Moreover, Malaysia is a member of the Asia/Pacific Group on Money Laundering (APG)[33] where

[32] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

[33] The Asia/Pacific Group on Money Laundering (APG) is an autonomous and collaborative international organisation founded in 1997 in Bangkok, Thailand consisting of 41 members and a number of international and regional observers. Some of the key international organisations who participate with, and support, the efforts of the APG in the region include the Financial Action Task Force, International Monetary Fund, World Bank, OECD, United Nations Office on Drugs and Crime, Asian Development Bank and the Egmont Group of Financial Intelligence Units. APG members and observers are committed to the effective implementation and enforcement of internationally accepted standards against money laundering and the financing of terrorism, in particular the Forty Recommendations of the FATF.

this international governmental body has acknowledged the close connection between money laundering and corruption.[34]

1.6.3 Types of Data

Both primary and secondary data were utilised for the purpose of this study.[35] Primary sources are data collected originally for the purposes of specific research. For this legal study, primary sources such as case laws that illustrate AML and corruption laws were observed and analysed. Statutory provisions in Malaysia were used in gathering information or substances for this study and hence, assisted the whole of the research process. AMLATFPUAA and MACCA were mainly referred to and took into account the provisions in completing this study. Alongside, MACMA were also taken into account by the researcher.

In addition to the analysis of case laws and statutory provisions, interviews of the enforcement officers were conducted to meet this study's third objective which was to investigate into the perceptions of enforcement officers regarding the current state of affairs of money laundering and corruption in Malaysia and also on the likelihood of involving the legal framework and regulatory mechanisms of AML to deter corruption activities.

[34] "Corruption", The Financial Action Task Force, accessed October 28, 2015, http://www.fatf-gafi.org/topics/corruption.
[35] "Chapter 2: Research Methodology", Saurasthra University, accessed October 28, 2015, http://shodhganga.inflibnet.ac.in/bitstream/10603/3704/12/12_chapter%202.pdf.

In relation to secondary sources, they are defined to be sources which have been interpreted and also analysed primary sources[36], and they include books, journal articles, legal reports, official documents, and other sources of information which are relevant. In relation to this study, sources from the United Nations (UN), the FATF, APG, and TI were appropriate. They were referred to, in order to gather more reliable information and strengthen the understanding of this study. As a result, the depth of understanding was sufficiently clear with the reading of these secondary sources and analysing views which vary from one source to another.

1.6.4 Data Collection

The data collection method for this study was carried out using the library-based approach. The undertaking of this research required intensive reading and thorough understanding of money laundering and corruption laws in Malaysia. Other than reading journal articles, another legal research method was going through case laws relating to the research topic. Reflection upon cases was done to obtain information from a practical point of view and also understand the extent to which the provisions have been used by the legal enforcers with respect to money laundering and corruption respectively.

By examining case laws, it was observed that it added a better scope to the research questions which have been formed by the researcher and hence, it is crucial for one to look into case laws when undertaking legal research as courts, on many occasions, take into consideration principles which relate to each case on its facts.

[36] Joop J. Hox and Hennie R. Boeije, "Data Collection, Primary vs. Secondary," *Encylopedia of Social Management,* no. 1 (2005): 593.

In order to obtain practical views on issues identified in these areas, interview sessions were conducted as one of the data collection methods. A semi-structured interview was employed as this method was considered suitable. This was reasoned as semi-structured interview involved the interviewer asking open-ended questions but with a guide on the main issues to be inquired. With this study encompassing a small sized sample, semi-structured interview allowed the researcher and the respondents to have some flexibility on what to ask and what to answer.

While key legislations and case laws in these areas of law were analysed, it was necessary to ascertain the scope of interview sessions for this study. As aforementioned, the respondents were, (1) officers of the MACC, and (2) officers of the AGC. Specifically, the size of the sample (respondents) was confined to one to two officers from each enforcement agencies. A small sample is believed to form a high, enhanced validity of particular research and also, responses can be closely observed, hence a study with in-depth analysis can be produced.[37]

The scope of research questions for interview sessions was based on open-ended concept and questions were mainly asked on the impact of corruption, effectiveness of legal framework and regulatory mechanisms respectively and their views on using the combating instruments of money laundering in battling against corruption in Malaysia. Although qualitative research interview provides freedom to a certain extent for researchers to set the scope of conducting interviews; depending on the type of study being carried out, the research questions of this study did not touch on questions which

[37] "Constructing Grounded Theory: A Practical Guide through Qualitative Analysis," National Centre for Research Methods, accessed October 28, 2015, http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf.

are sensitive in nature as this study involves the highly sensitive topic of corruption and money laundering.

The purpose of carrying out this study was to acknowledge the close-linkage which exist between money laundering and corruption, the possibility of unifying the tools to combat corruption to achieve an enhanced legal and regulatory force in Malaysia and therefore, reduce the possible obstacles faced by enforcement officers involving these serious offences.

Overall, data collection for primary sources were undertaken in public universities in Malaysia as well as public libraries which had relevant materials for the purposes of this study. While on the other hand, secondary data were collected through mainly online databases which include Journal of Money Laundering Control, Lexis Malaysia, Current Law Journal (CLJ), e-theses and any other relevant international research databases. Search engines were also utilised.

1.6.5 Data Analysis

The analysis of data was carried out by interpreting, evaluating and examining the data which were collected. In this sense, an analysis is defined as "the procedure of breaking down an intellectual or substantial whole into parts or components."[38] Since this is doctrinal legal research, primary and secondary sources were ultimately used to undertake the research. Through a careful reading and study of those sources, the data analysis allowed the researcher to gain some insights on the current state of affairs of

[38] Tom Ritchey, "On Scientific Method -Based on a Study by Bernhard Riemann," *Systems Research* 8, no. 4 (1991): 21.

corruption as well as the question of how far AML law can be useful in curbing potential corrupt activities in Malaysia.

Content analysis was employed in this study where it focused on the reading and analysis of judgements, legislations as well as government policies relating to a particular area of law. Based on Krippendorff's study, "there are six questions to be asked and they are: (1) which data are analysed, (2) how are they defined (3) what is the population from which they are drawn, (4) what is the context relative to which the data are analysed (5) what are the boundaries of the analysis and (6) what is the target of the inferences."[39]

The statutory interpretation was employed in interpreting legislations. Rules of interpretation consist of literal rule where meanings of statutes will be given its literal meaning, and golden, and mischief rules are utilised where the purpose behind statutes will be looked at.

In addition, content analysis was used to analyse responses from interview sessions systematically. Thereafter, the researcher organised the responses and transcribed into written form for further analysis. This is the first step of data analysis for qualitative research interview.[40]

The second step is where once the responses have been transferred; the researcher classified responses into, either, sequences, patterns or types. For this study, grouping

[39] Steve Stemler, "An overview of content analysis," *Practical Assessment, Research & Evaluation* 7, no. 17 (2001): 1.
[40] Julia Bailey, "First steps in qualitative data analysis: transcribing," *Family Practice* 25, no. 2 (2008): 127.

responses into patterns were suitable as the focus was on perceptions of enforcement officers on the seriousness of corruption as well as money laundering in Malaysia and the possibility of combining legal framework and regulatory mechanisms. Patterns were identified based on keywords or phrases. [41]

Sufficiency of anti-corruption mechanisms on their own was a concern of this study. As there were a number of enforcement officers identified for research interviews, analysing data (responses) to look out for patterns were appropriate to gain a bigger picture of respondents' insights into this study, i.e., the symbiotic relationship between money laundering and corruption.[42]

The final stage of analysis entails bringing those detailed responses into broader and underlying concepts or outcomes. This was carried out to track the development of themes, concepts or outcomes resulting from the data (responses). Based on these broader outcomes, the researcher appraised the findings to answer this study's research questions and also, meet the objectives being formed.[43]

On the whole, to endow with full insights of this area of law, it is essential to note that the researcher made a brief account of the historical background of money laundering and corruption, following that, an overview of AML as well anti-corruption laws were presented.

[41] Helen Noble and Joanna Smith, "Qualitative data analysis: a practical example," *Evidence-Based Nurse* 17, no.1 (2014): 2.
[42] Noble and Smith, "Qualitative Data," 2.
[43] Noble and Smith, "Qualitative Data," 2.

Besides, the researcher had also identified, interpreted and analysed the Malaysia's current position of legal framework and regulatory mechanisms for both areas of law where it was opined that combating these offences together may form a more efficient and systematic instrument as this study had put forth arguments that there is a close-link between money laundering and corruption and enforcers may work together by utilising the Malaysian AML law's forfeiture tool.

1.7 Limitations of the Study

One of the significant limitations which have been identified by the researcher is that the lack of data and information on money laundering under the Malaysian AML regime where there are not many books on money laundering which are available in Malaysia. The crime of money laundering is considered to be a novel area of financial crime in Malaysia as compared to corruption which has existed much earlier in time. Only after AMLA came into force, money laundering has been codified as a criminal offence. In order to overcome these problems, cases and journal articles from other jurisdictions were utilised.

A limitation identified in relation to the collection of data is confidentiality. To a certain extent, the researcher was not able to receive much data from enforcement agencies, especially BNM where they are obliged to carry out duties in line with data protection policies within the agency. However, the exemption might be applicable where research is the sole purpose of obtaining data, and it should not be published in an obvious manner.

As corruption as a criminal offence is intricate and susceptible to criticisms, the researcher had to limit her research into the sufficiency of the current legal framework

and regulatory bodies in Malaysia in line with the primary aim of unifying the mechanisms for both of these financial crimes. This applies to interview sessions as well.

Interviews generally consume time as the researcher needs to do a thorough preparation to arrange for the interview sessions as well as seeking permission. The main issue with regard to conducting an interview is where the respondents had rejected the researcher's request to interview them, even when the researcher requested to conduct an interview through e-mail.

Due to many case laws under the AML law in Malaysia are not reported, the researcher may have obtained those unreported cases from the courts if they were not available in any database. This acted as a solution to the limitation of this study. However, in order for future researchers to overcome these limitations, they should consult a more comprehensive database for a detailed study.

1.8 Literature Review

The researcher observes that many authors had undertaken research to analyse the persistent issues pertaining to money laundering and corrupt practices globally. Many researchers recommended instruments to fight against them. However, though the literature covered the research of such nature, the researcher perceives inadequacy in a study that relates to money laundering and corruption together and how AML law can be useful in the battle against corruption in Malaysia. This study examines on the possible connection exist between these two unlawful activities; analysis is done on the existing Malaysian regulatory mechanisms which relate to both money laundering

and corruption and the possibility of employing AML law in combating corruption in Malaysia.

1.8.1 Money Laundering and Malaysian AML Measures

Traditionally, Shanmugam and Thanasegaran claimed that "money laundering had been initiated by the US Mafia in order to 'clean' the 'dirty' monies gained through criminal activities such as prostitution, gambling, and extortion. This group of people managed many businesses which may seem legal but however, these are formed as a cover up for the illegal cash flow."[44] Generally, there are different perspectives on what money laundering means.

Kemal[45] viewed "money laundering as a criminal act which is undertaken purely based on money. This is achieved through financial institutions as a medium of transaction for the so-called 'clean' monies. The three stages of money laundering which are: (1) placement, (2) layering, and (3) integration that allow launderers to 'clean' the 'dirty' monies."

Money laundering for He[46] is "an act that involves the launderer attempts to disguise proceeds from unlawful activities. Conventionally, launderers employ smuggling, banks, corruption, and insurance companies as methods to transform 'dirty' monies to 'clean' ones. He found that other modern means of laundering money has been utilised and they include real estate, gambling, international trade, offshore company. The term

[44] Bala Shanmugam and Haemala Thanasegaran, "Combating money laundering in Malaysia," *Journal of Money Laundering Control* 11, no. 4 (2008): 331.
[45] Muhammad Usman Kemal, "Anti-money laundering regulations and its effectiveness," *Journal of Money Laundering Control* 17, no. 4 (2014): 416.
[46] Ping He, "A typological study on money laundering", *Journal of Money Laundering Control* 13, no. 1 (2010): 15.

money laundering has been shying away from the conventional methods with the presence of fast-paced technology world.

In short, money laundering is a simple notion where it "covers all procedures that aim to change the true identity of illegally obtained money so that it appears to have originated from a legitimate source."[47]

The beginning of Malaysian AML measures that aimed to fight money laundering operations through international cooperation was explained by Shanmugam, Mahendhiran, and Suganthi.[48] They stated that "Malaysia is considered as one of the Asian countries where serious money laundering activities are prevalent mainly due to less stringent monetary legislation and weak system under financial services where the need of addressing the serious problem of money laundering arose. In 2007, the first international move made by the Malaysian government was by joining the APG as a member. From here, Malaysia identified the importance of forming well-structured AML measures and the National Coordination Committee (NCC) was established to facilitate a proper national AML framework."

Yasin[49] then has identified that "the first piece of law which addressed the need to curb organised crime was the Dangerous Drugs (Forfeiture of Property) Act 1988 (DDFP). This first legislation, however, was limited to the proceeds of the sale of illegal drugs." As the 1988 Act does not cover all offences related to money laundering, Mohamed

[47] Konstantin D. Magliveras, "The regulation of money laundering in the United Kingdom," *Journal of Business Law* (1991): 525.
[48] Bala Shanmugam, Mahendhiran Nair and R. Suganthi, "Money laundering in Malaysia", *Journal of Money Laundering Control* 6, no. 4 (2003): 374.

[49] Norhashimah Mohd Yasin, "An Examination of the Malaysian Anti-Money Laundering Act 2001 (AMLA)," *the Malaysian Current Law Journal* 6 (2002): 1.

and Ahmad[50] have recognised that "AMLATFA were enacted on March 1997 as more comprehensive Act which covers almost all money laundering related offences. This Act incorporates the FATF Forty Recommendations on money laundering."

In 2014, Hamin, Omar, Rosli, and Razak[51] perceived that "AMLATFA was amended and changed into the AMLATFPUAA to include proceeds of unlawful acts." It was contented by Rahman[52] that "AMLATFPUAA's old provisions under Part VI were useful as uniformed tool relating to freezing, seizure, and forfeiture of property acquired through predicate offences."

Forfeiture as a tool to minimise the laundering of unlawful proceeds is useful. It was long established back in the UK. Doyle observed that "forfeiture is said to have originated from England which included deodands (similar to a fine), estate or common law forfeiture, and forfeiture relating to statutes or commercial."[53] As observed by Dery,[54] "forfeiture is considered as frequently assumed as the divestiture, not taking into account the compensation of property against the laws of the sovereign."

[50] Zakiah Muhammaddun Mohamed and Khalijah Ahmad, "Investigation and prosecution of money laundering cases in Malaysia," *Journal of Money Laundering Control* 15, no. 4 (2012): 423.
[51] Zaiton Hamin, Normah Omar, Wan Rosli and Muhammad Muaz Abdul Hakim (2015), "Recent development in the AML/CFT law in Malaysia," *In Interdisciplinary Behaviour and Social Sciences - Proceedings of the 3rd International Congress on Interdisciplinary Behaviour and Social Sciences, ICIBSoS* (2014): 43.
[52] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions," (Ph.D diss., University of Western Australia, 2008): 98.
[53] Charles Doyle, "Crime and Forfeiture," Congressional Research Service Report 2015, accessed November 21, 2015, www.fas.org/sgp/crs/misc/97-139.pdf.
[54] Alice W. Dery, "Overview of Asset Forfeiture," American Bar Association Business Law Section, (2010), accessed November 21, 2015, https://www.americanbar.org/publications/blt/2012/06/02_dery.html.

On the same note, Hamin[55] also stressed that "forfeiture is a divestiture of a property devoid of some circumstances." Moving on, Hamin reported[56] that "Malaysia's asset forfeiture takes into account the UN Convention and the FATF Recommendations." Furthermore, the literature submitted that under the AMLATFPUAA, forfeiture is divided into criminal and civil forfeiture. For example, Yasin[57] described that under the AMLATFPUAA, the "confiscation of property upon the illegal property was to be passed to the *bona fide* third party or to be surrendered to the government after forfeiting the properties."

Yasin has also examined precedents relating to money laundering under the AMLATFPUAA. "As money laundering allows the movement of illegal monies through legitimate financial institutions, AMLATFPUAA was formed to counter the major problem faced by Malaysia." Yasin claimed that "money laundering may be a new phenomenon in Malaysia, mostly cases relate to proceeds of crime or handling stolen goods. Relevant sections and cases were examined in order to observe the pattern of prosecuting money laundering related offences."

1.8.2 Corruption and Malaysian Anti-Corruption Measures

Corruption is one of the most prevalent crimes that distorts the well-being of a country's economy, disrupts the social behaviour of the human race and leads to a wider disparity between the rich and the poor. If there are constant failures to combat

[55] 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* 3, (2015): 789.
[56] Zaiton Hamin et al., (2015), "Recent development in the AML/CFT law in Malaysia," *In Interdisciplinary Behaviour and Social Sciences - Proceedings of the 3rd International Congress on Interdisciplinary Behaviour and Social Sciences, ICIBSoS* (2014): 4.
[57] Norhashimah Mohd Yasin, *Legal Aspects of Money Laundering in Malaysia from the Common Law Perspective* (Kuala Lumpur: Lexis Nexis, 2016): 20.

this toxic crime, the consequences continue to be negative on the whole development of a country. Eradicating corruption is one of the components given importance to be included in public policies of governments.

The term corruption has been perceived differently by many schools of thought. The simplest and most basic notion of corruption: an act of a person who gives or receives personal benefits with the view of going beyond the powers granted. The researcher notes some basic definitions from many studies, and these include the definition by Abdullah[58] as a "misuse of public power for private gains." Corruption was recognised by Siddiquee[59] as "the illegitimate and unethical use of public authority for personal and private advantage."

In Graycar and Sidebottom's study[60], in order to avoid lack of consensus from many definitions, he adopted TI's general definition of corruption as "the abuse of entrusted power for private gain." However, different from other authors mentioned above, Michel[61] presented corruption from a philosophical perspective, and he was inspired by a few philosophers whom mostly viewed corruption as acts which are unethical and here, personal gain is the underlying idea of corruption. With many definitions of corruption being identified, for the purposes of this study, the researcher believes that

[58] "Eradicating Corruption: The Malaysian Experience," Nik Rosnah Wan Abdullah, accessed November 27, 2015, https://www.researchgate.net/publication/228877572_Eradicating_Corruption_The_Malaysian_Experience.
[59] Noore Alam Siddiquee, "Approaches to Fighting Corruption and Managing Integrity in Malaysia: A Critical Perspective," *Journal of Administrative Science* 8, no. 1 (2011): 47-74, accessed November 27, 2015, http://ir.uitm.edu.my/8428/1/NOORE%20ALAM%20SIDDIQUEE.pdf.
[60] Adam Graycar and Aiden Sidebottom, "Corruption and control: a corruption reduction approach," *Journal of Financial Crime* 19, no. 4 (2012): 384.
[61] Michel Dion, "What is corruption corrupting? A philosophical viewpoint," *Journal of Money Laundering Control* 13, no. 1 (2010): 46.

TI's definition of corruption adopted by Graycar and Sidebottom [62] is relevant to all situations pertaining to corruption.

Looking into the historical development of Malaysian government recognising the need to combat corruption, Quah[63] has analysed the level of corruption back in 1957 after independence. Adopting Professor Syed Hussain Alatas, Quah[64] has observed that the "level of corruption is least serious as compared to other developing Asian countries although there was growing concern on the issue of not getting more corrupted." The type of anti-corruption strategy implemented by the Malaysian government is effective where it covers all possible anti-corruption action plans and also allows important political figures to be involved in fighting against corruption.

After gaining independence from the colonial master, the Malaysian government has incorporated many initiatives into curbing crimes that cause illness in the economy, and this includes corruption. Abdullah[65] has examined corruption in Malaysia and Singapore which consists of the "development of the legal framework and regulatory bodies. During the governance of the British, there was already a legal framework exist to combat corruption which is the Prevention of Corruption Ordinance 1950. In the 60s, the Malaysian Parliament passed a piece of legislation named the Prevention of Corruption Act 1961. This Act substituted the 1950 Ordinance. The implementation

[62] Adam Graycar and Aiden Sidebottom, "Corruption and control: a corruption reduction approach," *Journal of Financial Crime* 19, no. 4 (2012): 384.
[63] Jon S.T. Quah, "Corruption in Asia with Special Reference to Singapore: Patterns and Consequence," *Asian Journal of Public Administration*, accessed November 27, 2015, http://www.jonstquah.com/documents/Corruption%20in%20Singapore%20AJPA.pdf.
[64] Quah, "Corruption in Asia."
[65] "Eradicating Corruption: The Malaysian Experience," Nik Rosnah Wan Abdullah, accessed November 27, 2015, https://www.researchgate.net/publication/Eradicating_Corruption_The_Malaysian_Experience.

of the 1961 Act was carried out through the Anti- Corruption Agency (ACA) which was formed in 1967."

On the same note, Nichols[66] has also scrutinised into the development of Malaysia in controlling corruption. ACA has been operating under the Prime Minister's supervision, and here their primary task is to oversee possible corrupt activities, carry out investigations and prosecutions through Anti-Corruption Act 1997 (ACA 97) as well as act as a monitoring body. ACA also carries out responsibilities in providing valuable information to the public at large regarding corruption. This was implemented through media. However, due to some weaknesses identified in the way ACA works, MACC was formed with the view to further improve on detecting and investigating corrupt practices. This Commission operates to implement the MACCA enacted by the Parliament.

The shift from ACA to MACC was considered by Siddiquee[67] as the "best move made by the Malaysian government in curbing corruption. It was acknowledged that the current Malaysian anti-corruption agency has its foundation based on Hong Kong's anti-corruption agency. A check and balance mechanism were formed through the Parliament, and here, the MACC attracted criticisms, questioning on their impartiality and the ability to prosecute as the Executive is also involved in guiding the MACC." Although both Abdullah[68] and Nichols[69] had given a good impression on the evolution

[66] "The Psychic Costs of Violating Corruption Laws," Philip M. Nichols, accessed November 27, 2015, https://lgst.wharton.upenn.edu/lgst/assets/File/45VandJTransnatlL145.pdf.
[67] Noore Alam Siddiquee, "Approaches to Fighting Corruption and Managing Integrity in Malaysia: A Critical Perspective," *Journal of Administrative Science* 8, no. 1 (2011): 47.
[68] Siddiquee, "Approaches to Fighting Corruption." 48.
[69] "The Psychic Costs of Violating Corruption Laws," Philip M. Nichols, accessed November 27, 2015, https://lgst.wharton.upenn.edu/lgst/assets/File/45VandJTransnatlL145.pdf.

of ACA to MACC, there is still room for doubt on the effectiveness of the agency in detecting and prosecuting those who are involved in corrupt activities.

According to Quah[70], "it is irrelevant to how many measures of curbing corruption does a government initiates. One of the key issues here is impartiality of the implementation. Alongside, using anti-corruption laws, i.e., ACA 97 and MACCA effectively to investigate and prosecute is also what is needed for an ideal anticorruption framework."

1.8.3 Money Laundering and Corruption as a Close-linked Concept

One of the predominant contributors to proceeds from criminal activities is corruption that facilitates laundering and due to its link to money laundering, corruption can hinder the key measures against money laundering and may prevail if not monitored closely.[71]

Corruption is viewed as a serious offence which highly relates to money laundering in most countries. The effects of the association of corruption and money laundering on the legislative or institutional frameworks are to be seen as superficial in fighting the two close-linked offences. "The preamble to the UNCAC has recognised the links between corruption and other forms of crime, in particular, organised crime and economic crime including money laundering."[72]

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[70] Jon S.T. Quah, *Curbing Corruption in Asia: A Comparative Study of Six Countries* (Singapore: Eastern Universities Press, 2003): 6.
[71] "An assessment of the Links between Corruption and the Implementation of Anti-Money Laundering Strategies and Measures in the ESAAMLG Region," Eastern and Southern Africa Anti-Money Laundering Group, accessed September 15, 2015, http://www.esaamlg.org/userfiles/Corruption_and_AML_Systems.pdf.
[72] Eastern, "An Assessment."

Focusing on mechanisms in Malaysia concerning money laundering and corruption, there are two primary legal mechanisms which are binding laws, and they are: AMLATFPUAA and MACCA. These legislations were enacted separately. As mentioned, there is indeed a connection between money laundering and corruption seen in these laws.

Alongside these legislations, BNM and MACC are the major regulatory bodies which implement several initiatives involving money laundering and corruption. The collaboration between BNM and other related government bodies has been formed to execute the AML/CFT system to scrutinise the AMLATFPUAA closely and the relevant government agencies and supervisory authorities.[73]

On the whole, prior to the formation of the ACA, the Malaysian government did regularly establish different strategies and plans in fighting against corrupt practices. These measures, in spite of its continuity, may be improved further in line with the current progress of technology and financial systems globally.[74]

1.8.4 Impact of Money Laundering on Corruption

Money laundering as a crime indeed has an impact on the seriousness of corruption in a jurisdiction. Kumar viewed "money laundering as a danger to a country's economy as it allows movement of dirty monies into legal banking institutions through the act

[73] "Malaysia's Anti Money Laundering/Counter Financing of Terrorism (AML/CFT) Programme," Bank Negara Malaysia, *Financial Stability and Payment Systems Report* (2006): 1.
[74] "Combating Corruption and Managing Integrity in Malaysia: A Critical Overview of Recent Strategies and Initiatives," Noore Alam Siddiquee, Springer Science and Business Media, LLC (2009), accessed September 17, 2015, http://cism.my/cismv2/uploads/articles/article/201106151555300.Combating%20corruption%20in%20Malaysia.pdf.

of corruption. Individuals with power as well as private individuals employ money laundering as a method to carry out corrupt practices." [75]

Carr and Goldby[76] studied money laundering and corruption as interlinked crimes. Their study aimed to illustrate the relation between UNCAC and AML standards. They claimed that "money laundering and corruption are interlinked, as the key objective of the corrupt is to conceal the illegal proceeds of crime and thus, enjoy the proceeds through the money laundering process." The authors have acknowledged the World Bank's contention that this has increased the poverty level. This is reasoned as AML regimes are costly and hence, this can have a negative impact on poverty in developing countries.

In line with Carr and Goldby's study, Mugarura[77] has claimed that corrupt activities weaken AML law in a nation. He suggested that equal attention should be given simultaneously to both corruption and money laundering offences. Hence, it shows that these offences affect each other.

However, Mendes and Oliveira's study[78] was different from others. It was aimed at studying the impact of corruption on money laundering from a public sector's perspective. They have observed that "corrupt activities may challenge all policies executed by legal institutions." The model which they have developed had its focus on

[75] Vandana Ajay Kumar, "Money Laundering: Concept, Significance and its Impact," *European Journal of Business and Management* 4, no. 2 (2012): 113.
[76] Indira Carr and Miriam Goldby, "Recovering the proceeds of corruption: UNCAC and anti-money laundering standards," *Journal of Business Law*, no. 2 (2011): 170-193.
[77] Norman Mugarura, "The effect of corruption factor in harnessing global anti-money laundering regimes," *Journal of Money Laundering Control* 13, no. 3 (2010): 272.
[78] Cassandro Mendes and Jailson Oliveira, "Money laundering and corrupt officials: a dynamic model," *Journal of Money Laundering Control* 16, no. 1 (2012): 55.

the salary system used in the public sector. They pointed out that the presence of corrupt officials affects the effectiveness of AML law. In other words, the authors have acknowledged the two-way impact of money laundering and corruption.

1.9 Chapter Outline

This study comprised of six chapters. Chapter one illustrated the research proposal of the study which included an introduction, problem statement, research questions, and objectives as well significance of the study. It also focused on research methodology where it aimed to form research design, the scope of the study, types of data, data collection and data analysis. The limitations of the study and literature review were included in the first chapter.

Chapter two focused on money laundering as an offence. It examined the nature of money laundering, the stages of carrying out the offence and the impact of the crime. This chapter also focused on the application of forfeiture laws in general.

Chapter three discussed the AML laws in Malaysia. This chapter reviewed the existing mechanisms mainly on investigation and forfeiture in Malaysia. This chapter took account of relevant legislation and case laws relating to money laundering.

Chapter four discussed corruption in Malaysia. Similar to chapter three, the nature of corruption was analysed. The factors which influence this offence were observed and examined. Investigation on the sufficiency of anti-corruption mechanisms in relation to proceeds of crime was undertaken. This also incorporated relevant legislation and case laws.

Chapter five aimed to look at the legal issues in utilising AML law to combat corruption. This was to accommodate the primary purpose of this study which to invoke AML law into fighting against corruption. This provided some insights into how money laundering and corruption are interlinked by nature. Alongside, through this chapter, it discovered the perceptions of enforcement officers through interview sessions. The interview mainly focused on the possibility of using AML law as combating tool for corruption and the likely consequences of doing so.

This study concluded with an overall analysis and comprised of some recommendations based on discussions throughout. This was incorporated into chapter six.

1.10 Schedule of Work

The specified duration for the completion of this study is approximately three years.

Start	End	Research Activities
February 2015	September 2015	• Preparation and writing the research proposal • Literature search enhancement
September 2015	February 2016	• Research proposal submission • Proposal colloquium • Literature search enhancement • Research proposal submission • Proposal defense
February 2016	September 2016	• Data collection • Qualitative interview • Literature review enhancement • Thesis writing • Paper writing (publication)

September 2016	February 2017	• Literature review enhancement • Data analysis • Thesis writing
February 2017	September 2017	• Thesis Writing • Thesis submission • Paper writing (publication)
September 2017	September 2018	• Thesis Writing • Thesis submission

CHAPTER TWO

THE NATURE OF ANTI-MONEY LAUNDERING LAWS

"Money laundering is a very sophisticated crime, and we must be equally sophisticated."
-Janet Reno.

2.1 Introduction

This chapter involves the background of money laundering. The researcher focuses on the definition of money laundering, followed by the methods and its impact. This chapter also focuses on the nature of money laundering and forfeiture of criminal proceeds. Forfeiture is said to be one of the key tools used to combat money laundering and also, corruption by many enforcers. The researcher examines the various initiatives taken by international agencies such as IMF, The United Nations (UN), the FATF, APG and the Egmont. Malaysia has adopted recommendations from these agencies. As such, the researcher aims to answer the first research question and achieve the first objective of this study.

2.2 Definition of Money Laundering

Annually, there are a vast amount of funds generated from illegal activities which include drug trafficking, tax evasion, human smuggling, theft, arms trafficking, and corrupt practices. Funds are in cash form, and they are brought into the legitimate financial system without triggering any suspicious transactions. Cash is converted into other forms to facilitate the crime. It creates a considerable gap between the crime and

the funds generated. This is termed as 'money laundering' where illicitly obtained funds are given the appearance of having been legitimately obtained.[79]

Historically, "the US Mafia have established money laundering as a channel to clean 'dirty' monies obtained from illegal activities such as prostitution, gambling, and extortion. This is done to cover up the illegitimate businesses and to show authentic cash flows." [80]

Thereafter, "the illegal activities brought up by the Mafia have allowed the growth of money laundering activities to the other parts of the world. This is reasoned as when a crime generates substantial profits; the affected party must find a way to control the funds without attracting attention to the underlying activity." The individual launders monies by hiding the sources, converting into other forms or shifting the funds obtained where he is unlikely to be detected by the bankers or law enforcers. Therefore, these activities were carried out to conceal the illicitness. They owned legitimate businesses to cover their illicit income.

Money laundering is considered as the ultimate tool for criminals to conceal their proceeds generated from unlawful activities and the process allows them to enjoy the advantage of transferring the proceeds into financial institutions and invest those monies. It gives space for them to spread their ideas on others internationally and hence, the unstable financial system. In curbing money laundering, one has to come up with full-fledged measures, coupled with reporting institutions having effective

[79] "Money Laundering," Australian Transaction Reports and Analysis Centre, accessed October 14, 2016, http://www.austrac.gov.au/elearning/pdf/intro_amlctf_moneylaundering.pdf.
[80] Bala Shanmugam and Haemala Thanasegaran, "Combating money laundering in Malaysia," *Journal of Money Laundering Control* 11, no. 4 (2008): 331.

detection and tracing systems on the proceeds. With these measures, money laundering may possibly be detected and curbed; prohibiting them from investing using the proceeds.

The September 11 attacks have given a significant impact on money laundering and created a new dimension to the definition of money laundering as terrorism financing has been included as one of the activities involving money laundering. With the three stages of money laundering, money launderers successfully carry out the activities without leaving any trace. This is done merely by manipulating the banking system throughout the world.[81] As a matter of fact, money laundering is not considered to be a new occurrence.

The fact that money laundering activities have been occurring for many years leads to a serious question of whether these untamed illegal activities can be entirely curtailed with the adequate tool and proper system, which can be used to detect those activities. In general, as time passes by, there are many versions as to how can money laundering be defined. The meaning of money laundering may be different now.

Essentially, money laundering leads to substantial issues relating to prevention, detection, and prosecution by the bankers, enforces and policymakers. These issues are further complicated by the launderers utilising various methods of money laundering which often involve different channels used by numerous financial institutions.

[81] Bala Shanmugam, Mahendran Nair and R.Suganti, "Money laundering in Malaysia," *Journal of Money Laundering Control* 6, no. 4 (2003): 373.

Governments across the world have identified the grave consequences of money laundering activities. These consequences could be a threat to their country's economy and social well-beings. Therefore, the legislators enact laws which allow them to take away the launderers benefits in the form of criminal proceeds and forfeiture is the tool that can be utilised to do so. It is known that proceeds of crime originated from predicate crimes and the launderers use money laundering as the means to 'clean' the proceeds.

A number of authors have made efforts in defining money laundering. According to Fabian[82], he adopted Article 305bis of the Swiss Criminal Code (2015) which defined money laundering as "any act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which are known or assumed to originate from a felony." Jeffrey defined money laundering as "a technique used by criminals to disguise the origin of ill-gotten gains with the intent of enjoying their 'cleansed' money without interference from predatory underworld rivals or law enforcement."[83] Another definition is "the use of manipulative schemes designed to conceal the provenance and true nature of criminal activities that generates laundered assets"[84] According to Ahmad, money laundering involves "a criminal who acquires illegal funds will seek to ensure that he can use the money without the authorities' realising that the funds are derived from criminal activities."[85] Based on the various definitions provided above, criminal proceeds is the key to the laundering process.

[82] Fabian Maximilian Johannes Teichmann, "Twelve methods of money laundering," *Journal of Money Laundering Control* 20, no. 2 (2017): 130.
[83] Jeffrey Simser, "Money laundering: emerging threats and trends," *Journal of Money Laundering Control* 16, no. 1 (2012): 41.
[84] Norman Mugarura, "Does the broadly defined ambit of money laundering offences globally, a recipe for confusion than clarity?," *Journal of Money Laundering Control* 19, no. 4 (2016): 432.
[85] Ahmad Mohammad Abdalla Abu Olaim and Aspalella A. Rahman, "The impact of Jordanian anti-money laundering laws on banks," *Journal of Money Laundering Control* 19, no. 1 (2016): 70.

Back in 1988, in the Vienna Convention, money laundering was first defined formally under Article 3 (1) (b)[86]:

> b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
> ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

On the same note, Article 1 of the 1990 Council of Europe Convention has defined money laundering as follows[87]:

> [T]he conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action; the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

[86] "The Vienna Convention," United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, accessed January 12, 2016, https://www.unodc.org/pdf/convention_1988_en. pdf.
[87] "Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime," Council of Europe, *European Treaty Series* 14, accessed January 12, 2016, https://rm.coe.int/168007bd23.

> the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity; participation in the association to commit, attempts to commit and aiding, facilitating and counselling in commission of any of the actions mentioned in the foregoing paragraphs.

In other words, both Article 3 (1) (b) and Article 1 illustrated money laundering as "any form of activities that involve conversion or transfer of property at the state of mind of knowing or aware of such property is derived illegal activities." Article 1 and the Vienna Convention carries a similar definition of money laundering, but however, Article 1 covers other crimes than proceeds of drug trafficking.

According to the Commonwealth Model Law, it has defined money laundering in the following manner:[88]

> (a) (i) engaging, directly or indirectly, in a transaction that involves property that is proceeds or crime: or
>
> (ii) receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing or bringing into the (territory) any property that is proceeds of crime; and
>
> (b) (i) knowing or having reasonable grounds for suspecting that the property is derived or realised directly or indirectly, from some form of unlawful activity; or
>
> (ii) where the conduct is the conduct of a natural person, without reasonable excuse failing to take reasonable steps to ascertain whether or not the property is derived or realised directly or indirectly, from some form of unlawful activity;] or

[88] "Model Law for the Prohibition of Money Laundering 1996," Commonwealth Secretariat, accessed January 12, 2016, https://www.imolin.org/pdf/imolin/Comsecml. pdf.

(iii) where the conduct is the conduct of a financial institution, failing to implement or apply procedures and control to combat money laundering.[89]

Many countries including Malaysia have adopted the definition of the Commonwealth Model Law as the foundation for establishing their very own interpretation of money laundering.

The FATF[90] and OECD have also given their formal definition of money laundering as "the processing of the proceeds of crime so as to disguise their illegal origin." On the other hand, the UN has given the formal definition of money laundering as:

> […] activities linked with the conversion or transfer of property, or the concealment of the disguise of the true nature of property, knowing that this property is derived from drug trafficking.[91]

The United Nations Convention against Transnational Organized Crime (UNTOC) which is also known as the "Palermo Convention," defines money laundering as:

- The conversion or transfer of property, knowing it is derived from a criminal offence, for the purpose of concealing or disguising its illicit origin or of assisting any person who is involved in the commission of the crime to evade the legal consequences of his actions.
- The concealment or disguising of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that it is derived from a criminal offence.

[89] Commonwealth, "Model Law."
[90] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.
[91] 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.

- The acquisition, possession or use of property, knowing at the time of its receipt that it was derived from a criminal offence or from participation in a crime[92]

It appears that the definition of money laundering by the Palermo Convention is different from the UN's formal definition which has its focus on drug-related crimes. The word 'knowledge' is an essential notion to define money laundering. By and large, an all-encompassing explanation of the concept 'knowledge' is utilised to define money laundering.

Besides, the FATF's initial undertaking was to dismiss the idea that money laundering involves only cash. Using their own money laundering 'typologies', the FATF has proved that money laundering can be undertaken through almost every medium, financial institution or business.[93] On the same note, the intention needed to prove money laundering involves the objective standard.[94]

In addition, "for many money laundering cases in multiple jurisdictions, judges use the concept "wilful blindness where they define the concept as the "deliberate avoidance of knowledge of the facts" or "purposeful indifference." The judges equated wilful blindness with real knowledge of the illegal proceeds or the mental state of a person involved in a money laundering operation."[95]

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[92] "Risks and Methods of Money Laundering and Terrorist Financing," ACAMS, accessed January 15, 2016, http://files.acams.org/pdfs/English_Study_Guide/Chapter_2. pdf.
[93] "Report on Money Laundering Typologies," Financial Action Task Force on Money Laundering, accessed January 15, 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG. pdf.
[94] The standard of proof was mentioned under FATF's 40 Recommendations on Money Laundering, its 9 Special Recommendations on Terrorist Financing and the 3rd European Union Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing.
[95] "Report on Money Laundering Typologies," Financial Action Task Force on Money Laundering, accessed January 15, 2016, http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG. pdf.

From the above definitions, it is apparent that money laundering is a process where criminals employ a variety of methods in legalising 'dirty' monies. They have been obtained from illegal activities, and those methods involve financial, accounting and legal tools. Money laundering process usually employs banks and financial institutions, insurance companies, lawyers, accountants, offshore banks and lottery companies to avoid suspicion.[96]

Although many perceived that money laundering is an ancillary offence, it actually is a stand-alone crime. Money laundering is thought to be a secondary offence as there is a need for a predicate offence to produce the illicit gain in order to go through the laundering process.[97] There is a need to prove a predicate offence at the preliminary stage before moving on to establish money laundering. This renders money laundering as an ancillary. A predicate offence occurs first before individuals, or criminal organisations launder the proceeds earned from predicate offences. From this, it is derived that in general, the crime of money laundering relies on the predicate offences.[98]

The fluctuating reliance is an echo by the point that money laundering entails a predicate offence to be present although it is understood that criminals can be prosecuted for money laundering even if there is no conviction for the predicate offence.[99] As a result, money laundering is thought to be a specific offence. However, for instance, "the doctrine of subsidiarity as applied by German courts allows judges

[96] Financial Action Task, "Report."
[97] Anastasia Suhartati Lukito, "Financial intelligent investigations in combating money laundering crime: An Indonesian legal perspective," *Journal of Money Laundering Control* 19, no: 1 (2016): 92.
[98] Lukito, "Financial Intelligent" 92.
[99] "Scope of the criminal offence of money laundering," FATF Recommendation 1, accessed January 16, 2016, https://www.un.org/sc/ctc/wp-content/uploads/2016/03/fatf-rec01. pdf.

not to prosecute offenders of money laundering where they will be prosecuted for the predicate offence as the UN Convention against Transnational Organized Crime 2004 emphasised on the doctrine of subsidiarity and stated that money laundering is not a specific offence."[100]

Different frameworks are established in various jurisdictions to determine what predicate offences are, i.e., crimes which are committed to make proceeds. There are many different predicate offences incorporate money laundering. These allow launderers to operate the laundering process without being caught and hence, disabling the international efforts in fighting against money laundering. Due to this reason, which crime is considered as a predicate offence should be standardised across the board.

Overall, from the many definitions identified, the researcher contends that money laundering can be viewed as a 'channel' to legalise proceeds from unlawful activities, and these activities may be carried out by criminal themselves, syndicates, politicians and any other persons who have the intention of benefiting from illegal activities. Often, money laundering ultimately ends up with the injection of 'dirty' monies into the 'clean' economy where third-party interventions are necessary to hide the proceeds of crime and hence, giving the proceeds a legal 'mask.'[101]

[100] Selina Keesoony, "International anti-money laundering laws: the problems with enforcement," *Journal of Money Laundering Control* 19, no: 2 (2016): 134.
[101] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (The Edinburgh Building: Cambridge University Press, 2000): 11.

2.3 The Money Laundering Stages

In general, there are three basic stages of money laundering, and it is a process. It can be completed in one transaction, and at the same time, it may seem to be a separate process. The three stages are as follows:[102]

(a) Placement
(b) Layering
(c) Integration

2.3.1 Placement

This stage involves the act of placing illicit proceeds into accounts of financial institutions. The proceeds are permeated into the system to make it look legal. This allows the proceeds to be handled easier by rendering it to be more liquid by placing the proceeds into bank accounts.[103] Possession of monies by the criminals may make themselves to be caught for illegal activities. As such, by infusing the proceeds into the system, it may not create suspicion for laundering illicit proceeds where the laundering can be carried out subtly. Placement is the first method to 'clean' the 'dirty' monies. Money laundering is considered to be a "cash-intensive" activity which makes tons of money from unlawful activities.[104]

2.3.2 Layering

This second stage of money laundering involves criminals separating the unlawful proceeds into a few layers to spread the risks of getting caught by the financial system.

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[102] "AML Awareness-three stages of money laundering," ICAS, accessed January 20, 2016, https://www.icas.com/regulation/aml-awarenessthree-stages-of-money-laundering.

[103] Angela Samantha Maitland Irwin, Kim-Kwang Raymond Choo and Lin Liu, "An analysis of money laundering and terrorism financing typologies," *Journal of Money Laundering Control* 15, no. 1 (2012): 87.

[104] Irwin, Choo and Liu, "An Analysis." 87.

This stage is undertaken via many different techniques such as bank accounts, intermediaries, traveller's cheques, financial services, property dealings and valuable assets.[105]

Different methods are employed to disguise the transactions, and it may become anonymous. In short, a multifaceted system of multiple transactions is generally part of the layering process. Criminals can meddle with the system once the unlawful proceeds are placed into the banking system. This stage is crucial as it creates a huge gap between the basis of the proceeds and the status quo.[106]

Through layering, monies move in and out of accounts of bearer companies. This movement is undertaken through online fund transfers. For instance, in the U.S, "there are over 500,000 legitimate wire transfers involving 1 trillion U.S dollars, and it is not known whether the monies are 'dirty' ones." There is no sufficient information leading to the legitimacy of the money in the account. Due to this, launderers are able to layer their 'dirty' monies without any suspicion.[107]

2.3.3 Integration

Through this stage, launderers usually manage to assimilate the unlawful proceeds into the financial system which is authentic. Integration is undertaken to show others that

[105] "The second stage in the washing cycle," One Stop Brokers, accessed March 2, 2016, http://www.onestopbrokers.com/2015/01/26/second-stage-washing-cycle-layering.
[106] One Stop Brokers, "The Second Stage."
[107] "Stages of Money Laundering Process," International Money Laundering Bureau, accessed March 2, 2017, http://www.imlib.org/page5mlstgs.html.

the proceeds are from legal sources. Under this stage, it is nearly impossible to identify the source and its illegitimacy as the 'dirty' money has been 'cleaned'.[108]

The process of laundering money does not at all times involve the three stages. They may intersect in certain circumstances making it one or two stages. The number of stages depends on the nature of the laundering method as well as criminal organisations.[109] The stages and goals are further demonstrated in figure 2.0:

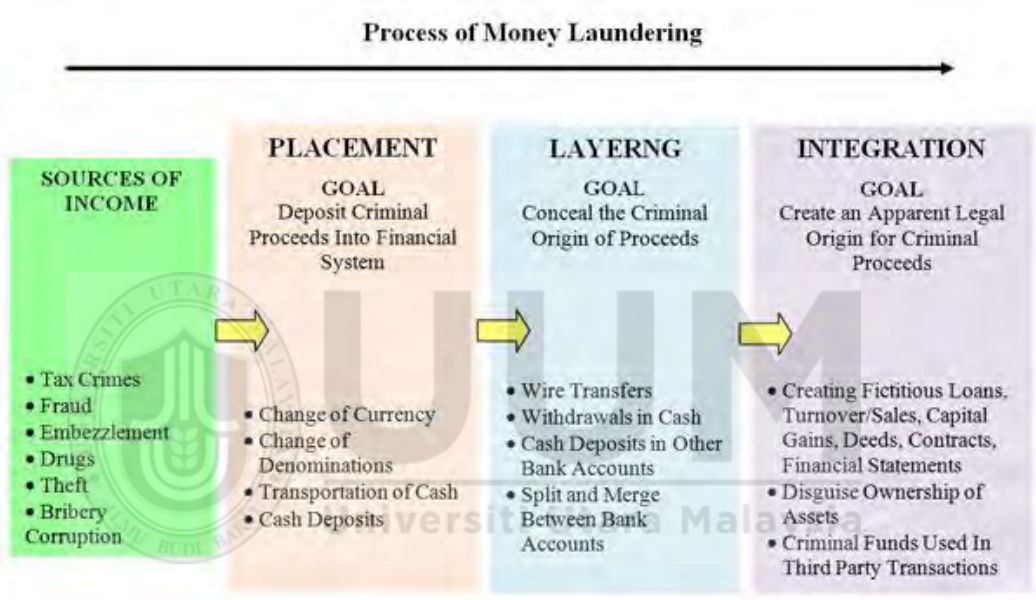

Figure 2.0 : Goals of Money Laundering Process[110]

Figure 2.0 shows the goals of each stage of money laundering. In general, the sources of income are from the predicate offences which include tax crimes, fraud, embezzlement, drugs, theft, bribery as well as corruption. There are different goals at a different stage. During placement, the aim of the launderers is mainly to ensure that the monies are placed into the legitimate financial system and during the second stage

[108] William R. Schroeder, "Money Laundering**:** A Global Threat and the International Community," *FBI Law Enforcement Bulletin*, (2001): 1.
[109] Schroeder, "Money Laundering," 2.
[110] "Stages of Money Laundering," One Stop Brokers, accessed November 13, 2016, http://www.onestopbrokers.com/2015/01/12/stages-money-laundering/.

which is layering, they aim to 'mask' the criminal proceeds. In the end, the launderers often manage to create an impression that the monies gained are legal through integration.

2.4 Methods of Money Laundering

Each stage of money laundering has its uniqueness and the implication of a process which has been carefully designed and structured. The aim of not getting exposed to any attention needs to be understood by those charged with the detection as well as investigation of such issues. Lawmakers have failed to notice the nature of money laundering activities which is complex.[111] 'The characters and hidden agendas are part of money laundering as a channel to legalise the 'dirty' monies.

There are many methods of laundering which one may employ. It can be from the simplest conventional methods to modern ones. Several factors which may influence the choice of methods which launderers have, and they are:[112]

i. The amount of money to launder
ii. The involvement of professionals to assist the launderers
iii. The sophistication of the criminal enterprise
iv. The geography where the laundering is going to take place

2.4.1 Cash Smuggling

One of the oldest methods of money laundering involves cash smuggling.[113] This is the illegal physical movement of currency and monetary instruments out of a country.

[111] Barry A.K. Rider, "Recovering the proceeds of corruption," *Journal of Money Laundering Control* 10, no. 1, (2007): 5.
[112] Anthony Kennedy, "Dead fish across the trail: illustrations of money laundering methods," *Journal of Money Laundering Control* 8, no. 4, (2005): 305.
[113] Kennedy, "Dead Fish," 313.

The various transport does not leave discernible audit trails. Another method could be currency stockpiling where one would pile the cash and launder when the situation allows.[114]

2.4.2 Internet Banking and e-Money System

Internet banking and electronic money (e-money) systems are considered essential medium for money launderers. The launderers launder money at ease using banks as their channels to launder money, and it gives them accessibility and haven.[115] Through the banking system, the criminal organisation receives payment globally, and multiple online transfers can be carried out to avoid triggering suspicious transactions. Therefore, for this very reason, launderers take advantage of banking systems such as wire transfer, correspondent, and private banking to launder unlawful proceeds.[116]

Wire transfer is one of the tools to launder illegal proceeds, and it is present at all levels of the laundering process, explicitly at the layering stage. Wire transfer is favoured by the money launderers as there are too many wire transfers worldwide and due to this, much information can be disclosed. This minimal disclosure of information allows efficiency to be achieved by the launderers. Illegal monies moving from one jurisdiction to another is made in the blink of an eye, and the trail may not be easy for enforcers to figure out.[117]

[114] "Money Laundering in the EU," Exeter, accessed November 13, 2016, http://people.exeter.ac.uk/watupman/undergrad/ron/methods20and%20stages.htm.
[115] Jackie Johnson, Y. C. Desmond Lim, "Money laundering: has the Financial Action Task Force made a difference?," *Journal of Financial Crime* 10, no. 1 (2003): 7.
[116] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions," (Ph.D diss., University of Western Australia, 2008): 25.
[117] Rahman, "An Analysis," 27.

Apart from internet banking, cyber laundering is also a prominent channel to commit money laundering which can be done with minimal evidence and identification of the parties involved. Similar to other methods of money laundering, cyber laundering also leaves almost no trail and transactions do not come under the official regulatory system.[118] There a few types of cyber laundering and e-money is one of the noticeable methods of cyber laundering. Money laundering can be carried out via e-money through the transfer of payments online and also, prepaid cards and e-vouchers as they do not need any physical form of monies.[119]

E-money gives launderers a few other advantages, and they are:

- transfers can be done in a quick manner through wire transfer
- lack of identity
- Difficult to determine the jurisdiction in which the suspects need to be prosecuted, and the case is to be tried

On the other hand, private banking gives the privilege to the clients to secure their personal information relating to their accounts. Usually, private banking is for those who are able to deposit a million or more. A special officer deals with their banking affairs such as global wealth management, tax, and estate planning.[120]

[118] Steven Philippsohn, "The Dangers of New Technology- Laundering on the Internet," *Journal of Money Laundering Control* 5, no.1 (2001): 87.
[119] Michael F. Zeldin and Carlo V. di Florio, "Strengthening Laws and Financial Institutions to Combat Emerging Trends in Money Laundering," *Journal of Money Laundering Control* 2, no. 4 (1999): 303.

[120] Michael Brindle, "Private banks' Initiative Against Money Laundering," *Journal of Money Laundering Control* 4, no. 4 (2001): 344.

There are a few reasons why launderers are in favour of using private banking, and they are:[121]

- Clients are rich, and no further questions asked
- Banking secrecy
- Special relationship with the representatives

Alongside private banking, correspondent banking is also useful in assisting the launderers to carry out their money laundering activities. Likewise, the correspondent bank does not need the physical appearance of their clients as everything is dealt with via international transfer systems. For instance, in the U.S, correspondent banking is prevalent, and banks do not take reasonable steps in avoiding the usage of the correspondent banking system. International bankers should take initiatives and proper measures in monitoring the correspondent banking system as launderers use this channel to launder unlawful proceeds. A jurisdiction without appropriate AML laws may not be able to trail this type of laundering method.[122]

Making use negatively the banking system allows launderers to escape from being caught by the legal enforcers as they own the bank. In this context, launderers usually have their very own offshore banks where they deal with financial transactions which are not regulated. However, one of the drawbacks for them owning offshore banks is that they are not able to produce official documentation to be presented to enforcers.[123]

[121] Brindle, "Private Banks," 344.
[122] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions," (Ph.D diss., University of Western Australia, 2008): 28.
[123] Rahman, "An Analysis," 59.

In addition, another method under the banking system is internet banks. This form of banking system provides all banking services with their clients over the internet. The types of services consist of fund transfer online, cheques issued via the internet and shares issuance. The benefits of using this type of channel to launderer unlawful proceeds are fast in processing, globalised, lack of information on their clients' identity as well as other personal data.[124]

2.4.3 The *Hawala* System

The FATF refers to "the *Hawala* system as an alternative remittance system. *Hawala* system involves the transfer of monies through local and international networks leaving no trace in the legitimate financial systems."[125] This system is deemed to be the easiest and quickest method to remit monies by workers overseas to their families.

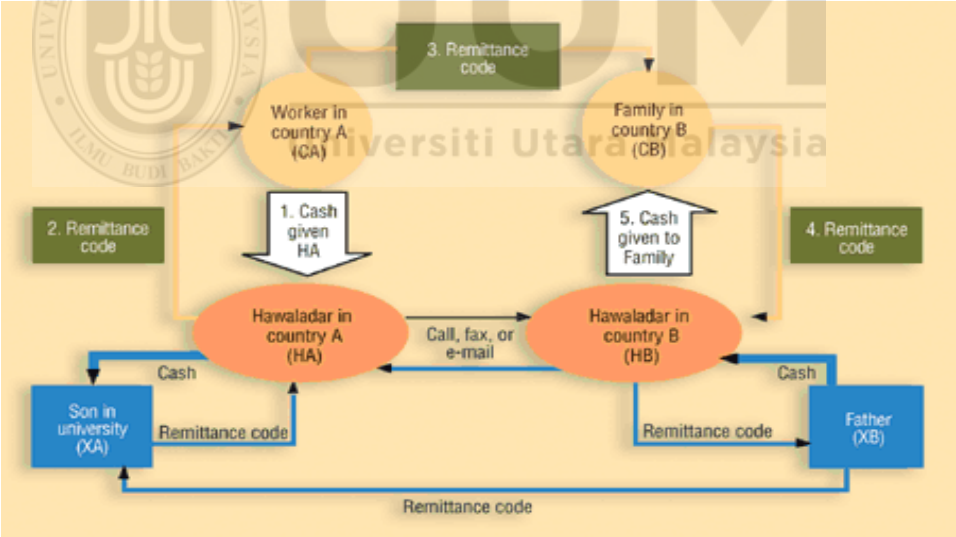

Figure 3.0 : Hawala system[126]

[124] Steven Philippsohn, "The Dangers of New Technology-Laundering on the Internet", *Journal of Money Laundering Control* 5, no. 1 (2001): 87.
[125] Dr. Bala Shanmugam, "Hawala and money laundering: a Malaysian perspective," *Journal of Money Laundering Control* 8, no. 1, (2005): 37.
[126] "Hawala System," GDRC, accessed 27, October 2017, https://www.gdrc.org/icm/hawala.html.

Figure 2.1 illustrates how the *Hawala* system works. “Basically, the first transaction can be a payment from a customer (CA) from country A, or a payment arising from some preceding obligation, to another customer (CB) in country B. Then, a *hawaladar* from country A (HA) accepts funds in one currency from CA and provides CA with a code for the purposes of verification purposes.”[127]

“The HA contacts his country B correspondent (HB) to deliver an equal amount in the local currency to a selected beneficiary (CB), who is required to reveal the code to collect the funds. HA can be paid by charging a fee or through an exchange rate spread. After the remittance, HA has a liability to HB, and the settlement of their positions is made by various means, either financial or goods and services. Their positions can also be transferred to other intermediaries, who can assume and consolidate the initial positions and settle at wholesale or multilateral levels.”[128]

“The settlement of the liability position of HA and HB that was created by the initial transaction can be carried out through imports of goods or "reverse *hawala*." A reverse *hawala* transaction is often utilised for investment purposes or to cover travel, medical, or education expenses from a developing country. Relating to a country subject to foreign exchange and capital controls, it is seen that a customer (XB) interested in transferring funds abroad for, in this case, university tuition fees, provides local currency to HB and requests that the equivalent amount be made available to the customer's son (XA) in another country (A).”[129]

[127] “The Hawala System,” Mohammed El-Qorchi, Senior Economist, Monetary and Exchange Affairs Department, IMF, accessed 28, November 2018, https://www.gdrc.org/icm/hawala.html.
[128] El-Qorchi, “The Hawala.”
[129] El-Qorchi, “The Hawala.”

"Following the transfer, often that customers are oblivious of the transaction they initiate is a *hawala* or a reverse *hawala* transaction. HB may ask HA directly if funds are required by XB in country A or indirectly by asking him to use another correspondent in another country, where funds are expected to be delivered.[130]

In addition, a reverse *hawala* transaction does not often involve the same *hawaladars*. The transaction may perhaps involve other *hawaladars* and get involved in a different transaction. The transaction may either be an easy one or complex. "Furthermore, the settlement can also take place through import transactions. For instance, HA would settle his debt by financing exports to country B, where HB could be the importer or an intermediary."[131]

As traditional methods of laundering 'dirty' monies have been too commonly used by launderers, they now utilise modern methods of money laundering to avoid suspicious transactions traced by law enforcers.[132] With the recent technological method of laundering criminal proceeds, it may not leave any trace to create suspicion. Due to this, it may interrupt the proper function of the financial system of a country.

As such, launderers worldwide continuously misuse banks as channels to 'clean' the criminal proceeds.[133] Usually, it is carried out by drug dealers and criminal organisations which seems to be an easy method for laundering process. For this very

[130] El-Qorchi, "The Hawala."
[131] El-Qorchi, "The Hawala."
[132] "Money laundering and market," Peterson Institute for International Economics, accessed March 11, 2016, https://piie.com/publications/chapters_preview/3813iie3705.pdf.
[133] "Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors," The OECD, accessed March 11, 2016, http://www.oecd.org/taxexchange-of-tax-information/43841099.pdf.

reason, the detection of suspicious transactions is essential in not allowing launderers to misuse the banking system further.[134]

With regard to foreign banks, laundering of 'dirty' monies is done in an unconventional manner, and it involves methods which do not allow the banks to identify those laundering activities. As such, foreign banks are needed to assist local banks in investigating suspicious transactions. This is done together with banking laws and regulations of both local and foreign countries.[135]

2.4.4 Games of Chance-Casino and Betting

Apart from financial institutions such as banks, launderers use games of chance as networks to carry out the laundering of 'dirty' money.[136] For instance, casinos are one of the games of chance which are associated with money laundering. The process includes the purchase of chips in bulk and converts them into 'clean' monies. Once they clean the 'dirty' monies', all they have to do is to declare that those are income from the casino.[137]

Another method to launder money which is part of games of chance is sports betting.[138] This involves the purchase of the lottery ticket which has been won. 'Dirty' monies are offered to the winner, and the launderers save themselves from being caught. They bet using the 'dirty' monies so that it may not create suspicion.[139]

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[134] OECD, "Money Laundering."
[135] OECD, "Money Laundering."
[136] "Money Laundering's Other Face," Banking Exchange, accessed March 11, 2016, https://piie.com/publications/chapters_preview/3813iie3705.pdf.
[137] Banking Exchange, "Money Laundering."
[138] "Money Laundering Risks and E-Gaming: A European Overview and Assessment: final report," Michael Levi, accessed March 11, 2016, http://www.egba.eu/pdfLevi_Final_MoneyLaundering_Risks_egamingpdf.
[139] Levi, "Money Laundering Risks."

2.5 The Nature of AML Laws

As the threats related to money laundering are constantly growing, legislators around the world have established AML laws which act as an instrument to curtail these unlawful conducts. In most countries, money laundering has been criminalised, and this indicates the seriousness of governments in handling the money laundering phenomenon. For example, Malaysia's AMLATFPUAA, the UK's Proceeds of Crime Act 2002 (POCA) and Australia's Anti Money Laundering and Counter-Terrorism Financing Act 2006.[140]

Strategies to combat money laundering are regularly updated to suit current situations. However, the critical issue is whether those strategies can cover all possibilities. "It has been reported that approximately 2.8 trillion USD or between 2% and 5% of GDP worldwide is laundered."[141] This indicates a danger to the world economy, and if there are ineffective legal strategies, the system can be distorted. Legal enforcers need to form a catch-all approach to reduce ineffectiveness as much as they can if not elimination.

Implementation of strategies to combat money laundering takes up a lot of the financial allocation of a country. High-cost surges over the sustainability of economic growth and the world are in a battle to fight against money laundering.[142] In order to reduce

[140] "Anti-Money Laundering and Counter-Terrorism Financing Act 2006," Australian Transaction Reports and Analysis Centre, accessed November 7, 2015, http://www.austrac.gov.au/amlctf.html.
[141] "Offshore Activities and money laundering's recent findings and challenges", European Parliament, accessed March 11, 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595371/IPOLSTU(2017)595371_EN.pdf.
[142] Nella Hendriyetty and Bhajan S. Grewal, "Macroeconomics of money laundering: effects and measurements", *Journal of Financial Crime 24*, no.1 (2017): 65.

the surge, there is a need for cooperation amongst many countries, legal enforcers and financial institutions to look out for the intersection of all AML laws and the shared responsibilities over the battle.

Developed countries have existing plans for AML regimes, and yet, there are specific gaps found in the regime which need attention and further improvements.[143] Money laundering is a serious issue worldwide, and developed countries need to assist the developing ones in establishing and improving the AML regime which includes related predicate offences such as corruption.

The assistance of developed countries is necessary due to the fact that individual initiatives are insufficient as developed countries have more resources and abilities to manage AML regimes.[144] Compared to developed countries, the legal systems of developing countries are still insubstantial, and activities concerning money laundering can be carried out effortlessly. Developed countries could assist them in resolving issues in terms of technicalities and also, financially since their financial system is advanced and resourceful.[145]

Following that, poverty is the channel used by launderers to grow 'dirty' monies and other related predicate activities.[146] There is a huge gap in the economic sector between developed and developing countries. Even though developing countries have their own

[143] Ayodeji Aluko and Mahmood Bagheri, "The impact of money laundering on economic and financial stability and on political development in developing countries: The case of Nigeria", *Journal of Money Laundering Control* 15, no. 4, (2012): 442.
[144] Aluko, Bagheri, "The Impact," 443.
[145] Aluko, Bagheri, "The Impact," 443.
[146] "Money laundering Damages Development," Economia, accessed March 14, 2016, https://economia.icaew.com/en/opinion/globalreview-2014-2015/money-laundering-damages-development.

punishments for money laundering activities, the harshness of the punishments is insufficient to give impact on the launderers[147] and also, the legal enforcement of the developing countries may not have appropriate techniques and laws to combat money laundering.[148]

It is crucial for every government to combat money laundering so that criminals will not be able to have the benefits of making use the financial, accounting as well as legal instruments to take all proceeds from activities associated with money laundering.[149] Effective countermeasure and well-equipped law enforcement are the keys to 'catch' those behind the serious acts, and it includes forfeiture of criminal proceeds. AML laws ensure that criminals will not easily get away with the criminal proceeds and also, without having to pay for the crime.

Corporate governance and public-office transparency must contribute its share and play a vital role in the global fight against money laundering and hence, the very need to enact AML legislations in sequence to establish and brace a suitable regime in the country. This will not only increase the public's confidence but also ensure that financial tools are not used to launder proceeds of unlawful activities. Alongside, forfeiture exists as a part of the AML regime in the view to deprive benefits gained from those criminal activities.

[147] Santha Vaithilingam and Mahendhiran Nair, "Factors affecting money laundering: lesson for developing countries", *Journal of Money Laundering Control* 10, no. 3 (2007): 352.
[148] Vaithilingam and Nair, "Factors Affecting Money Laundering," 352.
[149] Zulkifli Hasan and Abd Hamid Abd Murad, "Explanatory Note on Anti Money Laundering (Amendment) Act 2003," *Malaysian Journal of Shariah and Law 2* (2010): 162.

With the realisation throughout the world that money laundering has become one of the offences which is ever troubling, it must be noted that AML laws in every country have its own but similar aims. Succinctly, AML laws can be construed as actions which put a stop to or aims to curb money laundering from happening. This is an oversimplification of a complicated situation. The meaning of 'criminal proceeds' differs from each jurisdiction where it is believed that some activities are deemed as unlawful in some jurisdictions and not in others.[150]

Correspondingly, the objectives of AML law are not necessarily the same in different jurisdictions. Here, some courts may set their very own aims, and they might take account of purposes such as preventing organised crime, reducing drug dealings, deterring terrorist activities as well as protecting the good name or reputation of the financial services industry.[151]

"A good money laundering check and balance allows the following"[152]:

- Remove or distance themselves from the criminal activity generating the profits, thus making more it difficult to prosecute them;
- Distance profits from the criminal activity, thereby preventing them from being confiscated by the law enforcement authorities;
- Enjoy the benefit of the illicit profits without bringing attention to themselves; and,
- Reinvest the illicit profits in future criminal activities or even in legitimate business.

[150] "Anti-Money laundering Requirements: Costs, Benefits and Perceptions City Research Series Number Six, ZYEN, accessed November 7, 2016, http://www.zyen.com/PDF/AMLRFULL.pdf.
[151] Zyen, "Anti-Money Laundering."
[152] "Money Laundering Methodologies and International and Regional Counter-Measures", Gambling, Technology and Society: Regulatory Challenges for the 21st Century, Rick McDonell, accessed March 15, 2016, http://www.aic.gov.au/media_library/conferencesgambling/mcdonnell.pdf.

As such, there are two essential tools[153] to combat money laundering, and they are: forfeiture of criminal proceeds and criminalisation of money laundering. The researcher considers that there are two fundamental principles which are apparent under AML regime in every jurisdiction and they include: punishment for those who have committed crime relating to money laundering and on the other hand, taking away the benefits gained from unlawful activities. With these objectives of the AML law, the funding of criminal organisation can be weakened and hence, the reduction of criminal cases involving laundering of monies can be observed.

The tools mentioned above are beneficial for corruption charges. Tracing of the assets is essential in allowing the prosecution to prove the crime by showing the relationship between the crime and the property. Asset tracing is the process of following the trail of monies. This is undertaken by tracing evidence such as bank and financial records, investigating financial advisors, financial disclosure of the defendants as well as government and corporate documents.[154]

As money is the key motive for corruption cases, tracing allows the investigators to discover where the money came from and where the money is moving to. The corrupt would do everything he or she could to hide the gains, and if tracing is used to obtain the evidence of the trails, it will be of great use in proving the case.[155]

[153] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (The Edinburgh Building: Cambridge University Press, 2000): 25.
[154] "What is Asset Tracing?" Columbia Law School, accessed March 18, 2016, https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/what_is_asset_tracingaugust2016.pdf.
[155] Columbia Law School, "What is Asset Tracing?."

However, as proceeds of crime can either be physical or in cash, it makes tracing difficult as the corrupt may hide the proceeds in different places thus making the entire transactions complex. This method of layering used by the launderers makes the investigation and tracing difficult because of the lack of evidence.[156]

2.6 The Impact of Money Laundering

A form of crime that impacts not only individuals but has detrimental outcomes on the economy and well-being of the public is called economic or financial crimes.[157] Without any doubt, money laundering and other organised crimes come under these categories. Criminal proceeds are given to enforcers as bribes to influence them on not to put them behind bars. This may disrupt the legal system as well as the good governance of a nation via these corrupted individuals.

The adverse effects of money laundering on economic development are difficult to quantify, yet it is clear that such activity damages the financial sector that is critical to economic growth. Money laundering reduces productivity in the economy's real sector by diverting resources and encouraging crime and corruption. This slows the economic growth and also, distorts the economy's external sector of the international trade and capital flows.[158]

[156] Columbia Law School, "What is Asset Tracing?."
[157] Yusuf Ibrahim Arowosaiye, "The Devastating Impact of Money Laundering and other Economic and Financial Crimes on the Economy of Developing Countries: Nigeria as a Case Study", Ahmad Ibrahim Kulliyyah of Laws International Islamic University Malaysia.
[158] Vandana Ajay Kumar, "Money Laundering: Concept, Significance and its Impact," *European Journal of Business and Management* 4, no. 2 (2012): 116.

"Developing countries' strategies to establish offshore financial centres (OFC) as vehicles for economic development are also impaired by significant money laundering activities through OFC channels."[159]

Money laundering perceives ease of entry to a country that attracts an undesirable element across its borders, degrading quality of life and raising concerns about national security. The crimes perpetrated by these undesirable elements erode basic individual liberties by threatening rights to life and entitlements to own properties.[160]

Private sectors can be affected by laundering activities. Launderers use their powers to manipulate legal businesses and become a monopoly. These legitimate businesses become shields for the launderers when carrying out their illegal activities. These shields are to protect the launderers from enforcers tracing the criminal proceeds.[161]

Besides influencing private sectors, money laundering also has an impact on emerging markets. When emerging markets allow others to be part of their economies and financial services, launderers take opportunities to launder the 'dirty' monies through these markets. Hence, the shift is now from the financial and the OFC to emerging markets. This is reflected by especially cross-border cash shipments and real estate in emerging markets.[162]

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[159] "The Negative Effects of Money Laundering on Economic Development," Brent Bartlett, For the Asian Development Bank, Regional Technical Assistance Project No.5967, Countering Money Laundering in The Asian and Pacific Region, accessed November 8, 2017, https://waleolusi.files.wordpress.com/2013/05/the-negative-effects-of-money-laundering-on-econom.pdf.

[160] "Background Intelligence Brief: Money laundering," Queensland's Crime and Misconduct Commission, accessed November 20, 2016, http://www.ccc.qld.gov.au/research.

[161] Brent Barlett, "The Negative Effects of Money Laundering on Economic Development," *Platypus Magazine* 18 (2002): 19.

[162] John McDowell, "The Consequences of Money Laundering and Financial Crime," *Journal of the U.S. Department of State* 6, no. 2, (2001): 7.

Furthermore, money laundering activities increase social costs and risks. Since launderers carry out their laundering activities through predicate crimes such as drug trafficking, smuggling and the most prevalent currently, corruption, government increases their allocation for more strict enforcement and proper healthcare for drug addicts.[163] Overall, money launderers increase their influence through legitimate economic activities.

Money laundering exposes the financial sector to tax evasion. Different circumstances such as corruption, financial malpractices, and wrong policy decision-making do not allow taxpayers to act in good conscience.[164] Tax evasion is an illegal practice where there is an intentional avoidance to pay the actual tax liability.[165] This is undertaken by money launderers to hide their illicit money flows.[166]

In terms of financial systems, money laundering distorts the transparency, strength, and effectiveness of the system.[167] In 2012, "HSBC Holdings, a London-based company, paid nearly $2 billion in fines after it was discovered that the financial institution laundered money for drug traffickers, terrorists, and other organised crime groups throughout Iran. The laundering went on for many years before the activity was detected."[168] In 2014, "BNP Paribas, a French bank with global headquarters in

[163] McDowell, "The Consequences," 8.
[164] "Money Laundering Problems, Their Implications and Governments Efforts in the Nepalese Context," Shyam Prasad Mainali, accessed March 18, 2016, http://unpan1.un.org/intradoc/groups/public/documents/eropa/unpan026376pdf.
[165] Anais Storm, "Establishing the Link between Money Laundering and Tax Evasion", *International Business & Economics Research Journal* 12, no. 11 (2013): 1438.
[166] Storm, "Establishing the Link,"1438.
[167] Anu Arora, 'The Evaluation of International Money Laundering Regulation', *Issues in International Commercial Law* (2005): 174.
[168] "Money laundering," Legal Dictionary, accessed March 20, 2016, https://legaldictionary.net/money-laundering.

London, pled guilty to falsifying business records after it was discovered the institution violated U.S. sanctions against Cuba, Sudan, and Iran. As a result, BNP was forced to pay a fine of $8.9 billion which is the largest fine ever imposed for violating those sanctions."[169]

These instances mentioned above point out that financial institutions and banks need to form proper and practical approaches to combat money laundering. This is essential in protecting the reliability and stability of the financial system in every jurisdiction. Effective strategies to combat money laundering require the banks to comply with regulations by observing them meticulously.

There are a few general effects of money laundering, and they include:

(a) The increase in crime and corruption level

Money laundering activities allow criminal organisations to achieve financial stability. Due to this fact, many of them use money laundering as a means to commit a crime as it gives them the freedom to carry out criminal activities without leaving any trace.[170] Usually, money laundering is committed without any predicate offences. However, corruption is always interlinked with money laundering as criminals may try to escape from penalties by offering bribes to related persons such as legal enforcers, government officers, bankers, and solicitors.[171]

(b) Affecting the legitimacy of the private sector

[169] Legal Dictionary, "Money laundering."
[170] "The Amounts and the Effects of Money Laundering," Australian National University, accessed March 20, 2016, http://www.econ.uu.nl/users/unger/publications/Amounts%20and%20Effects%20ML.pdf.
[171] National University, "The Amounts."

Money laundering affects the legitimacy of the private sector where launderers cover their illegitimate businesses through the front cover of legitimate businesses or companies. These legitimate entities are 'masked' and controlled by criminals to get away with proceeds of the crimes.[172] Businesses which are run to 'mask' the illegal activities have huge funds and involves products and services provided below market rates. This increases competition between legitimate and 'masked' businesses. By forming front businesses, there is an immense impact on the macro-economy where criminal proceeds are utilised to run that particular industry wholly or partially.[173] As a whole, the effect on the legitimacy of the private sector by front businesses affects the stability of the economy and the financial system of a country.

(c) Negative effects on financial institutions

In general, the laundering of criminal proceeds affects the stability of banks and other financial institutions, and hence, it reduces the efficiency of the financial system of a country.[174] For instance, some of the real-life incidents relating to money laundering include the failure of the first Internet bank, the European Union Bank, Riggs Bank, money laundering scandal at the Bank of Credit and Commerce International (BCCI) as well as the 1995 collapse of Barings Bank.[175]

Altogether, money laundering as a universal phenomenon interferes with the efficiency and stability of a nation from economic, financial and social aspects.

[172] "Economic Effects of Money Laundering," Exeter, accessed March 22, 2016, http://people.exeter.ac.uk/watupman/undergrad/rtb/effects2.htm.
[173] Exeter, "Economic Effects."

[174] Vandana Ajay Kumar, "Money Laundering: Concept, Significance and its Impact", *European Journal of Business and Management* 4, no. 2 (2012): 115. http://www2.econ.uu.nl/users/unger/publications/Amounts%20and%20Effects%20MLpdf.
[175] Richard J. Herring, "BCCI & Barings: Bank Resolutions Complicated by Fraud and Global Corporate Structure", *Systemic Financial Crises* (2005): 321.

Hereafter, the legal enforcers should establish a legal framework which oversees all possible circumstances involving money laundering, and they also should update their systems as they go along into the future. Comparisons should be made with other jurisdictions for a better legal framework to combat corruption using the AML law.

2.7 Terrorism Financing

Terrorism Financing is the process by which terrorists fund their operations in order to perform terrorist acts. Terrorists need financial support to carry out their activities and achieve goals set. There is a little difference between terrorists and other criminals in their abuse of the financial system. While different from money laundering, terrorists often exploit similar weaknesses in the financial system.

2.8 International Initiatives

Immense effect on the economy and financial sectors globally alerted the community to eradicate this destructive criminal activity. There is a need for international firms and Non-Governmental Organisations (NGOs) to pull together to get the job done. Policies and regulations relating to the AML regime are designed, shared and implemented in various countries.

Cooperation and coordination are needed amongst international organisations to combat money laundering. It was identified a long ago that unity between many countries worldwide are required as money laundering activities involve an extensive criminal network that has no boundaries. Therefore, standardised international cooperation is a must to fight against money laundering and corruption. This approach may halt the chain of criminal organisations. There are several international initiatives, and these shall be seen as follows:

2.8.1 International Monetary Fund (IMF)

In combating money laundering, international intervention is essential, and here, their aims for the AML regime are possibly collective. "Notably, in 2000, the IMF responded to calls from the international community to expand its work in the area of AML in general. After the September 11 attacks, the IMF has intensified the efforts and broadened their scope to include combating the financing of terrorism."[176]

"The IMF is particularly concerned about the possible consequences of money laundering on its members' economies. These include risks to the soundness and stability of financial institutions and financial systems, increased instability of international capital flows, and a reducing effect on foreign direct investment. The issue is global; money launderers and terrorist financiers make use of loopholes and differences among national AML/CFT systems and transfer their funds to or through jurisdictions with weak or ineffective legal and institutional frameworks."[177]

2.8.2 The Financial Action Task Force (FATF)

The FATF also plays a key role. "It was set up in 1990 under the umbrellas of the Organisation for Economic Co-operation and Development (OECD), with a membership of developed countries. In 1990, the FATF formed a set of recommendations which are known simply as 'The Forty Recommendations.' This has to be the base for money laundering legislations in all UN member countries as the UN supports the FATF Recommendations. The UN has overtly supported the FATF Recommendations since a Security Council Resolution in 2005."[178]

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[176] "Anti-Money Laundering /Combating the Financing of Terrorism", International Monetary Fund, accessed November 7, 2016, http://www.imf.org/external/np/leg/amlcft/eng/aml1htm.
[177] International Monetary Fund, "Anti-Money Laundering."
[178] The Financial Action Task Force on Money Laundering, accessed November 17, 2016, http://www.fatf-gafi.org.

The objectives of the FATF are as follows:[179]

i. to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system;
ii. starting with its own members, the FATF monitors countries' progress in implementing the FATF Recommendations;
iii. reviews money laundering and terrorist financing techniques and counter-measures; and
iv. promotes the adoption and implementation of the FATF Recommendations globally.

The FATF scrutinise the progress of its members in terms of:[180]

i. implementing necessary measures
ii. reviews money laundering and terrorist financing techniques and counter-measures; and
iii. promotes the adoption and implementation of appropriate measures globally.

2.8.3 The FATF Forty Recommendations

The FATF has established a few Recommendations that are recognised as the international standard to fight against money laundering and the financing of terrorism and proliferation of weapons of mass destruction. In 1990, the first version of the FATF Recommendations was made. The FATF Recommendations were then revised in 1996, 2001, and 2003 and most recently in 2012 to make sure that they are up to date and related, and they are intended to be of a worldwide application.[181]

[179] The Financial Action Task Force.
[180] The Financial Action Task Force.
[181] The Financial Action Task Force.

The Forty Recommendations were introduced by the FATF in the year 2010. Through these Recommendations, the FATF offer a wide-ranging set of countermeasures against money laundering which consists of the criminal justice system and law enforcement, the financial system and its regulations, and international co-operation.[182]

"Predominantly designed in 1990, the Recommendations were first time modified in 1996 to take into account changes in money laundering developments and to look out for probable future dangers. In recent times, the FATF has completed a thorough review and update of the Forty Recommendations in 2003. Furthermore, The FATF has also come up with Interpretative Notes which are proposed to streamline the request for specific Recommendations and to provide further guidance."[183]

In association with other international stakeholders, the FATF works to recognise national-level weaknesses with the view of shielding the international financial system from misuse."[184] There are four parts to the revised Forty Recommendations, and they contain:

- Part One relates to the criminal offence of money laundering. Here, the member countries are encouraged to criminalise money laundering in line with the Vienna Convention and Palermo Convention.[185]
- The FATF improved on the standard for money laundering and predicate offences.

[182] The Financial Action Task Force.
[183] The Financial Action Task Force.
[184] The Financial Action Task Force.
[185] "Forty Recommendations," FATF, accessed November 14, 2017, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

- Part Two relates to financial institutions and non-financial business and professions. It focuses on money laundering. Previously, in the old Forty Recommendations, it only focused on financial institutions.[186]
- Part Three comprised important institutional measures in the AML regime and the affairs of legal persons and arrangements. This part was reviewed in 2003.[187]
- Part Four provides recommendations with regard to mutual legal assistance relating to investigations on money laundering and prosecutions.[188]

2.8.4 The Asia/Pacific Group on Money Laundering (APG)

"APG was founded in 1997 in Bangkok, Thailand. It is an independent and joint international organisation. It incorporates 41 members and a number of local and intercontinental observers and they are: the FATF, IMF, World Bank, OECD, UNODC, Asian Development Bank and the Egmont Group of Financial Intelligence Units."[189]

The role of APG members and observers is mainly to implement effective enforcement and combating system against money laundering and terrorism financing. This includes the Forty Recommendations of the FATF.[190]

There are five key functions of APG:[191]

- Mutual evaluations: assess compliance by APG members with the global AML/CFT standards through a mutual evaluation (peer review) programme;
- Technical assistance and training: coordinate bi-lateral and donor-agency technical assistance and training in the Asia/Pacific region in order to improve compliance by APG members with the global AML/CFT standards;

[186] FATF, "Forty."
[187] FATF, "Forty."
[188] FATF. "Forty."
[189] Asia/Pacific Group on Money Laundering (APG), accessed November 15, 2016, http://www.apgml.org.
[190] APG.
[191] APG.

- Typologies research: conduct research and analysis into money laundering and terrorist financing methods to better inform APG members and the general public of trends, methods, risks, and vulnerabilities of the financial and non-financial sectors to these crimes;
- Global policy development: participate in, and contribute to, policy development of the international AML/CFT standards by active participation in the global network of FSRBs; and
- Private sector engagement: provide information to the private sector to better inform them of international developments in AML/CFT and provide a forum for them to engage with the APG.

Furthermore, the APG also aids its affiliates to form coordination instruments at a national level and to employ resources effectively to fight against money laundering. After the September 11 attacks, the APG also has its focus on combating terrorist financing. The APG undertakes mutual evaluations every few years of its members and conducts workshops on money laundering techniques and trends. There are guidelines available for their members to utilise. The Secretariat assists the APG in conducting their activities. In the year 2006, the APG became an Associate Member of the FATF.[192]

2.8.5 The United Nations (UN)

"Part of UNODC is the Law Enforcement, Organized Crime and Anti-Money-Laundering Unit of UNODC which is accountable for conducting the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism. This unit was formed in 1997 due to the directive was given to UNODC

[192] The Financial Action Task Force (FATF), accessed November 20, 2016, http://www.fatf gafi.org/pages/asiapacificgrouponmoneylaunderingapg.html.

via the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988."[193]

"In 1998, the Unit's directive was supported by the Political Declaration and the strategies for combating money-laundering implemented by the General Assembly at its twentieth special session. The scope of the directive did not only involve drug cases but was extended to other crimes. In December 1998, the first move made by the UN in fighting against money laundering was by establishing the Vienna Convention. This convention was held to discuss over proceeds of crime and criminalise money laundering."[194]

Under the Vienna Convention 1998, the key reason to combat money laundering is to target international criminals to break their strengths. It is difficult to hide the money gained through criminal activities as the monies are key evidence of the crime committed. Large sums of money transferred into the financial institutions such as banks can be detected through suspicious transactions system. Since the twentieth century, this early detection is undertaken to ensure that the proceeds of crime can be traced and forfeited.[195]

"As one of the international bodies responsible for combating money laundering, the UNODC assists the Members in the proper execution of AML laws which are in line with internationally accepted strategies to combat money laundering."[196] "This

[193] "Money Laundering," United Nations Office on Drugs and Crime, accessed November 20, 2016, https://www.unodc.org/unodc/en/money-laundering.
[194] "Standards," United Nations Office on Drugs and Crime, accessed November 20, 2016, https://www.unodc.org/unodc/en/money-laundering/Instruments-Standardshtml.
[195] United Nations, "Standards."
[196] United Nations, "Standards."

approach was reaffirmed through the Political declaration during the UN General Assembly Special Session on Drugs in 1998. The General Assembly then designed an action plan named 'Countering Money Laundering' after several years to accommodate to current circumstances and to include new strategies in combating money laundering at a global stage."[197]

In December 2000, UNTOC was signed to include terms involving proceeds of all types of crime. State members were to work with each other to detect, investigate and prosecute those who commit money laundering. The Convention encourages the Parties in implementing customer identification, record keeping and also, suspicious transactions reporting. Therefore, financial intelligence units are responsible for all duties mentioned.[198]

Besides, UN Member States highlighted that there are relations between terrorism, international organised crime, drug-related activities, and money laundering. They encouraged those who have not joined the force to join the Convention, and this includes the 1999 International Convention for the Suppression of the Financing of Terrorism.[199]

On top of all these, "UN's efforts in combating money laundering and terrorism financing was extensive when they implemented resolution 1373 in 2001 by forming the Counter-Terrorism Committee (CTC).[200] This committee is responsible for observing the operation of the resolution requiring States to identify and combat

[197] United Nations, "Standards."
[198] United Nations, "Standards."
[199] United Nations, "Standards."
[200] United Nations, "Standards."

terrorism financing. As a result, States which are under this committee establishes appropriate preventive measures in combating terrorism financing."[201]

A fully-equipped AML regime can, therefore, make a significant contribution to the fight against money laundering phenomenon and these can be seen in two manners which include:[202]

- assist in revealing evidence of criminal activity through the identification of suspicious movements of financial assets, thus increasing the chances of a successful prosecution of the perpetrator of the crime and;
- smooth the progress of the tracking of criminal proceeds in order to preserve, recover and return to their legal owner.

However, it is observed that whether the regime is to be successful, it depends on the management of the financial, legal and accounting system which relate to AML measures.

2.8.6 The Vienna Convention

"Before 1973, 12 multilateral drug control treaties were established. The key aims then were the regulation and movement of drug supply. Due to the increased drug trafficking activities and monies generated through illegal activities, the UN, through the United Nations Drug Control Programme (UNDCP) commenced international cooperation to fight against drug trafficking and money laundering.[203] As continuous efforts, the Vienna Convention was adopted in 1988. It is also known as the United

[201] United Nations, "Standards."
[202] "Challenges in the Legal Regime to Deal with Money Laundering," Chethiya Goonesekera, accessed November 8, 2016, http://www.unafei.or.jp/english/pdf/RS_No83/No83_11PA_Chethiyapdf.
[203] "Vienna Convention on the Law of Treaties," Britannica, accessed November 15, 2016, https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties.

Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances."[204]

The main focus of the Vienna Convention is to combat the illegal trading of drugs and regulate laws relating to it. However, this convention refers only to drug trafficking offences.[205] It does not focus much on money laundering. On November 11, 1990, the Convention was officiated. It encouraged all countries to criminalise money laundering activities although they do not focus on money laundering.[206] Hereafter, the UN recommended the adoption of measures to accomplish:[207]

- Enable the tracing, freezing, and confiscation of the proceeds.
- Co-operate with the other countries in identifying, tracing, freezing and seizing these assets and;
- Provide for the bank, financial or commercial records to be available to investigators, notwithstanding bank secrecy.

Much later, the Vienna Convention expanded its focus on the proceeds from money laundering. "Article 3 of the convention calls for the member countries to form as a criminal offence under its local law, those activities facilitate and perpetuate money laundering. It calls upon the nations to declare those acts which lead to money laundering as a crime in their domestic laws."[208]

[204] "Vienna Convention on Diplomatic Relations," The United Nations, accessed November 15, 2016, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en.
[205] "Vienna Convention on the Law of Treaties," Britannica, accessed November 15, 2016, https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties.
[206] Britannica, "Vienna Convention."
[207] The United Nations, accessed November 20, 2016, http://www.un.org/en/index.html.
[208] "Vienna Convention on the Law of Treaties," The United Nations, accessed November 20, 2016, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

"Article 5 (2) of the Convention calls upon the member countries to enact and enforce in its domestic provision to identify, trace, seize and forfeit the profit derived from illegal activities."[209]

"Article 5 (3) requires member countries to empower the courts in the domestic country to summon the record or seize the records of those banks or financial institutions which are most likely to commit offences."[210] The convention makes sure that the concept of bank secrecy did not inessentially delay the forfeiture process from money laundering. As such, bank secrecy is not the reason for avoiding the supply of information. It also makes certain that the forfeiture process is carried regardless of the changes of the proceeds to another form.

Besides, the Vienna Convention stresses the idea of taking away the benefits of the crime committed. To implement this idea, the Convention established common AML law. Following this, it is believed that the Convention was essential in solving criminal issues globally and the possibilities of taking away financial powers from international criminal groups.

"The Central Bank governors of Belgium, Canada, France, Germany, Italy, Japan, Netherland, Sweden, Switzerland and United States also known as the G-10 group met in December 1988 to discuss the issues relating to Money Laundering."[211] The result of the meeting was that a committee was formed on Banking regulations and supervisory practices to evolve a set of principles to guide the members to fight the

[209] The United Nations, "Vienna Convention."
[210] The United Nations, "Vienna Convention."
[211] "UNTOC," The BIS, accessed October 20, 2016, https://www.bis.org/list/g10publications.

menace of money laundering.[212] These principles are known as the Basel Principles where they prevent criminals from utilising the banking system to launder 'dirty' money. Basel Committee sets out three guidelines relating to money laundering.[213]

2.8.7 The Palermo Convention

"The Palermo Convention (UNTOC) implemented by General Assembly resolution 55/25 of 15 November 2000" is the key international channel in combating transnational organised crime.[214] "It was signed by the Member States during High-level Political Conference. It was held in Palermo, Italy, on 12-15 December 2000 and came into force on 29 September 2003."[215]

There were three Protocols set in the Convention, and they focus on specific areas and organised crimes.[216] "Those Protocols are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, focusing on Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition."[217] It is a must for Members to join as parties to the Convention prior to them adhering to any of the Protocols.

The Palermo Convention is a fundamental plan in fighting against transnational organised crime. This Convention reflects the acknowledgement by the Member States in combating these serious problems and the need for international cooperation.[218]

[212] The BIS, "UNTOC."
[213] The BIS, "UNTOC."
[214] "United Nations Convention against Transnational Organized Crime and the Protocols Thereto", UNTOC, accessed November 21, 2016, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOChtml.
[215] UNTOC, "The Protocols."
[216] UNTOC, "The Protocols."
[217] UNTOC, "The Protocols."
[218] UNTOC, "The Protocols."

It is understood that the Member States that choose to endorse this instrument oblige to take serious steps in fighting against transnational organised crime and they have to include the following:[219]

- the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice);
- the adoption of new and sweeping frameworks for extradition, mutual legal assistance, and law enforcement cooperation;
- the promotion of training and technical support for building or upgrading the necessary capacity of national authorities.

According to the Convention, "the development of the convention followed an increased realisation during the 1980s and 1990s that the threat of organised crime was no longer merely a domestic one but had grown into one of the global proportions. The realisation that an international threat requires an international response became an important driving force."[220]

"Government delegations attending the Palermo conference in December 2000 could not have known that less than a year later a new international threat would suddenly emerge that would be regarded as far more immediate and dangerous than transnational organized crime.[221] The attacks on the World Trade Centre and the Pentagon resulted in a shift of attention and resources toward countering terrorism, causing transnational organized crime to drop on the priority and threat lists.

[219] UNTOC, "The Protocols."
[220] "Transnational Organized Crime and the Palermo Convention: A Reality Check", International Peace Institute, accessed March 10, 2016, https://www.ipinst.org/2011/01/transnational-organized-crime-and-the-palermo-convention-a-realitycheck.
[221] International Peace Institute, "A Reality Check."

However, during the past five years, the significant expansion and impact of transnational organized crime in different parts of the world have contributed to a renewed focus on the international threat that it poses. National strategies to counter transnational organized crime have been dusted off and strengthened, and additional resources are being made available to help in doing so."[222]

Article 6 (1)[223] states:

> Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

Article 6 (1) gives a guideline for the State Party to establish acts which can be considered as committing a money laundering offence. This article ensures that the State Party follows the fundamentals for determining the framework for financial crime.

[222] International Peace Institute, "A Reality Check."
[223] United Nations Convention against Transnational Organized Crime and the Protocols Thereto, accessed November 21, 2016, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

Alongside Article 6 (1), Article 6 (2)[224] provides that:

> For purposes of implementing or applying paragraph 1 of this article: (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences; (b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups.

Article 6 (2) sets out that a State Party should set their predicate offence lists covering all plausible situations which relate to organised crimes that are defined under Article 2. The list should be extensive.

Moreover, Article 7 relates to measures to combat money laundering while Articles 8 and 9 provide measures against corruption and criminalisation of corruption.[225]

2.8.8 The 1990 Council of Europe Convention

In November 1990, the Council of Europe Convention was implemented to form a standardised criminal policy concerning money laundering. The aims of the Convention are to include:[226]

- progresses in this area of law and to further improve international best practices in order to preserve the health, integrity, and stability of credit institutions and other financial institutions.

[224] UNTOC, "The Protocols."
[225] UNTOC, "The Protocols."
[226] "Details of Treaty No.141," Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, accessed November 21, 2016, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty141.

- to upkeep confidence in the financial system as a whole while establishing an area of freedom, security, and justice.
- to provides for a legal definition of money laundering
- to set out common measures to deal with money laundering.
- to focus on principles which are necessary for international co-operation among the contracting parties.

The membership of the council is open to others than European countries. The focus of the council is the criminal proceeds from money laundering. The Convention also has its other focus such as terrorism financing. They take steps by confronting terrorists' finance and safeguarding against financial safe havens in Europe.[227]

Nevertheless, the Convention did not follow a few important protocols:[228]

- it does not" impose an obligation to ensure that corporations and other legal persons can be held liable for money laundering.
- its operation has not yet been sufficient to permit conclusions to be drawn as to its adequacy and that, consequently, it would be premature to undertake a modernising initiative of this type.

2.8.9 The Egmont Group (Financial Intelligence Units-FIU)

This group is the principal authority in almost all countries accountable for the collection of information relating to finance for the purpose of AML and counter-terrorist financing. It is named Egmont as the first meeting took place in Egmont Arenberg Palace in Brussels in 1995.[229]

The aim of the group is to be responsible for a forum for FIUs globally to meet and share information annually. There is a need to cooperate with each other in supporting and exposing other Members to each other's national AML programmes in fighting

[227] Convention on Laundering, "Details of Treaty."
[228] Convention on Laundering, "Details of Treaty."
[229] Egmont Group, accessed December 2, 2016, https://egmontgroup.orgen.

against money laundering, terrorist financing, and other financial crimes. The support includes:[230]

- Expanding and systematising the exchange of financial intelligence information,
- Improving expertise and capabilities of personnel, and;
- Fostering better communication among FIUs through technology and helping to develop FIUs worldwide.
- sharing of information, training, and knowledge.

There are principles set by this group for information exchange between Financial Intelligence Units for Money Laundering Cases, and they include:[231]conditions for the exchange of information, limitation on permitted uses of information, and confidentiality. The growth of the Egmont Group was immense in 2017 as the number of Members was 156 as compared to when it was first started. Kuwait and Sudan are new Members of this group.[232] There were only 14 units in 1995 and 131 FIUs in 2012. The FIUs of Gabon, Jordan, Tajikistan, and Tunisia joined the Group in 2012."[233]

To qualify as a Member, an FIU must be formed and be an integrated unit within a country or its jurisdiction. The establishment must aim to identify financial crimes and make sure laws against financial crimes, i.e., money laundering, terrorism financing are regulated. From here, it demonstrates that the Egmont Group is a significant channel for Members to share information and trace the proceeds of crime as they go through several jurisdictions.

[230] Egmont Group.
[231] Egmont Group.
[232] Egmont Group.
[233] Egmont Group.

2.9 The Nature of Forfeiture

Money laundering related-activities demand for all enforcers from all over the world to spend their precious time to track down the proceeds of serious crimes. This is reasoned as proceeds are shifting swiftly from one place to another.[234] Therefore, in order to do so, effective and right tools have to be engaged to recuperate proceeds from unlawful activities and hence, take away all benefits from the offenders. This is where forfeiture comes in as an instrument to trail the proceeds.[235]

Historically, "forfeiture of assets or criminal proceeds commenced in England from the word 'felony', in which the Saxon word 'fee' or landholding and 'lon' or price were combined to define forfeiture as an act or omission that could result in the loss of property.[236] Forfeiture can be traced to 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 have to forfeit not only his life but also his interest in land and chattels as well as his ability to pass the title to his heirs."[237]

After World War II, economic growth and globalisation gave way for more prospects for the establishment and productivity of unlawful enterprises. Moving intangible properties through electronic devices are easily undertaken, and criminal organisations can get away with their illicit gains without being traced in the legitimate financial

[234] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19*,* no. 4 (2016): 337.
[235] Stefan D. Cassella, "The case for civil forfeiture: why in rem proceedings are an essential tool for recovering the proceeds of crime," *Journal of Money Laundering Control* 11, no. 1 (2008): 8.
[236] Jeffrey Simser, "Money laundering and asset cloaking techniques", *Journal of Money Laundering Control* 11*,* no. 1 (2008): 15.
[237] Zaiton Hamin et.al, "When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing," P*rocedia Economics and Finance* 31, (2015): 789.

system.[238] The legal system may not be able to detect these activities as they try to make it less visible as possible to be detected by using multiple channels to layer the proceeds.

Police and prosecutors deal with difficulties in bringing charges against leading criminal organisations and also, unable to trace and forfeit their unlawful gains. Moreover, short of substantive or procedural laws explicitly relating to the proceeds of crime, forfeiture of those unlawful proceeds without a conviction may be nearly impossible.[239]

The issues faced by the legal enforcers are tracing, restraining and recovering intangible assets, such as bank accounts, the online banking system. In the jurisprudence world, there is a vital question of whether these laws are relevant to intangibles. The area of law especially criminal law appears to be developing into an ineffective area of law and are incompatible in handling the heavy usage of e-banking and money transfers.[240]

"Up to the turn of the century, efforts to better target proceeds of crime and money laundering were concentrated on the development of new substantive offences and criminal procedure. Recognising that criminal law mechanisms are an effective part of the justice system, but that still more needs to be done in the pursuit of illicit profits, jurisdictions began to seek remedies beyond the realm of the criminal law. Civil

[238] Robert G. Kroeker, "The pursuit of illicit proceeds: from historical origins to modern applications," *Journal of Money Laundering Control* 17, no. 3 (2014): 269.
[239] Micheal Levi and Lisa Osofsky, "Investigating, seizing, and confiscating the proceeds of crime," *Crime Detection and Prevention Series* 61, accessed November 24, 2016, http://orca.cf.ac.uk/48241/.
[240] Robert G. Kroeker, "The pursuit of illicit proceeds: from historical origins to modern application," *Journal of Money Laundering Control* 17, no. 3 (2014): 269.

forfeiture regimes, also referred to as non-conviction-based asset forfeiture, began to emerge as a new approach to proceeds in common law countries in the 1990s and continued to spread over the next decade."[241]

"Forfeiture actions have been based upon the notion that the non-living 'things' can be guilty of wrongdoing. In short, if the non-living 'thing' is "guilty," forfeiture tool should be applied. This allows the focus on the property which was purchased from the crime to the person who may have committed the crime."[242]

In layman's term, according to Oxford Advanced Learner's Dictionary of Current English, forfeiture is defined as "the act of taking away something."[243] Focusing on the legal meaning of forfeiture, it is "the act of depriving one's benefits obtained through illicit acts."[244]

Forfeiture of criminal proceeds is generally divided into criminal and civil. The nature of how these two types of forfeiture work differ from one another.[245] In this manner, criminal forfeiture of proceeds comprises an order that is enforced in a criminal case where the relevant suspect is convicted based on evidence that proceeds of crime have been benefitted from an unlawful activity or to pay a fine. It also deprives those proceeds or property utilised.[246]

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[241] Kroeker, "The pursuit of illicit proceeds," 269.
[242] Kroeker, "The pursuit of illicit proceeds," 270.
[243] A. S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford: Oxford University Press, 2010): 587.
[244] *Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and the Proceeds of Crime Act 2002.*
[245] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4, (2016): 339.
[246] Stefan D. Cassella, "The case for civil forfeiture: why in rem proceedings are an essential tool for recovering the proceeds of crime," *Journal of Money Laundering Control* 11, no. 1 (2008): 8.

Criminal forfeiture is also similar to confiscation order in some jurisdictions. It involves an order *in personam*, not in proprietary. In other sense, the charges will be against the person who was involved in the illicit activity.[247] In a criminal forfeiture of proceeds, if the defendant laundered any amount of monies through illegal activities and purchase properties, it is then implied that the court may make an order to forfeit those proceeds from the legal activity.[248]

Civil forfeiture has aims which are similar to criminal forfeiture where it takes away criminal proceeds from the criminals and illegally acquired property as a facade. Civil forfeiture focuses on property, tort, and equity where it is a legislative response based upon this civil law which is incorporated into a judicially controlled process.[249]

Basically, civil forfeiture laws are implemented by the State to bring a civil suit to forfeit the proceeds or the instrument of unlawful activities. In this sense, instruments comprise of property used to facilitate the commission of an offence and not to being proceeds of an offence alone. Usually, civil forfeiture suits are brought *in rem* which is against the property bought using the unlawful proceeds.[250]

Another special feature of civil forfeiture is the affected parties can seek an interlocutory order to preserve the property pending final disposition of the matter. An order of this nature in effect restrains or "freezes" the property, preventing dissipation

[247] Cassella, "The Case," 9.
[248] Cassella, "The Case," 10.
[249] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4 (2016): 339.
[250] Aurasu and Rahman, "Money Laundering," 340.

while the court process unfolds. Usually, applications for preservation orders can be made on short notice or no notice. These features make available for civil forfeiture to be applied quickly and thus, can effectively seize assets. It assures that the property is left to be dealt with, within the jurisdiction of the relevant courts.[251]

Apart from that, the legislations apply not only to unlawful activities within the jurisdiction but also to offences committed elsewhere, so long as the conduct in question would also have been an offence under domestic law had it occurred within that jurisdiction.[252] "The underlying policy rationales for civil forfeiture are primarily preventative and compensatory. Civil forfeiture laws provide mechanisms whereby the proceeds of crime can directly be targeted and recovered – in a practical sense giving effect to the nostrum-"crime does not pay."[253]

There are two preventative purposes:[254]

- First, the removal of illicit profits attacks the profit motive behind economic crimes, acting as a general deterrent to others.
- Second, specific deterrence is achieved by removing the profits from an illicit enterprise, making the forfeited resources unavailable to the wrongdoer to facilitate further criminal activity.

[251] "Asset Confiscation as an Instrument to Deprive Criminal Organisations of the Proceeds of their Activities," Gay Mitchell, *Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) 2012-2013*, (2012), accessed December 3, 2016, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/crim/dv/mitchell_/mitchellen.pdf.
[252] "How the fight over civil forfeiture lays bare the contradictions in modern conservatism," Sarah A. Seo, accessed December 1, 2016, https://www.washingtonpost.com/news/made-by-history/wp/2017/07/24/how-the-fight-over-civil-forfeiture-lays-bare-the-contradictions-in-modern-conservatism/?utm_term=fc8a91dabde6.
[253] "Impact Study on Civil Forfeiture", Council of Europe, accessed December 1, 2016, https://rm.coe.int/impact-study-on-civil-forfeiture-en1680782955.
[254] Council of Europe, "Impact."

"Prevention is achieved by helping to remove these preconditions to crime. Civil forfeiture is also intended to be compensatory. In cases where there are clearly identified and defined victims who suffer pecuniary loss, like Ponzi schemes and other fraudulent activities, proceeds can be recovered and returned to the victims."[255]

The procedure of court for criminal and civil is different. Here, the burden and standard of proof for criminal and civil forfeiture are as follows:[256]

a) Criminal forfeiture

    i) The burden of proof- prosecution
    ii) The standard of proof- beyond a reasonable doubt

b) Civil forfeiture

    i) The burden of proof- the government
    ii) The standard of proof- on the balance of probabilities but a slightly higher burden for civil order in a criminal case.

Distinct from criminal forfeiture, civil forfeiture amounts to a lawsuit filed directly against a possession, be it guilt or innocence.[257] There are a few situations where civil forfeiture is appropriate, and they include[258]:

i) Uncontested forfeiture claim
ii) The defendant is dead
iii) The suspect is not known
iv) Third party intervention
v) A case where the situation does not call for a criminal conviction, i.e., minor cases involving laundering of money
vi) The wrongdoer is convicted in another country, but the property is elsewhere

[255] Council of Europe, "Impact."
[256] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4 (2016): 341.
[257] "The use and abuse of Civil Forfeiture," Sarah Stillman, accessed November 10, 2016, http://www.newyorker.com/reporting/2013/08/12/130812fafact_stillman.
[258] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4 (2016): 341.

Forfeiture as a tool to deprive the criminal's benefits is valuable for a few reasons. Ultimately, it is formed to ensure that criminal activities are lessened by depriving offenders of the profits from their crimes. At its core, forfeiture's aim is to deter crime. Since imprisonment does not deter all offenders, forfeiture picks up where conventional punishments do not work.

However, there is no particular study to show the link between forfeiture and occurrence of criminal activities. Recently, a group of economists came up with their theoretical views regarding the likely deterrent effect of forfeiture. They suggested that a system should have combined sanctions. By employing this method of combined sanctions, the courts may deter criminal activities more efficiently rather than just punishing the offenders.[259]

2.10 Conclusion

While it is known that money laundering is an area where every government is trying to fight against, forfeiture is one of the instruments used under the AML regime and indeed an essential part where law enforcers use in combating money laundering and corruption worldwide. Be it the criminal or civil forfeiture of criminal proceeds; it gives room for the court to go against the person and also the property purchased using the laundered money or even property utilised to carry out the businesses which are used to launder the illegal monies.

[259] Aurasu, "Money laundering," 341.

However, how far can forfeiture as an AML tool assists in eradicating corruption effectively is still questionable. Criminals launder money with their networks without any fear of convictions or fine on them. With this strong attitude, it is for sure that these criminals would do anything to get away from getting caught by laws.

Laundering money using the unique network when it involves white collar crimes can be one example which illustrates the smart way that criminals work these days. They tend to create a network that is not easy to detect the money which moves around unless governments take the initiative to improvise the detection system which is employed by reporting institutions like banks.

With such complexity of money laundering activities, forfeiture of criminal proceeds is still a central feature of the AML regime where it allows the deprivation of benefits from the criminals. This tool would be useful in tracing the proceeds from corruption. Law enforcers and governments should be prepared for other possible situations of money laundering as they go along into the future and hence, forfeiture as a depriving tool should readily be employed whenever corrupt practices are detected.

Other than protecting the victims of money laundering, civil forfeiture system may contribute to the government and law enforcement. However, there are several trade-offs to such a system. As stated above, the ownership of private property is one of the most valued rights which has been contributed by the modern civil forfeiture law. Civil forfeiture allows the defendant's property to remain in the jurisdiction and the intention of the owner is irrelevant as it is sufficient if it can be proved that the property is part

of the unlawful activities. From this, it renders that the civil forfeiture regime is a system which affects the property owners, the legal system, and innocent third parties.

In short, under the AMLATFPUAA, civil forfeiture provisions is one of the most serious intrusions on private property rights. As such, it does not make the owner guilty. Instead, it targets the property. Property owners may not be able to prove their innocence in relation to the property acquired through money laundering and the standard required to demonstrate their innocence does not aid them to prove it easily. Therefore, this allows legal enforces to benefit from the civil forfeiture regime as the key target is the property and not owners.

CHAPTER THREE

ANTI-MONEY LAUNDERING LAWS IN MALAYSIA

"Power tends to corrupt, and absolute power corrupts absolutely."
-Lord Acton.

3.1 Introduction

This chapter emphasises the historical background of AML laws in Malaysia where the researcher introduces a few relevant statutes briefly before the enactment of the AMLATFPUAA, and they are: DDFP, ACA 97, the Penal Code, the Customs Act 1967 and the Labuan Offshore Trust Act 1996. This chapter focuses on the functions of the NCC. This body is accountable for the establishment of laws relating to money laundering in Malaysia. Most importantly, the aim of this chapter is to examine in detail the provisions of the AMLATFPUAA. Through this chapter, the research targets to answer the second research question and achieve the second research objective of this study.

3.2 Historical Background

Back then, money laundering was relatively a new concept in Malaysia, and there were no specific legislations to combat this offence.[260] It is essential for the government of Malaysia to form an effective legal framework to fight against money laundering as there are many financial institutions and banks which could be the medium for the launderers to utilise. There is no proper evidence that Malaysia is one of the main hubs

[260] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions," (Ph.D diss., University of Western Australia, 2008): 68.

for money laundering activities. According to APG's Mutual Evaluation Report[261], "Malaysia is the middle entity in drug trafficking transactions between Europe and other countries. In addition to drug trafficking, other crimes also generate criminal proceeds, and they are: corruption, fraud, gambling, human trafficking, forgery, smuggling, extortion, and robbery. The criminal proceeds are generated through various medium such as real estate, the banking system, capital markets, money changers and foreign exchange."[262]

There were a few legislations before the enactment of the AMLATFPUAA which had provisions for concealing illegal funds offences, and these laws shall be discussed briefly as AMLATFPUAA is the key legislation to combat money laundering and terrorism financing.

One of the earliest legislations enacted was the DDFP which was effective from 10 June 1988, empowers the court to forfeit properties upon convictions for offences of trafficking, planting or cultivation of drugs. When it is proved to the satisfaction of the court that these offences have been committed, the court may make an order for the forfeiture of relevant property which is the subject matter of that offence or which has been used for the commission of that offence, although no person may have been convicted of the offence. These can be seen under sections 3 and 4 of the DDFP. This Act mainly focuses on drugs-related offences.

[261] APG Mutual Evaluation Report on Malaysia 2007, 20.
[262] APG Mutual Evaluation Report on Malaysia 2007, 20.

Section 4 of the DDFP[263] "prohibits a person from dealing with or use, hold, conceal or receive properties acquired from activities which involves drug trafficking." This section deals with money laundering offences and rarely applied.

In an unreported case of Public Prosecutor v. Lim Ah Kew,[264] "a money changer had four charges under section 4 (1) of the DDFP for receiving and holding property, knowing or having reason to believe that it belonged to a deceased suspected drug dealer.[265] The appellant had changed from Thai baht to Malaysian ringgit. He had deposited those substantial monies into his account. The appellant disagreed of him knowing that his customer was involved in drug dealing and the monies deposited are proceeds of the crime. Through section 35 of the DDFP, it makes him a 'liable person'. The onus of proving is on the appellant that the proceeds are not from unlawful activities. As the prosecution did not prove the case beyond a reasonable doubt, the court acquitted the accused."[266]

However, a few other cases showed the application of DDFP in relation to drug-related offences under other sections. In the case of Public Prosecutor v. Wong Huang Ing,[267] "the appellant's residential property was seized under section 25 (1) of the DDFP upon the police finding drugs inside the property. The appellant and Public Bank Bhd, who had granted a loan to the appellant to purchase the property, had filed a claim under section 32 (1) (c) of the Act for the property. The court referred to cases such as Public

[263] *Dangerous Drugs (Forfeiture of Property) Act 1988,* s 4.
[264] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions", (Ph.D diss., University of Western Australia, 2008): 69.
[265] Rahman, "An Analysis," 69.
[266] Rahman, "An Analysis," 69.
[267] [2015] 5 AMR 674.

Prosecutor v. Cherian a/l KC George & Anor[268], Public Prosecutor v. Jason Chan Huan Sen & 3 Ors[269] and Public Prosecutor v. Lim Kim Hoei & Anor."[270]

In the case of Public Prosecutor v. Lim Kim Hoei & Anor,[271] "the Court held that 8 properties seized from the respondents under sections 25 (1) and 26 of the DDFP be forfeited to the Government." In this context, in 2006, the respondents were arrested by the police for the purpose of an investigation under section 3 (1) of the Dangerous Drugs (Preventive Detention Measures) Act 1988 on the grounds that there is a reason to believe that the respondent was involved in trafficking of dangerous drugs."

"Consequently, the respondents applied under section 32 (2) of the Act for the 8 properties to be released to them on the grounds that they are the true owners of the properties. After careful contemplations, the Court contended that the properties were legally acquired, and they were not purchased using the proceeds from the drug trafficking." This case illustrates that proving the term 'illegal property' is difficult as it covers a wide range of offences and reliable evidence is needed. These cases above involve forfeiting properties which were purchased using proceeds from drug dealings and courts had made reference to the DDFP.

Moreover, under the ACA 97, section 18[272] provides "provisions relating to money laundering where it is an offence if a person deals with, using, holding, receiving or concealing gratification or advantage in relation to any offence." Under section 2,[273]"

[268] [2012] 2 AMR 477.
[269] [2014] 6 AMR 189.
[270] [2014] AMEJ 0113.
[271] [2014] AMEJ 0113.
[272] *Anti-Corruption Act 1997,* s 18.
[273] *Anti-Corruption Act 1997,* s 2.

it includes prescribed offence where offences punishable under the Penal Code, the Customs Act 1967 and Elections Offences Act 1954." On the same note, under the Labuan Offshore Trust Fund Act 1996, section 53[274] states the following in its original words:

> 53. (1) A trust company acting as a trustee of a Labuan trust shall not accept— (a) any money or other property originating from a transaction, operation or other activity which is a criminal offence under the laws of Malaysia or which, had it been carried out in Malaysia, would have been such an offence; or (b) any money or other property the receipt, ownership or control of which is or would be an offence as mentioned in paragraph (a).

Section 53[275] does not allow a trust company to receive any monies from unlawful activities. Apart from that, sections 36[276] "contains provisions for the forfeiture of property after prosecuting the accused for an offence while the Public Prosecutor is given the power to make applications to the court for an order of forfeiture of property without any prosecution or conviction. This is seen under section 37.[277] Prior to the order, the judge has to publish a notice in the Gazette requesting any person who claims to have an interest in the property to attend before the court on the date specified in the notice. Subsection 2[278] requires the judge to do so."

Under the Penal Code of Malaysia, there are a few sections which relate to illegal funds and money laundering. Section 411[279] "prohibits a person from retaining any stolen

[274] *Labuan Offshore Trust Fund Act 1996,* s 53.
[275] *Labuan Offshore Trust Fund Act 1996,* s 53.
[276] *Anti-Corruption Act 1997,* s 36.
[277] *Anti-Corruption Act 1997,* s 37.
[278] *Anti-Corruption Act 1997,* s 37 (2).
[279] *Penal Code,* s 411.

properties, section 412[280] prohibits a person from receiving properties connected to a gang robbery, section 413[281] prohibits a person from regularly receive or retain any stolen property, and section 414 also punishes a person for assistance in receiving or retaining any stolen property."

In relation to the forfeiture of criminal proceeds, the Criminal Procedure Code (CPC) gives powers to the law enforcers to forfeit properties which are related to unlawful activities. This power is granted through "Chapter XLI (41) of the CPC: Disposal of Exhibits and of Property the Subject of Offences. The code allows the court to make a forfeiture order if it thinks that any transferrable property or document is subject to any commission of unlawful activities."[282] However, application of this section is subject to any other provisions relating to forfeiture or confiscation of properties or documents.

Apart from CPC, Customs Act 1997 has provisions relating to forfeiture. This power is illustrated under section 126[283] where "all goods are liable to seizure shall be liable to forfeiture." A court may order for forfeiture through section 127[284] "if there is evidence to prove that the goods were the subject matter of or were used in the commission of the offence." Section 128[285] "allows the goods to be forfeited if there is no prosecution and the goods are not claimed within a month." On the same note, Excise Act 1976 also contains provisions relating to forfeiture. Under section 65 (1)

[280] *Penal Code,* s 412.
[281] *Penal Code,* s 413.
[282] *Penal Code,* s 407.
[283] *Customs Act 1997,* s 126.
[284] *Customs Act 1997,* s 127.
[285] *Customs Act 1997*, s 128.

of the 1976 Act, “all goods are liable to seizure shall be liable for forfeiture. All goods forfeited shall be passed to enforcers and shall be disposed of accordingly.”

The forfeiture provisions above only focus on the property being reasonably suspected of being involved in offences of the statutes. There is a lack of provisions relating to situations where criminal proceeds or assets which have been changed to those proceeds. Hence, due to this reason, DDFP is the crucial legislation enacted to focus on forfeiture of property resulting from drug dealings mainly.

However, DDFP was enacted by the Parliament using Article 149 of the Federal Constitution of Malaysia where it grants power to violate fundamental rights of citizens. The original words of Article 149 read as follows:

> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation—
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

DDFP can never be challenged to be inconsistent with Article 13 of the Federal Constitution[286] as it has a special power from the Parliament. The case of Ketua Polis Negara & Anor v. Gan Bee Huat[287] illustrates the validity of section 32 of the DDFP, and it is not inconsistent with Article 13.

By and large, money laundering was given recognition as a crime in Malaysia through legislations mentioned above, and these were formed before AMLATFPUAA came into effect. These legislations had no proper provisions for forfeiture. The enactment of the AMLATFPUAA gives more room for more crimes to be included for forfeiture, especially forfeiture of criminal proceeds.

3.3 The National Coordination Committee to Counter Money Laundering (NCC)

Malaysia formed the NCC in 2000 to manage risk assessment relating to money laundering and corruption. NCC mainly consists of persons from FIU and other members of the committee are ministers, ACA, BNM, AGC, and Governmental departments. Relevant data was collected to support risk assessment which is known as the National Risks Assessment (NRA).[288]

In 2013, the NRA was restructured to accommodate new assessment which included terrorism financing. The NRA is updated every three years to suit current situations as

[286] Article 13 provides that no person may be deprived of property save in accordance with law. No law may provide for the compulsory acquisition or use of property without adequate compensation.
[287] [1998] 3 CLJ 1.
[288] "National Risk Assessment on Money Laundering & Terrorism Financing," Bank Negara Malaysia, accessed November 18, 2017, http://amlcft.bnm.gov.my/AMLCFT03.html.

supported by the Islamic State of Iraq and the Levant (ISIL) White Paper. This has indicated that the NCC is the crucial mechanism in collecting data for an accurate risk assessment.[289]

The Economic Council involves the Prime Minister as the key person to consider and provide information to the NRA. From the Economic Council, only then agencies will be briefed, and data are given relating to the NRA. The NRA publishes for the reference of the private sectors. However, with regard to terrorism financing, briefings are provided to the private sectors through the White Paper on ISIL.

There are two key objectives for the NCC, and they are:[290]

- To develop national policy measures to counter money laundering/terrorist financing (ML/TF).
- To develop and ensure the proper implementation of measures to counter ML/TF based on international standards.

The drawbacks of implementing the NRA is the lack of cooperation between agencies and also, lack of initiatives in supervising AML/CFT although Malaysia was regarded as largely compliant with former regulation 31.

After the Mutual Evaluation Report, "the NCC formed an AML/CFT Strategic Plan (2010-2012) to reflect the weaknesses identified and to take into account the revised FATF standards. The NCC identifies the risk every 6 months and organises annual

[289] Bank Negara Malaysia, "National Risk,"
[290] "Anti-Money Laundering Measures in Malaysia," Bank Negara Malaysia (BNM), accessed November 18, 2017, http://www.bnm.gov.my/guidelines/03_dfi/02_anti_money/02_standard_guidelines_amla.pdf.

peer review of the AML standards. These actions are undertaken to address the issues faced by the agencies."[291]

NCC is also in charge of regulating the APG's membership requirements. It is known that in order to be a member of APG, one needs to join the mutual evaluations through peer review. The review is done to take into account the AML/CFT standards in the members' jurisdictions. The committee ensures that the standards are being adhered to by the jurisdictions and weaknesses are acknowledged for further improvements.[292]

In 2001, evaluation on the Labuan International Offshore Financial Centre (IOFC)[293] was undertaken, and the findings were that "this centre does not carry out any sort of organised crimes or money laundering activities." Prior to the implementation of the AMLATFPUAA in 2001, IOFC was already aware of measures to be taken relating to these serious crimes, and they had managed to reduce their risk. The committee had established recommendations based on BNM's guidelines as the basis of the regulatory regime.[294]

The second evaluation on Malaysia shows that the rating for Malaysia is equal to other developed countries. "Malaysia achieved 9 'Compliant', 24 'Largely Compliant', 15 'Partially Compliant' and one 'Non-Compliant' ratings against the FATF Recommendations on AML and anti-terrorism financing."[295] As a result, a national action plan was formed to reflect the evaluation, and they are: legislative amendments,

[291] BNM, "Anti-Money Laundering."
[292] BNM, "Anti-Money Laundering."
[293] APG Mutual Evaluation Report on Labuan 2007, 6.
[294] APG Mutual Evaluation Report on Labuan 2007, 6.
[295] APG Mutual Evaluation Report on Malaysia 2007, 6.

measures to strengthened regulatory guidelines, compliance monitoring, measures to enhance the investigative powers of law enforcement authorities and the establishment of a national asset management corporation for seized and forfeited assets.[296]

The NCC devised an Interim National AML/CFT Strategic Plan (ISP) in 2014 to execute NRA and other assessments relating to ML/TF. The review is done on the ISP, and they have to take into consideration risks and related policies. NRA findings are also taken into account for the members' action plans. In 2015, the fourth evaluation was done.[297]

The legal system in Malaysia involving property recovery is well-established and focused. Special Taskforce on tax and goods smuggling forfeiture are well-received, and the crime level has reduced as many are complying with tax regulations. However, crimes such as corruption, drugs, and fraud are still high in numbers, and forfeiture provisions under the AMLATFPUAA are not applied often.[298]

Confiscating properties of crimes committed by high-level criminals is complex, and it takes a longer period to collect evidence and complete the investigations. Thus, legal enforcers in Malaysia has not forfeited any properties acquired through terrorism activities. The application of forfeiture is limited to local cases and rarely extended to foreign predicate offences as well as offshore.[299]

[296] APG Mutual Evaluation Report on Malaysia 2007, 6.
[297] APG Mutual Evaluation Report on Malaysia 2015, 35.
[298] APG Mutual Evaluation Report on Malaysia 2015, 8.
[299] APG Mutual Evaluation Report on Malaysia 2015, 8.

The lack of application of forfeiture over foreign cases indicated that Malaysia does not focus much on cross-border crimes and this allows for more room for criminals to commit cross-border cash smuggling. As this is indicating a serious issue, legal enforcers should extend their applications of forfeiture over cross-border cases by implementing action plans which are meticulous and cooperation between Royal Malaysia Police (RMP), Royal Malaysian Customs (RMC) and BNM are highly needed to work out those action plans.[300]

3.4 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA)

The Anti-Money Laundering Act (AMLA), enacted in January 2002, criminalised money laundering and lifted bank secrecy provisions for criminal investigations involving more than 150 predicate offences. The law also created FIU located in the Central Bank, BNM. The FIU is tasked with receiving and analysing information and sharing financial intelligence with the appropriate enforcement agencies for further investigations. The Malaysian FIU works with more than twelve other agencies[301] to identify and investigate suspicious transactions.

Malaysia has moved towards forming an effective AML regime, and AMLA was first passed in 2001 where the FATF Forty recommendations were codified. With this Act coming into force on 15 January 2002, Malaysia has taken more efforts in criminalising money laundering as well as giving disapproval for banking secrecy.

[300] APG Mutual Evaluation Report on Malaysia 2015, 9.
[301] Bank Negara Malaysia, Ministry of Finance, Attorney-General's Chambers, Ministry of Foreign Affairs, Ministry of Home Affairs, Royal Malaysian Police Force, Malaysian Anti-Corruption Commission, National Narcotics Bureau, the Royal Customs and Excise Department, Securities Commission, Companies Commission of Malaysia and Inland Revenue Board.

With high regard given to the FATF 9 Recommendations, the Malaysian AMLA was amended in 2003 and renamed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA). This was undertaken to include fighting instruments against terrorist financing which was part of the 9 Recommendations.

The key objectives of AMLATFA were:

- To criminalise money laundering and terrorism activities
- To forfeit and seize any properties involving money laundering, terrorism, and other predicate offences
- To provide measures for prevention and detection of money laundering and terrorism financing

"AMLATFA has 93 sections where it is divided into 8 parts, namely, part 1: preliminary, part 2: money laundering offences, part 3: financial intelligence, part 4: reporting obligation, part 5: investigation, part 6: freezing, seizure and forfeiture, part 6A: suppression of terrorism financing offences and freezing, seizure and forfeiture of terrorist property and last but not the least, part 7: miscellaneous."[302]

AMLATFA also contains 2 schedules where the First Schedule has the lists of reporting institutions in Malaysia and the Second Schedule sets the scope of predicate offences covered under AMLATFA. Over time, the list of predicate offences for the crime of money laundering has been modified to include offences such as human trafficking, fraud, smuggling, child prostitution, drug trafficking, gambling and the more prominent and long-established crime, corruption.

[302] Anusha Aurasu and Aspalella A. Rahman, "Money laundering and civil forfeiture regime: Malaysian experience," *Journal of Money Laundering Control* 19, no. 4 (2016): 380.

With regard to the list of predicate offences, the FATF has recommended to the Government of Malaysia also to include offences involving environmental issues, and this is in line with the FATF Recommendations for money laundering.[303] With the acknowledgement of the FATF's suggestion into making the list of predicate offence a more comprehensive one, it indicates that the legal enforcers in Malaysia are unceasingly prepared to enhance the scope of predicate offences under AMLATFA. This is carried out to accommodate any new offences which might be considered as part of money laundering offences.

In 2015, AMLATFA was further amended to include the forfeiture of proceeds of unlawful activities and instrumentalities of an offence. It was then renamed as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA). AMLATFPUAA comprises of instruments such as the investigation of money laundering and terrorism financing offences as well as the freezing, seizure and forfeiture of criminal proceeds.

The main objectives of the AMLATFPUAA are revised to include:

i. endows with the offence for money laundering;
ii. measures for fighting against money laundering as well as terrorist financing; and,
iii. provide for forfeiture of property and proceeds derived from money laundering and terrorist financing.

Figure 4.0 demonstrates on how a case is investigated under the AMLATFPUAA. For instance, if there is an investigation on cheating, it may be investigated under the Penal

[303] "Financial Stability and Payment Systems Report 2007," Bank Negara Malaysia, 45.

Code as well as for the criminal proceeds under AMLATFPUAA by the RMP. Upon investigation, prosecution of the case shall be handled by the AGC. It is understood that the case may be handled by different enforcement agencies depending on the predicate offences committed before passing the case to the AGC.

Figure 4.0 is the flow chart for a money laundering offence:

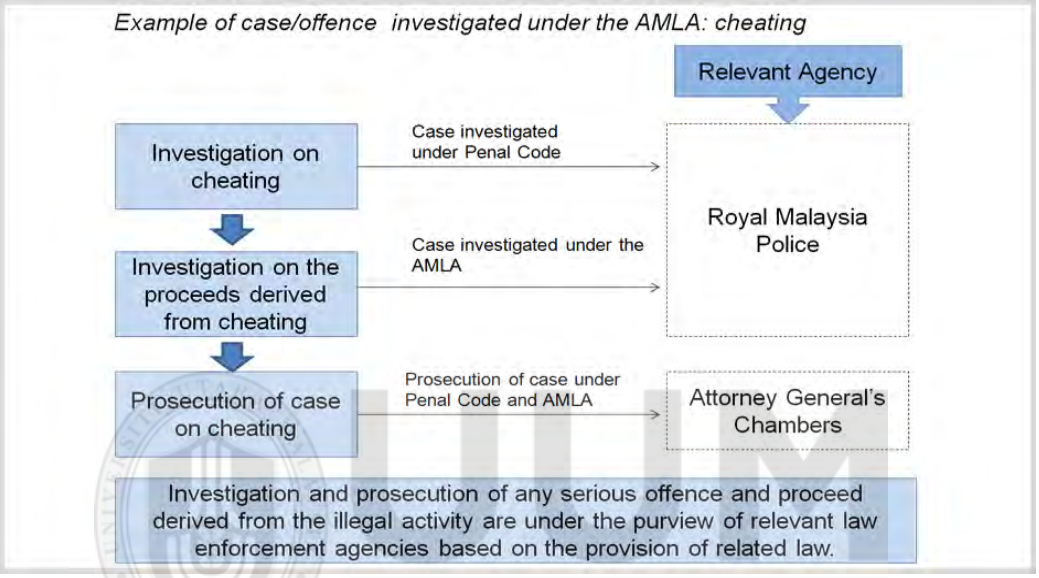

Figure 4.0 : Flowchart for a Money laundering Offence[304]

Furthermore, the provisions under the Mutual Assistance in Criminal Matters Act 2002 (MACMA) must be read together with the AMLATFPUAA. This Act involves provisions relating to tracing, recovery of properties as well foreign forfeiture orders. It covers any serious offence matters between Malaysia and other countries.

[304] "Flow chart of a money laundering offence," Bank Negara Malaysia, accessed 29, November 2017, http://amlcft.bnm.gov.my/AMLCFT02bi.html.

3.4.1 General Provisions of the AMLATFPUAA

3.4.1.1 Money laundering offences

Section 3 defining money laundering reads as follows:[305]

> -the act of a person who -
>
> (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
>
> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where-
>
> (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
>
> (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

"Section 3 allows the court to charge a person involved in the activity (s) relating to money laundering, be it directly or indirectly. The law in Malaysia recognises aiding, abetting and conspiracy. This is in line with section 107[306] and section 102A[307] of the Malaysian Penal Code."

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[305] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 3.

[306] A person abets the doing of a thing who— (a) instigates any person to do that thing; (aa) commands any person to do that thing; (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[307] When two or more persons agree to do, or cause to be done— (a) an illegal act; or Penal Code 73 (b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:

Moreover, "section 3 interprets "unlawful activity" as any activity which relates, directly or indirectly, to any serious offence or any serious foreign offence while "proceeds of unlawful activity" is defined as any property derived or obtained, directly or indirectly, by any person as a result of any lawful activity. Property is also widely defined as movable and immovable properties of any sort, be it tangible or intangible. It can be within Malaysia or outside Malaysia."

"A list of serious offences is listed under Second Schedule of the 2001 Act as predicate offences. 'Foreign offence' is defined as any unlawful activities which are recognised by international laws and considered a serious offence in Malaysia. From this, it is observed that there is nearly no possibility of escaping convictions as AMLATFPUAA covers a wide range of predicate offences."

"Section 4 covers the power given to the court to compel criminals to a fine not exceeding RM 5 million or imprisonment not exceeding five years or both." It is noted that section 4 (1) is the catch-all provision. It presides over the law on offences relating to money laundering. Hence, money laundering is not a stand-alone offence. Various offences derived from laws all over are caught under this heading of "money laundering."

An example of a case which illustrates the technicality of section 4 of the AMLATFPUAA is Public Prosecutor v. Ong Seh Seng.[308] In this case, the appellant was charged for an offence under section 4 (1) of the AMLATFPUAA had pleaded

[308] [2010] 7 CLJ 233.

guilty and he was sentenced to two years imprisonment and a fine of RM1 million or, in default 12 months' imprisonment. Subsequently, the appellant made an appeal against his sentence. In this case, the appellant said to had received RM1, 372,359 over illegal gambling relating to football games. From the illegal gain, the appellant admitted that RM1 million had been spent by the appellant. There were also multiple forgeries of his company's invoices which he then banked into the company's account. "There were three grounds where the appeal was made, and they are: no sentencing of imprisonment, two years of sentencing was too much, and RM 1 million of the fine was too high.

The Court of Appeal, however, did not allow the appeal on the basis that imposing RM1 million of the fine is part of the options of punishment under the Act enacted by the Parliament and there should be justified and compelling situations where fine of that amount is good.

Section 4 (1) of the AMLATFPUAA does not indicate that imprisonment is more appropriate for money laundering offences relating to terrorism financing.
"There is nothing to justify the suggestion by the appellant that a sentence of imprisonment would be more appropriate for offences of money laundering that involved elements of terrorism. "The provisions are generally worded so as to cast a net so wide, as to capture any acts of money laundering involving the various predicate offences as listed in the Schedule to the Act."

There are a few changes under the AMLATFPUAA which are significant. The AMLATFA created a single form of money laundering offence applicable to all crimes

in Malaysia to the proceeds of illegal activity. AMLATFPUAA has created a new section 4 to include the old section 3 (a) to (c) where it states that "money laundering is an act of a person who first engages directly or indirectly in a transaction that involves proceeds of unlawful activity or instrumentalities of an offence."[309] This change is in line with section 328 of the UK's POCA which focuses on the laundering stages of layering and integration. This section would catch those who knowingly assist a person in committing money laundering.[310]

Furthermore, section 4 (b) is wider than section 329 of POCA where "an offence is committed when a person acquires, receives, processes, disguises, transfers, coverts, exchanges, carries, disposes of or uses proceeds of unlawful activity or instrumentalities of an offence." Section 4 (c) is a new section which separates the old section 3 (b). This section states that "anything removed from or brings into Malaysia proceeds of unlawful activity and instrumentalities of an offence makes it a crime."

With regard to the mental element of the offences, AMLATFPUAA adds 'reasonable suspicion' as one of the *mens rea* as well as instrumentalities of an offence as secondary to unlawful activities. Previously under AMLATFA, the mental element required is whether a person has a reasonable knowledge of the fact that the property is purchased using the proceeds of unlawful activities.

There are significant changes to sanctions for money laundering in Malaysia. Previously under AMLATFA as mentioned above, the penalty is a maximum

[309] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4.
[310] Zaiton Hamin, "Recent changes to the AML/CFT law in Malaysia," *Journal of Money Laundering Control* 20*,* no. 1 (2017): 4.

imprisonment of five years or RM 5 million or both. To be on par with other jurisdictions, AMLATFPUAA "increased the imprisonment period to 15 years maximum and a maximum fine up to five times the size and value of the proceeds of unlawful activity or instrumentalities of an offence or RM 5 million or whichever higher." Maximum imprisonment for other jurisdictions are as follows:

- The UK - 14 years
- The U.S - 20 years
- Australia - 25 years
- Indonesia -15 years
- Hong Kong - 14 years

The changes above are to acknowledge the 2007's APG Mutual Evaluation Report on Malaysia which discerned that the sanctions for money laundering under AMLATFPUAA were insufficient for such a serious offence.[311] These changes are considered as a good move by the government of Malaysia to indicate that they are continually improving AML law to acknowledge the FATF's Recommendations based on international standards for money laundering and its applications.

3.4.1.2 Financial Intelligence

Part III of the AMLATFPUAA relates to Financial Intelligence. This part sets out the functions and powers of authorities who are responsible for financial intelligence matters. In Malaysia, the FIU was established in August 2001 under BNM. The former Minister of Finance appointed BNM as the relevant body dealing with financial intelligence in 2002. FIU manages and analyses matters relating to financial intelligence for money laundering and terrorism financing.

[311] APG Mutual Evaluation Report on Malaysia 2007, 6.

AMLATFPUAA accords powers to FIU through section 8[312] , and they are:

- to receive and analyse suspicious transaction reports
- to share information with other enforcement agencies
- to collect and compile statistics relating to compliance with AMLATFPUAA
- to make recommendations to other relevant reporting institutions, enforcement agencies and supervisory authorities
- to provide appropriate training for reporting institutions.

Moreover, FIU through section 9 is "given the power to release any relevant information to other enforcement agency." Access to information is given as to allow the enforcement agency to carry out their function. Thus, with this power conferred, FIU has the right to refuse or allow to disclose any relevant information. Subsection (3) also states that "FIU may also allow the Attorney-General in obtaining information relevant to mutual assistance in criminal matters."

In addition, "section 29 (3) of the AMLATFPUAA provides that FIU and the relevant enforcement agency will have to coordinate and cooperate with any other domestic and foreign enforcement agency in investigations with regard to money laundering and terrorism financing offences in Malaysia and other jurisdictions." FIU has entered into agreements with Indonesia, Philippines, Thailand, China, Sri Lanka, Bangladesh and Brunei since 2008.

[312] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, ss 8 (2), (3).

"Section 10 allows FIU to exchange information with a foreign State based on the agreement of the Minister of Finance and the foreign State." Relevant information is disclosed to assist investigations relating to money laundering and terrorism financing. Though this exchange of information is carried out only if subsections 3 (a), (b) and (c) are satisfied:

> (3) Notwithstanding any other written law or the rule of law, the competent authority may communicate any information reported to it under section 14 or any additional information received by it or disclosed to it by any person under this Act to a corresponding authority of a foreign State if—
>
> (a) the competent authority has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence; and
>
> (b) either—
>
> (i) the Minister of Finance has, in accordance with subsection (1), entered into an agreement or arrangement with that foreign State regarding the exchange of such information; or
>
> (ii) the competent authority has, in accordance with subsection (2), entered into an agreement or arrangement with that corresponding authority regarding the exchange of such information, under which the corresponding authority of the foreign State has agreed to communicate to the competent authority, upon the competent authority's request, information received by the corresponding authority that corresponds to any information required to be reported to the competent authority under section 14 or any other information received by or disclosed to the competent authority under this Act; and
>
> (c) the competent authority is satisfied that the corresponding authority has given appropriate undertakings—
>
> (i) for protecting the confidentiality of anything communicated to it; and

(ii) for controlling the use that will be made of it, including an undertaking that it will not be used as evidence in any other proceedings.

Through "section 10 (3), FIU is able to make decisions effectively as to whether it is appropriate to disclose relevant information." This enables them to avoid a risky situation such as leakage of information to other parties. Thus, AMLATFPUAA empowers FIU with a high level of discretion as to disclosure of information to foreign States.

As the key aim of FIU is to facilitate the implementation of the AMLATFPUAA and cooperate with agencies locally and other countries, it must be noted that FIU has membership and participation in different international groups. In 2003, "the Malaysian FIU joined the Egmont Group of FIU which consists of FIUs from Asian countries." These FIUs sit together to improve their AML/CFT systems further.[313] Moreover, FIU also complies with the FATF's Forty Recommendations to combat money laundering and terrorism financing.

With the establishment of FIU through part III of the AMLATFPUAA, combating corruption using AML law thus would be great since FIU has been empowered with such responsibility of facilitating the implementation of the AMLATFPUAA including the exchange of information relating to money laundering which could involve corrupt practices as well.

[313] Egmont Group, accessed 10, March, 2017, https://www.egmontgroup.org/en.

3.4.1.3 Reporting Obligations

Under the AMLATFPUAA, record-keeping is one of the obligations of reporting institutions. Part IV of the AMLATFPUAA sets out the relevant obligations. These include the implementation of AML/CFT risk management, customer due diligence (CDD), record on customers and their transactions, report on suspicious transactions and cash threshold report. "The first schedule of the AMLATFPUAA lists out types of reporting institutions. It can be licensed banks or financial institutions. They include financial advisor, insurance broker, money-broker, company secretaries, licensed gambling institutions, accountants as well as lawyers."

Under section 14 of the AMLATFPUAA, reporting institutions have duties to report to BNM whenever required. The first report is the Cash Threshold Report (CTR). Any amount exceeding RM50, 000 involving local and foreign currencies bearing negotiable instruments triggers the reporting institutions to make CTRs. This omits bank drafts, cheques, electronic transfers or fixed deposits. This system applies to single or multiple transactions through section 13 (4) of the AMLATFPUAA.[314]

Section 4A of the AMLATFPUAA sets out the offence of structuring transactions so as to avoid reporting CTR. A structuring involves splitting transactions into separate amounts under RM50, 000 per day to avoid CTR transaction reporting requirements under the AMLATFPUAA.

Another obligation of reporting institutions is to report suspicious transactions (STR). Section 14 (b) provides that an STR should be made if the transaction creates

[314] "Reporting Obligations under the AMLA," Bank Negara Malaysia (BNM), accessed November 12, 2016, http://amlcft.bnm.gov.my/AMLCFT05b.html.

suspicion. The transaction involves both money and another form of transactions of any amount. The characteristics of a suspicious transaction are the following:[315]

- unusual
- unclear purpose of the transaction
- gives the impression of being illegal
- does not match with the customer's profile
- criminal proceeds
- money laundering or terrorism activities

As AMLATFPUAA does not state the definition of suspicion, BNM has created a guideline which lists out possible transactions which may create suspicion and they are[316]:

- cash transactions
- private banking
- foreign banking
- transactions involving credit cards

This guideline is available for all reporting institutions which enables them to distinguish what is suspicious transaction and what not since AMLATFPUAA does not provide any clear picture of what suspicion is.

AMLATFPUAA requires reporting institutions to look out for information and verify customers. Under "section 16 (1), the reporting institutions are also required to maintain accounts in the name of accounts holders and disallow the opening of anonymous accounts or accounts which are in a fictitious, false or incorrect name."

[315] BNM, "Reporting Obligations."
[316] Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Banking and Deposit-Taking Institutions (Sector 1), Bank Negara Malaysia (BNM), accessed November 13, 2016, http://www.bnm.gov.my/guidelines/01_banking/03_anti_money/04_gl_amla_amlcft_deposit.pdf.

"Sub-section (2) entails the reporting institutions to verify the identity of the account holder, the identity of the person in whose name the transaction is conducted and the identity of the beneficiary of the transaction, and to include the details in a record."

On the same note, "section 5 (1) of the Anti-Money Laundering and Anti-Terrorism Financial (Reporting Obligations) Regulations 2007 (AMLATF Regulations) stipulates that CDD measures must be undertaken when the system catches suspicious transactions." Besides, "section 5 (2) (b) of the Regulations involves a bank in identifying and verifying the identity of the beneficial owner of its customer. Under this section, if a reporting institution fails to comply with this obligation shall be liable to a fine not exceeding RM 250,000."

Apart from CTR and STR, reporting institutions should maintain their obligations for CDD through section 17 of the AMLATFPUAA. Reporting institutions are required to conduct CDD on the customer and the person conducting the transaction, when:

- establishing business relations
- providing money changing and wholesale currency business for transactions involving an amount equivalent to RM 3,000 and above
- providing wire transfer services
- carrying out occasional transactions involving an amount equivalent to RM 50,000 and above, including in situations where the transaction is carried out in a single transaction or several transactions in a day that appear to be linked
- carrying out cash transactions involving an amount equivalent to RM 50,000 and above; (f) it has any suspicion of ML/TF, regardless of the amount

- it has any doubt about the veracity or adequacy of previously obtained information.[317]

Primarily, reporting institutions are required to verify the identity of the customer and beneficial owner before, or during, the course of establishing a business relationship or conducting a transaction for an occasional customer. This is in line with section 13 of the AMLATFPUAA which requires reporting institutions to carry out record keeping.

Moreover, reporting institutions have to develop and implement internal programmes and procedures under section 19 of the AMLATFPUAA which requires them to ensure the following:

- procedures that ensure high standards of integrity of employees
- appropriate employee training programme
- independent audit function for compliance
- designate compliance officers

Thus, reporting obligation has its utmost importance in minimising the laundering of monies. In ensuring this prevention, both CTR and STR must be made effectively. Improper and ineffective reporting would render the entire system defective which might end up inaccurate and defensive reporting.[318] Hence, it is essential for reporting institutions to provide proper training for their employees in implementing effective CTR and STR regimes.

[317] BNM, "Anti-Money Laundering."
[318] Aspalella A. Rahman, "The impact of reporting suspicious transactions regime on banks: Malaysian experience," *Journal of Money Laundering Control* 16, no. 2 (2013): 162.

3.5 General Application of the AMLATFPUAA

AMLATFPUAA has a retrospective and extra-territorial effect. Previously, AMLATFA provides an extensive range on the offence of money laundering and it also gives a retrospective effect. Section 2 states that "this Act shall apply to any serious offence, foreign serious offence or unlawful activity whether committed before or after the commencement date." This section allows the court to apply the provisions of the AMLATFPUAA retrospectively since it can be applied to any unlawful activities before AMLATFPUAA came into force.

However, it is known that the law does not recognise the retrospective effect and courts should only apply legislations prospectively. This is reasoned as retrospective laws make the law less reliable and certain as it is unjust to punish a person for an act which was not a crime at the time it was committed.[319]

Under the Malaysian Federal Constitution, Article 7 may be used to challenge the validity of the AMLATFPUAA as a retrospective law[320] , and it reads as follows:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence that was prescribed by law at the time it was committed.

The validity of the AMLATFPUAA was mentioned in the case of Public Prosecutor v. Datuk Haji Wasli bin Mohd Said.[321] In this context, "Datuk Haji Wasli applied for

[319] "Retrospective Laws," Australian Law Reform Commission, accessed November 1, 2015, https://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_ch_7._retrospective_laws.pdf.
[320] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions", (Ph.D diss., University of Western Australia, 2008): 69.
[321] [2005] 4 CLJ.

leave for judicial review of the decision of the Federal Attorney General to charge him with offences under the AMLATFPUAA." The applicant submitted that AMLATFPUAA is against the constitutional rights and the court said that:

> [I]f there is no answer to the contention of the Applicant concerning Article 7, then it would be a great injustice to the Applicant to persist in the charges under the Anti-Money Laundering Act if it is obvious to the Attorney-General that the Applicant cannot be convicted of the charges if there were committed before the coming into force of the Act. Let me also quickly add that the charges seem to assert the date of the offences to be on a date after the coming into force of the said Act and therefore it cannot be said to be in violation of Article 7.[322]

In the case of Puncakdana Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors[323], the court also raised the issue of retrospective laws. It was held that allowing the tribunal to discuss over a sale and purchase agreement entered into before 1 December 2002 contravenes Article 7 of the Federal Constitution. This indicates that the tribunal does not recognise the retrospective effect of legislation as it may be against human rights.[324]

Under the AMLATFPUAA, the retrospective principle relates to any serious offence, foreign serious offence or unlawful activities. Thus, the question to be asked is whether AMLATFPUAA can be defied on the ground that it is inconsistent with Article 7 (1) of the Federal Constitution which clearly prohibits retrospective criminal laws.

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[322] Statement by Datuk Ian H.C. Chin J.
[323] [NO: R1-53-2003].

[324] "An assessment of the Links between Corruption and the Implementation of Anti-Money Laundering Strategies and Measures in the Esaamlg Region", Eastern and Southern Africa Anti-Money Laundering Group, accessed September 15, 2015, http://www.esaamlg.org/userfiles/Corruption_and_AML_Systems.pdf.

Moreover, challenging the validity of legislations relating to money laundering has also been seen in other countries. For instance, "in the Australian case of Leask v. The Commonwealth[325], through section 31 of the Financial Transactions Reports Act 1988 (FTRA), the court charged the plaintiff with 54 counts relating to offences prohibiting a person from conducting a currency transaction and hence, by doing so, it would make it as an exempt cash transaction according to FTRA. The plaintiff then challenged the validity of section 31 of FTRA involving the Constitution in the High Court. The court dismissed the challenge as it was stated that the Act was a valid one according to the Commonwealth in relation to currency under section 51 (xii) of the Commonwealth Constitution."

Based on the above case, it would be a rare situation if the Malaysian court allows any action which goes against the constitutional validity of the AMLATFPUAA. It can be opined that the retrospective effect of AMLATFPUAA ensures the effectiveness of the applications of it. Retrospective laws would allow legal enforcers in forfeiting criminal proceeds which have been collected by criminals for a long period of time and by doing so, the criminal organisations may not be able to continue with their activities as they may be deprived of the proceeds.

Other than retrospective effect, section 2 also disallows the 'double jeopardy' principle where it states that:

> Nothing in this Act shall impose any duty or confer any power on any court in or in connection with any proceedings under this Act

[325] [1996] 187 CLR 579.

against a person for a serious offence in respect of which he has been convicted by a court before the commencement date.

From the above, the government is prohibited from prosecuting an individual for two counts of money laundering offences under the AMLATFPUAA. The Federal Constitution of Malaysia also supports this principle.[326]

Sections 2 and 4 have to be read together with MACMA because of the extra-territorial effect of the AMLATFPUAA. In this context, Malaysia is part of the Treaty on Mutual Legal Assistance in Criminal Matters. This Treaty involves ASEAN countries for the international alliance. Other than ASEAN, Malaysia has signed treaties relating to mutual assistance in criminal issues with other countries such as the UK[327], U.S[328] and the Republic of Korea.[329]

The objectives of MACMA in assisting the government in criminal matters are set out in section 3[330] as follows:

- providing and obtaining evidence;
- making arrangements for persons to give evidence or to assist in criminal investigations;

[326] Article 7: A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.
[327] "Treaty between the UK and Malaysia on mutual legal assistance in criminal matters 2011," AG's Chamber, accessed January 15, 2017, https://www.gov.uk/government/publications/treaty-between-the-uk-and-malaysia-on-mutual-legal-assistance-in-criminal-matters.
[328] "Treaty between the United States of America and Malaysia, 2006, AG's Chamber, accessed January 16, 2017, https://www.state.gov/documents/organization/179065.pdf.
[329] "Treaty between Malaysia and the Republic of Korea," http://www.agc.gov.my/agcportal/uploads/files/coporate/AG_Div/Treaty%20between%20the%20Government%20of%20Malaysia%20and%20the%20Government%20of%20the%20Republic%20of%20Korea%20on%20MLA.pdf.
[330] *Mutual Assistance in Criminal Matters Act 2002*, s 3.

- recovering, forfeiting or confiscating of property in respect of a serious offence or a foreign serious offence;
- restraining dealings in property or freezing of property that may be recovered in respect of serious offence or a serious foreign offence;
- executing requests for search and seizure;
- identifying witnesses and suspects, and their location;
- service of process;
- identifying or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a serious foreign offence;
- recovering pecuniary penalties in respect of a serious offence or a serious foreign offence;
- examining things and premises.

However, in certain circumstances, assistance may not be given through MACMA, and they include failure to comply with the terms of a Treaty, an offence relating to politics, discrimination as to a person's age, sex, religion, ethnic origin, nationality; and if investigation can be conducted via other approaches.[331]

It is essential to note the importance of extra-territorial effect as it enables enforcers to work together across many countries in combating money laundering and also, corruption in particular by means of mutual assistance. Launderers may no longer be able to hide their ill-gotten gains as effective measures are taken to trace the criminal proceeds. To halt the financial system of criminal organisations, there is a need for cooperation between many other jurisdictions.

[331] *Mutual Assistance in Criminal Matters Act 2002,* s 20.

3.6 Application of forfeiture under the AMLATFPUAA

Scrutinising into forfeiture of criminal proceeds which is the focus of this study, part VI of the AMLATFPUAA involves instruments available for law enforcers when circumstances call for forfeiture of properties or criminal proceeds. Section 4 of the AMLATFPUAA[332] has to be read together with provisions under this part.

In the case of Public Prosecutor v. Thong Kian Oon & 4 Ors, [333]an order of forfeiture was made which relates to the properties that were seized from the respondents. All other respondents except for the first two were not arrested for any offence under the AMLATFPUAA. In view of the application, it was stated that the properties were the subject matter of or were used in the commission of an offence under section 4 of the AMLATFPUAA. "It was further stated that the respondents had been involved in the illegal public lottery and that the properties were proceeds of unlawful activity under section 4A (1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969."

The issues identified in this case were three and namely: "whether those offence(s) are referred to in the Second Schedule to the Act and whether the properties sought to be forfeited were the subject matter of a serious offence as contemplated by the Act as well as on the issue of sufficiency of evidence.

Unfortunately, the court did not approve the application and hence, made an order to return the properties. It was indicated that as "a forfeiture application is a serious matter

[332] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4.
[333] [2012] 5 AMR 444.

and the owner stands to lose property because the property was the subject matter of the offence of section 4 (1) of the AMLATFPUAA." The applicant has to make it the fact that the owner is responsible for providing answers. For this case, there was no proper evidence to prove that which offence was being depended on for the forfeiture application.

"The properties claimed by the applicant as being proceeds of unlawful activity under section 4 A (1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969 are not considered as part of the serious offence. There was a lack of evidence to indicate that the properties were derived from criminal activity and be considered an offence under section 4 (1) of the AMLATFPUAA."

Looking at provisions relating to forfeiture in Malaysia, section 55[334] reads as follows:

> 55. (1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where—
>
> (a) the offence is proved against the accused, or
>
> (b) the offence is not proved against the accused, but the court is satisfied—
>
> (i) that the accused is not the true and lawful owner of such property; and
>
> (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

[334] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 55.

> (2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.
> (3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

From the reading of section 55 of the AMLATFPUAA, it is clear that forfeiture can be undertaken when the property is believed to be purchased as mechanisms of money laundering or terrorist financing activities. Whether or not a property is a tool relating to money laundering, section 55 (3)[335] gives the court the power to determine such a state by applying a civil standard of proof - 'on the balance of probabilities'. The rationale behind this specific provision is to facilitate the proving of illegal transactions, and hence, it reduces the burden of the prosecutor to prove the case.

It is important to note that under section 55 (1) (a) and (b) of the AMLATFPUAA[336], there are a few circumstances that a court may issue a forfeiture order, and they include: an individual who has been prosecuted and convicted of a money laundering offence, if there is no conviction by the court, but there is evidence that the individual is not the legal and rightful owner of the property.

[335] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 55 (3).
[336] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 55 (1) (a) and (b).

Besides, section 56 in its original form can be seen as follows[337]:

> 56. (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied—
>
> (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
>
> (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

[337] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 56.

Under section 56 of the AMLATFPUAA[338], the court may make an order if it is convinced that the property purchased using proceeds from money laundering or used during the undertakings of money laundering activities.

Section 56[339] can be deemed as a useful section. It allows the court to forfeit criminal proceeds from money laundering activities even though there is no conviction under criminal division. This is called as civil forfeiture of criminal proceeds, and it is a new regime in Malaysia. Civil forfeiture is a regime where there is a significant and essential role to be played by directing at the property itself even without any convictions. Technicality problem of section 56 such as the time limit for forfeiture proceedings has been raised in the case of Public Prosecutor v. Dragcom Sdn Bhd & Ors and other applications.[340] This case encompasses the three applications through section 56 (1) by the public prosecutor.[341] In this case, the common basis for all three applications was the proceeds gained have nexus with money laundering under section 4 (1) (a).[342]

The basis for the charge for all respondents in all three cases was section 135 of the Customs Act 1967 for smuggling. In this context, the key issue which was raised by the court was whether the court had the jurisdiction to entertain an application under section 56 (1)[343] if it was filed 12 months or more after the seizure or freezing order."

[338] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56.
[339] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56.
[340] [2013] 5 MLJ 594.
[341] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56 (1).
[342] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1) (a).
[343] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 56 (1).

The prosecution put forth the argument that the court had the inherent power not to strike out an application on a technicality such as a delay. Furthermore, it was contended that AMLATFPUAA did not provide that an application under section 56[344] should be struck out if it was made outside the stipulated 12 months from the date of seizure or delay.

The court dismissed the application on the basis that the word 'may' in section 56 (1)[345] was used at the discretion of the public prosecutor to apply for forfeiture. In other words, the use of the word 'may' refer to the general discretionary power of the public prosecutor to proceed with forfeiture proceedings or to return the property. Assuming 'may' was interpreted to mean that the public prosecutor had the discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless.

Similarly, in the case of Public Prosecutor v. Liew Teng Shuan,[346] the issue was on whether the prosecution was outside the 12 months period for initiating criminal proceedings against the accused under section 56.[347] The accused's assets including his bank accounts were frozen. The monies in the bank accounts are said to be from an illegal activity which comes under the ambit of section 4 (1) of the AMLATFPUAA.[348] The trial was for four offences together.

[344] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 56 (1).
[345] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001*, s 56 (1).
[346] [2012] 10 MLJ 167.
[347] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56 (1).
[348] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1).

The arguments made by the accused was that section 56 (1)[349] must be interpreted with section 56 (3)[350] which states that if there was no conviction using section 4 (1)[351] within 12 months of the freezing order, the properties seized should be returned to the true owner of the properties.

However, the prosecution disagreed with the accused's arguments and therefore, appealed against the order of the court for ending the freezing order. On the same note, they also made an application to review the court's decision to discharge the accused not amounting to an acquittal. As the prosecution made the application within the 12 months period, the court allowed the appeal.

"It was found that the criminal proceedings were in fact instituted when the court had received the complaint from the prosecutor and issued a warrant of arrest on 4 June 2009. By issuing the warrant of arrest on 4 June 2009, the court was seized with jurisdiction to try the case, and as a result, the institution of the proceedings by the prosecutor was complete."

It is opined from the aforementioned case that the time limit for forfeiture application under section 56 (1)[352] should be construed in a strict manner. The 12 months time limit may be insufficient as the situation can be complex. However, as the word 'may' have been included, it is undeniable that some strict interpretations have to be

[349] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1).
[350] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56 (3).
[351] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1).
[352] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56 (1).

considered by the courts on whether to allow prosecutors to apply for forfeiture application even after 12 months.

In Public Prosecutor v. Mohd Bakri Samsu & Anor[353] and Public Prosecutor v. Billion Nova Sdn Bhd & Ors*[354]*, powers of forfeiture were recently illustrated. In these cases, the applications for forfeiture by virtue of section 56 were not accepted by the courts. In another case, Public Prosecutor v. Azmi bin Osman,[355] the Court held that the Public Prosecutor had fulfilled the burden of proof necessary under Section 56.[356]

In the case of Billion Nova*,* the Court of Appeal disallowed the prosecution's forfeiture application on the basis that the prosecution did not prove on a balance of probabilities that a money laundering offence had been committed. Here, it is known that respondents' monies were pursued to forfeit by the prosecution. Forfeiture was applied because the Prosecution suspected that the respondents' monies has a link with the laundering activities and it is applied by virtue of section 4 (1) of the AMLATFPUAA.[357]

"It has been affirmed that the selling of cigarettes by the respondents in Labuan is an offence under the Customs Act 1967 as this is a duty-free area. The proceeds of the sale were banked into their bank accounts. Prosecution's evidence to prove that the sale took place outside Labuan was that the transaction is from outside of Labuan into

[353] [2016] 5 CLJ 824.
[354] [2015] 2 CLJ 763.
[355] [2016] 3 MLJ 98.
[356] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 56 (1).
[357] "Powers to Forfeit – A Civil Standard for Criminal Conduct," Yap Yeong Hui, accessed December 12, 2016, http://www.skrine.com/powers-to-forfeit--a-civil-standard-for-criminal-conduct.

the account in Labuan. The Court did not admit the evidence as it is insufficient to prove that the sale took place outside Labuan. Thus, section 56 was not satisfied by the prosecution."

The land was sought to be forfeited which were purchased using proceeds from illegal activity in the case of Mohd Bakri Samsu. The Judge contended that the prosecution's evidence is insufficient to prove that lands were purchased using the illicit proceeds. This was held on the basis that the properties were sold by the respondents to third parties at a time when there were some illegal activities committed by the accused was too isolated and thus, insufficient. Concrete evidence is needed to link the purchase of the land with unlawful activity.

In contrary, the prosecution in Azmi bin Osman had successfully convinced the High Court and the Court of Appeal that proceeds in the accused's bank account were proceeds from unlawful activities. The Courts acknowledged that the illicit proceeds were from illegal gambling activities given to the accused, a policeman, in exchange for him giving protection to the gambling operators and were bribes given to him by the gambling operators which ought to be forfeited.

In the recent case of Public Prosecutor v. Noor Ismahanum Mohd Ismail,[358] BNM had seized properties of the appellant, but however, there was no conviction under section 4 (1) of the AMLATFPUAA. The appellant disagreed with the seizure and applied to the court for the BNM's such act.

[358] [2018] AMEJ 0160.

As section 61 of the AMLATFPUAA was irrelevant for this case, section 56 (1) of the AMLATFPUAA was utilised. “The Public Prosecutor’s application was grounded on the fact that the monies in the two bank accounts were the proceeds of money laundering, an offence under section 4 (1) (a) of the AMLATFPUAA.”

The focus of this case is the interpretation of the words “unlawful activities.” An activity must have a link to a serious offence and the prosecution based their application on the fact that the appellant was involved in an unlawful activity. The appellant has said to have received deposits, and there is no valid licence. It makes him have committed an offence under section 25 (1) of the Banking and Financial Institutions Act 1989 (BAFIA).

Failure to hold a valid licence makes it a predicate offence under section 137 of the Financial Services Act 2013 and through AMLATFPUAA, it is listed in the Second Schedule. Therefore, by receiving deposits without any valid licence, the act is rendered to be an offence under section 4 (1) of the AMLATFPUAA.

Interpreting the wordings of section 56 (1) of the AMLATFPUAA, it is not mandatory for the prosecution to charge a person before the forfeiture order is undertaken. What is necessary is that the enforcers satisfy the requirements under paragraph (a) or (b) or (c) or (d) of section 56 (1) of the AMLATFPUAA. However, the key issue here is that the property forfeited is a legal property. The judge can only make an order for forfeiture if the property falls under paragraph (i) or (ii) or (iii) or (iv) of subsection (2) (a) of section 4 of the AMLATFPUAA.

The following key points were mentioned in the judgement of this case:

> "In the context of this case, what the court needed to determine was whether the property was "the proceeds of an unlawful activity" within the meaning of paragraph (a) (iii) of section 56 (2) and not whether any person had been convicted or acquitted of an offence under section 4 (1)(a) of the AMLATFPUAA although the fact of such conviction or acquittal was relevant under section 76.
>
> "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 sections 56 (4) and 70 (1). This standard of proof must not be mistaken for proof beyond reasonable doubt, which is the heavier standard of proof that the Public Prosecutor 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 the AMLATFPUAA."
>
> "Thus, if the judge in an application under section 56(1) finds it to be more probable than not that the property is derived from a transaction that involves "the proceeds of an unlawful activity," that will be sufficient for him to make an order of forfeiture under section 56 (2). There is no need for him to be satisfied "beyond any reasonable doubt" that the property is derived from an "unlawful activity."
>
> To reiterate, "unlawful activity" means "any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence" and "proceeds of an unlawful activity" means "any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity." Illegal deposit taking is a "serious offence" by definition and is, therefore, an "unlawful activity" for the purposes of section 56 (2) (a) (iii) of the AMLATFPUAA. The court dismissed the appeal and affirmed the decision of the High Court."

As section 56 of the AMLATFPUAA involves civil forfeiture, the judge, in this case, focuses more on the legitimacy of the property and certainly, not whether the accused can be convicted or prosecuted. An order for civil forfeiture can be made without any conviction or prosecution if there is a reasonable ground to suspect that the property was obtained through unlawful activities.

As to the question when does a person discharge his civil standard of proof, Lord Denning in Miller v. Minister of Pensions[359] explained that "if the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged but if the probabilities are equal, it is not." Lord Denning construes the burden of proof as to more than 50 percent of the burden to discharge a civil standard of proof.

On the same note, in the case of Public Prosecutor v. Awalluddin bin Sham Bokhari,[360] an application of civil forfeiture was made by the appellant under section 56 of the AMLATFPUAA for the properties of the respondent. The court approved the application as the civil standard of proof was satisfied as the properties were obtained using criminal proceeds.

The Court of Appeal was of the opinion that the forfeiture order was against the law and the Malaysian Constitution. Here, there was no prosecution for an offence under section 4 (1) of the Act. The properties had earlier been seized pursuant to orders of seizure made under another Act.

[359] [1947] 2 All ER 372.
[360] [2017] 8 AMR 533.

“The core of the appellant's case was also that the properties had been obtained out of the proceeds of unlawful activity. The phrase "unlawful activity" is defined in section 3 of the Act as "any activity which is related, directly or indirectly, to any serious offence or any serious foreign offence.” The term "serious offence" refers to, among others, offences specified in the Second Schedule to the Act, which include the offence under section 420 of the Penal Code, that is, cheating and dishonestly inducing delivery of property. A person who engages directly or indirectly in a transaction that involves proceeds of any unlawful activity, knowing or having reason to believe that the property proceeds from any unlawful activity, is said to be involved in money laundering.”

The judge in the Court of Appeal analysed the case similar to the case of Noor Ismahanum Mohd Ismail where the words “unlawful activity” are the emphasis. The court mentioned that:

> In determining whether the properties were the subject matter of an offence under s 4(1) of the Act, the court shall apply the standard of proof required in civil proceedings under sections 55(3) and 70(1) of the Act. On October 24, 2014, the High Court allowed the appellant's application and ordered the respondent's properties to be forfeited to the government. The High Court was satisfied that the applicant had, on the balance of probabilities, shown that the respondent acquired the properties out of proceeds of unlawful activity. The respondent, on the other hand, had failed to discharge the burden to show that the properties had been acquired through his legitimate sources of income. The High Court found that his income from known legitimate sources was insufficient to support the purchases of the properties.
>
> The respondent, being dissatisfied, appealed to the Court of Appeal against the decision of the High Court. The respondent listed 14

> grounds of appeal in his petition of appeal. The Court of Appeal was of the opinion that there were only two issues for its determination, namely:
>
> (a) Whether the trial High Court judge had satisfied the first threshold of section 56(2) of the Act which required the applicant to prove, on the balance of probabilities, that the seized properties were the subject matter of or used in the commission of an offence under s 4 of the Act; and
>
> (b) Whether the trial High Court judge had evaluated the appellant's evidence, on the balance of probabilities, before he granted the order of forfeiture in respect of the seized properties.
>
> The trial judge's findings that the respondent obtained the properties out of the proceeds of unlawful activity was based on the evidence before him. The respondent failed to rebut the evidence against him on the balance of probabilities. Therefore, the appeal was allowed, and the forfeiture order was reinstated.

These two cases best illustrate that civil forfeiture is considered as the best tool to deprive a person's benefits gained from unlawful activities. Depriving benefits from a crime is the key to combat any type of predicate offences which includes corruption. Likewise, the DDFP has a similar provision with regard to civil forfeiture. As such, to interpret section 56 of the AMLATFPUAA, judges can refer to case laws which applied DDFP. For example, in the case of Public Prosecutor v. Kanagasavey a/l Sinayah,[361] the appellant was charged under the Dangerous Drugs (Special Preventive Measures) Act 1985, but the appellant was released by a writ of habeas corpus. Simultaneously, RM7,500 was seized by the respondent under DDFP. Through section

[361] [1995] 2 MLJ 238.

35 of the DDFP, the property was forfeited as the appellant did not successfully rebut the presumptions.[362]

The appeal was made to the High Court. The court held that since the appellant had failed to rebut the presumptions, the property was precisely forfeited.

Jeffrey Tan JC stated the following at p. 601:

> In criminal proceedings the burden is always on the prosecution to commence and furnish the required proof, however, in proceedings under the Act [DDFP], there is a subtle twist to that burden…What the person proceeded against is required to rebut those presumption on a balance of probabilities…in that (i) he is not a liable person under s.7 or (ii) the property is not illegal property.

The burden of proof under section 35 of the DDFP and section 56 of the AMLATFPUAA is comparable. As for the former, the onus is placed on the defendant to prove that the property is not criminal proceeds while the latter has reversed burden of proof which is consistent with Article 12 (7) of the UN Convention against Transnational Organised Crime and Article 5 (7) of the Vienna Convention. The reason for the reversed burden is where the defendant is in a better position to provide information relating to the origins of the monies and forfeiture laws would become not efficient if the burden is not reversed.[363]

[362] Aspalella Abdul Rahman, "An Analysis of the Malaysian Anti-Money Laundering Laws and Their Impact on Banking Institutions," (Ph.D diss., University of Western Australia, 2008): 106.
[363] Rahman, "An Analysis," 107.

Sections 55 and 56[364] are to be read together with sections 61 and 70[365] which provide the *bona fide* third parties' rights and the standard of proof respectively. Nonetheless, overall, when it comes to money laundering or terrorism financing offences, AMLATFPUAA still requires the prosecutor to apply the criminal standard of proof.

On the other hand, section 61 of the AMLATFPUAA recognises rights of *bona fide* third parties. The section provides that[366]:

> 61. (1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.
>
> (2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.
>
> (3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.
>
> (4) The court or enforcement agency shall return the property to the claimant when it is satisfied that—
>
> (a) the claimant has a legitimate legal interest in the property;
>
> (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
>
> (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had the knowledge, did not freely consent to its illegal use;

[364] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* ss 55 and 56.
[365] Section 70: Any question of fact to be decided by a court in proceedings under this Act shall be decided on the balance of probabilities.
[366] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.

(d) the claimant 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) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

Under section 61,[367] it is noted that those third parties can make their claims with notice. The burden of proof is on the claimant and here, he has to prove that he has a legitimate interest in the property, no participation in the money laundering activities, lack of knowledge of the illicit use of the property and the claimant did everything that he could to put a stop to the illegality of the property.

Under subsection 2, it is submitted that "the notice by third parties should be gazetted in order to show the reason (s) on why the property should not be forfeited." For example, in Public Prosecutor v. Raja Noor Asma bt Raja Harun,[368] the respondent was charged with 50 counts for the offence under section 4 (1) (a).[369]A third party notice was gazetted under sections 55 and 61[370] to inform any *bona fide* third party with interest to be present in the court to show cause as to why the properties valued at more than RM 8 million that was seized, could not be forfeited to the Government of Malaysia."

[367] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.
[368] [2013] 9 MLJ 181.
[369] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1) (a).
[370] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* ss 55 and 61.

"About 700 third parties who were the investors in the FX Capital Company belonging to the respondent were present in the court to claim the properties which were gazetted. The parties had agreed that about eight investors would testify representing the 700 investors." The judge contended that the investors were considered as *bona fide* third-party claimants and held that all the properties be reverted to them. As the prosecution disagreed with the court's decision, they appealed against the decision.

The case purports following arguments on the position of *bona fide* third parties in relation to money laundering:

> "The prosecution contended that section 61[371] does not provide for a procedure to prove that the claimants were *bona fide* third-party claimants and thus, the court had the discretionary power to determine the procedure by itself. Moreover, section 61 did not provide any obstruction or was wrong in law against any procedure which was admissible by the court in determining the *bona fide* third parties' claim against the properties gazetted."
>
> "The prosecution had further contended that the judge had erred in law and facts in deciding that the third-party respondents were *bona fide* third party claimants in their application and were entitled to recover the monies that they had deposited when there was no evidence adduced to support the decision. The investors were said to have failed to prove all the matters provided under paras (a) to (e) of s 61(4)[372] when it was proven that all the monies were obtained from illegal activities when the respondent pleaded guilty and convicted for all the charges preferred."
>
> On the facts, a sum of RM 1,372,359 of ill-gotten monies had been laundered, and RM 1 million from that sum had been admittedly

[371] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.
[372] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61 (4).

> expended by the appellant. There was, therefore, no merit in the appellant's plea that he had not benefitted from the offence. It mattered not that no criminal breach of trust was involved in the commission of the offence.
>
> A charge for a money laundering offence can, at the instance of the Public Prosecutor, be an unconnected allegation as a person may be charged, as in this case, quite independent of there being a charge for a predicate offence against him. In the circumstances, there was no reason why the offence committed by the appellant should or ought not to be caught squarely by the penalty provisions, imprisonment included, as contained under section 4 (1).[373]

One difficulty that the courts may face in invoking section 61[374] is that if one may point out the contrary to what some officials said, claims under this section is not automatic and indeed is not on first come first serve. A notice needs to be published in a Gazette first whereupon it will call upon a third party to show cause as to why the property shall not be forfeited.

A *bona fide* third party has to satisfy all circumstances under section 61[375] and they are read conjunctively. This poses a challenge to the third party as it may not be as easy as it may seem. Courts should assess all evidence thoroughly, and if there is a connection between the third party and the said illegal criminal property, he should be allowed to claim the ownership. However, interpreting the term 'good faith' may be difficult, and here, it can be said that each case should be dealt on its own facts as an interpretation of 'good faith' can be deemed to be subjective.

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[373] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 4 (1).
[374] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.
[375] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.

In the case of Public Prosecutor v. Lau Kwai Thong,[376] the court illustrated such prejudice to *bona fide* third parties. This case shows that it is not easy for the third party who claims to have any interest in the property to prove that he has good intention under section 61(4) (a)-(e) of the AMLATFPUAA which must be satisfied.

It is also essential to take note that section 61 remains the same under the AMLATFPUAA. Under this section, the burden of proof falls upon on the third party to prove that he is the legal owner of the property. From here, it is safe to say that section 61[377] does impose a hefty and unfair burden on the innocent party. It is noted that the provision relating to the burden of proof under section 61 needs to be amended as the third party should not be prejudiced as he is just *bona fide*.[378]

In addition, it is essential to take note that in determining the estimated value in relation to criminal proceeds, section 59[379] gives powers to enforcers to recover the number of benefits obtained from illicit activities and this is called a pecuniary penalty order (PPO). However, it can be opined that this provision is a stand-alone provision and there are other provisions on forfeiture of criminal proceeds under the AMLATFPUAA as supra.

[376] Unreported case in 2009, Shah Alam High Court.
[377] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 61.
[378] Zaiton Hamin, Normah Omar and Muhammad Muaz Abdul Hakim, "When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing," *Procedia Economics and Finance* 31, (2015): 789.
[379] *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001,* s 59.

3.7 Conclusion

In succinct, a criminal activity based on money laundering is a serious issue which has always been associated with underground, organised crime. Malaysia has taken measures in fighting against money laundering and hence, the enactment of the AMLATFPUAA. Alongside legal enforcement agencies, as money laundering involves mainly on transfers of monies, banks and financial institutions also have to ensure that their AML regimes are useful in combating corruption.

Apart from AMLATFPUAA being the key tool in minimising exploitation of the financial system by launderers, reporting institutions also play their role through effective AML/CFT regime by employing CTR and STR. These reports can also be utilised in combating corruption as the corrupt employs laundering methods in cleaning the 'dirty' monies gained. Thus, in order to implement an effective AML/CFT regime, enforcement agencies and reporting institutions need to supervise the regime continually and conduct research to enhance the system to accommodate different circumstances.

The recent changes to AMLATFA indicate that it went through an overhaul. AMPLATFPUAA created new section 4 which gives new perspectives relating to proceeds of crimes. This overhauled Act also enhanced the penalty to an appropriate one and established new money laundering offences. These changes certainly are in line with the Malaysian government's constant efforts in combating money laundering and maintaining standards by considering the FATF's Recommendations.

As there has been a significant increase in corrupt practices and they are becoming more prevalent in developing countries, it is vital to note that legal enforcers must look out for different methods in minimising the magnitude of corrupt practices. To reiterate, forfeiture as a preventing tool under the AMLATFPUAA would be valuable in fighting against corruption alongside other anti-corruption measures.

CHAPTER FOUR

ANTI-CORRUPTION LAWS IN MALAYSIA

"The world will not be destroyed by those who do evil, but by those who watch them without doing anything."
– Albert Einstein.

4.1 Introduction

The researcher has divided the analysis in this chapter into five parts, namely: historical background, anti-corruption laws in Malaysia, the pre-MACC legal framework, the background of the MACCA and its applications. Forfeiture provisions under the MACCA are analysed too. The researcher mainly examines the current Malaysian legal mechanisms to combat corruption together with relevant case laws to illustrate the applicability of the current anti-corruption law. This chapter aims to answer the first and second research questions and achieve the first and second research objectives of this study.

4.2 Corruption

Globally, one of the most potent forms of predicate offence is still corruption. It is a tool for a person to make use of the proceeds in the view of gaining some self-interest. Corruption leaves an impact on a country's economy. It is thought to be a tool to accommodate placement or integration of affected assets into the legitimate financial sector but however, the criminal organisations use it to undertake unlawful activities. Focusing into "the definition of corruption, "rent seeking" is somehow related to corruption and it interconnects largely." Rent seeking can be illustrated as "the means

to obtain rental."[380] It may not be illegal. The key concern is about "directly unproductive" rent-seeking activities, where there are resources which are of no use and can contribute to economic inefficiency.[381]

Definitions of corruption can be based on three parts, namely: public-office, market and public-interest centred. As for the first part, public-office-centred related to the public office, and it involves a deviant act where a person may end up with undertaking a corrupt practice while for the second type, market-centred permits a government employee to utilise his office as a form of business where he may gain personally from the profit he makes. The office is called the 'maximising unit.' The key factor in successfully carrying out this type of corruption is the efficiency of the economy, and as for the third type, public-interest centred involves a group of people who damage the public interest by abusing powers given to them upon specific positions.

Therefore, "the definitions of corruption are usually based on categories which include bribery and corruption and the means to practice corrupt practices can be through personal gain, workplace gain, abuse of powers, fraud, and malpractices."

The concept-corruption is interpreted by the UNDP as "the misuse of public power, office or authority for private benefits." This type of corruption include "bribery, extortion, influence, peddling, nepotism, fraud, speed money or embezzlement."[382] Both the public and private sectors may gain benefits from these predicate offences.

[380] Johann Graf Lambsdorff, "Corruption and rent-seeking," *Public Choice* 113 (2002): 97, accessed July 20, 2017, https://projects.iq.harvard.edu/gov2126/files/lambsdorff_2002.pdf.
[381] Lambsdorff, "Corruption," 98.

While the UNDP stated their focus on the definition of corruption,[383] the World Bank has defined corruption as "the abuse of public office for a private gain."[384] It covers almost all types of crime.[385]

The World Bank's definition of corruption takes into account public sector corruption and its effect on the State's activities as well as the market intrusion of the State.[386] The World Bank's definition is in line with Nobel laureate Gary Becker's perception that "if we abolish the state, we abolish corruption." This indicates that their definition only focuses on corrupt practices in the public sector, i.e., the State and not the private sector.[387] However, TI views corruption as "the abuse of entrusted power for private gain."[388] This definition is narrow, similar to the World Bank's definition which only focuses on the public sector. In general, corruption can be categorised into grand, petty and political. The factors to be taken into consideration are the amount of money and the sector where the corrupt practices take place.[389]

In contrast, international organisations such as OECD Anti-Bribery Convention and UNCAC commonly link corruption with bribery.[390] This points to the view that

[383] "United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators," The United Nations, accessed July 21, 2017, https://www.unodc.org/pdf/crime/corruption/Handbook.pdf.
[384] "Helping Countries Combat Corruption: The Role of the World Bank," The World Bank, accessed July 21, 2017, http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm.
[385] Olatunde Julius Otusanya, "An investigation of the financial criminal practices of the elite in developing countries: Evidence from Nigeria," *Journal of Financial Crime* 19, no. 2 (2012): 175.
[386] "Helping Countries Combat Corruption: The Role of the World Bank," The World Bank, accessed July 21, 2017, http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm.
[387] Wycliffe Amukowa, "The Challenges of Anti-Corruption Initiatives: Reflections on Strategies of the Defunct Kenya's Anti-Corruption Commission, *"Mediterranean Journal of Social Sciences* 4, no. 2 (2013): 481.
[388] "What is corruption?" Transparency International, accessed July 21, 2017, https://www.transparency.org/what-is-corruption.
[389] "What is Corruption?" Transparency International, accessed 21, July, 2017.
[390] "Causes of corruption in public sector institutions and its impact on development", Alexandra Mills, accessed July 23, 2017, http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan049589.pdf.

"bribery is the only type of corruption." There is no definition formed by the OECD, the Council of Europe and the UN Convention. They have listed out types of behaviour which have been categorised as corrupt practices.

The OECD Convention focuses on bribery of public officials from other countries, and the Council of Europe takes into consideration corrupt practices in the trading industry as well as bribery of the domestic and foreign public officers. Other than these acts, the Convention also takes into account misuse of properties in the public sector, a hindrance to justice and embezzlement. The above grouping of corrupt practices relates to the fact that the UN Convention measures the extent of corruption internationally through certain offences and not a general one.[391]

From the above interpretations, it is essential to note that "corrupt practices occur based on a few factors such as ideology, morality, culture, and politics." One's personal ideology and experiences are significant contributors to corruption. Apart from that, money and properties are two critical motivators for this serious offence to be committed and thus, affecting the social and financial system of a nation.

Hence, in general, corruption has always been viewed as a dishonest act which undermines sincerity, ideas, and moral views which in return would be criticised for. Corruption is often related to distortion of the social and economic system, incompetent governance, discrimination, inequality, volatility, and chaos. Mainly, corrupt practices leave an impact on human self-control, their morality, and honesty. Due to this negative impact, it is best for enforcers to look out for working frameworks

[391] Mills, "Causes of Corruption."

which have adequate measures in reducing, if not removing the effects of this serious crime on humanity.

For the purpose of the study, the researcher opts to choose the following definition of corruption: illegal, bad, or dishonest behaviour, especially by people in positions of power (Cambridge Dictionary) as it covers every possible circumstance relating to corruption. The researcher adopts this definition for the entire study.

The researcher also contends that combating corruption using AML measures is feasible as the corrupt officials usually launder the proceeds of the crime to integrate into the financial system and this reduces the suspicion. Using AML measures, the proceeds of the crime can be detected, and suspects can be punished.[392]

A government official who is corrupted is easily caught by the system as unnecessary attention is given to the sudden increase of his properties and wealth. Other criminals may be able to disguise the criminal proceeds without any trail. Therefore, AML and anti-corruption agencies can take corrupt officials' weaknesses as a chance to detect and punish them.[393]

The UNODC has recognised the link between money laundering and corruption and they state that:[394]

> There are important links between corruption and money laundering. The ability to transfer and conceal funds is critical for the

[392] "Laundering the Proceeds of Public Sector Corruption," Richard K. Gordon, accessed 9, July 2017, http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047001.pdf.
[393] Gordon, "Laundering the Proceeds."
[394] Gordon, "Laundering the Proceeds."

> perpetrators of corruption, especially for large-scale or grand-corruption. Money laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. It is therefore essential to establish corruption as the predicate offence for money laundering.

Based on the aforementioned recognition of the link, the UNCAC has some provisions regarding AML measures under Articles 14 and 23 which emphases on the laundering of the proceeds of crime. There are other conventions which recognise the laundering of the proceeds of corrupt activities, and they include: OECD, Council of Europe and the Criminal Law Convention on Corruption.

Besides, the OECD Convention provides in Article 7 that "each party which bribes its own public official to apply money laundering legislation will also bribe a foreign public official, regardless of the place where the initial bribery took place." Article 7 provides that if the public official launders the bribe monies, his act would be subject to AML law. This Article shows the close-link between money laundering and corruption.[395]

On the same note, Article 13 under the Council of Europe states that "a party can adopt legislative or other measures to establish, under its domestic law, the conduct for these criminal offences (and the committed acts) according to Article 6, para. 1 and 2 of the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Products from Crime. The criminal offences include the conversion or transfer of

[395] Gordon, "Laundering the Proceeds."

property with the scope of concealing or disguising the illicit origin of it so that the person responsible can evade punishment and confiscation of assets."[396]

Furthermore, Article 13 states that "criminal offences are in line with Articles 2 to12 of the Council of Europe Convention on Corruption, and they are: active or passive bribery of domestic or foreign public officials; bribery in the private sector or bribery of international organisations, international parliamentary assemblies, bribery of judges or officials in international courts and trading in influence."[397]

AML/CFT system is also essential in acknowledging the link between money laundering and corruption and IMF states that "effective AML and combating of the financing of terrorism regimes are essential to protect the integrity of markets and of the global financial framework as they help mitigate the factors that facilitate financial abuse."

IMF states the above to indicate that the financial system needs to be supervised thoroughly to detect and evade criminals from using the system which is used to integrate the criminal proceeds into the legitimate financial system. Apart from UNCAC, OECD, and Council of Europe, the FATF also recognises that money laundering and corruption are interlinked and here, the FATF plays a key role in combating them. FATF contends that bribery or stealing public funds for own gain which are 'masked' through the laundering process is one of the types of corruption cases.

[396] Gordon, "Laundering the Proceeds."
[397] Gordon, "Laundering the Proceeds."

There are a few prominent case studies which link money laundering with corruption. For example, "Joseph Estrada, former President of the Philippines, often received cash or check payments from gambling operators in exchange for their protection from arrest or law enforcement activities. This money was simply deposited into domestic accounts in the name of a fictional person or in corporate vehicles established by Estrada's attorney and then used for a variety of expenses." Similarly, "in the case of the bribery of US Congressman Randall Cunningham, who was a senior legislator with significant control over military expenditures, a military contractor bribed him both by checks to a corporation controlled by Cunningham, but also by agreeing to purchase real estate owned by Cunningham at a vastly inflated price."[398]

Another prominent case study involves the Bangkok film festival case. In this case, "two promoters were managed to bribe Thai officials to obtain the rights to sponsor and manage a government-funded film festival in Thailand. The bribes were paid simply by means of the wire transfer of funds from US-based accounts, where the promoters were located, into offshore accounts in third countries maintained by family members of the PEP. The bribes never passed through Thailand, although that was the locus of the corrupt activity."[399]

In addition, the US Senate reviewed four case studies of West African public officials. In that cases, it was identified that "lawyers were used in creating corporate vehicles, open bank accounts, and purchase property with the express purpose of bypassing AML controls set up to screen for PEPs. For example, the son of the President of one West African nation, who himself was a minister within the government, wished to

[398] "Laundering the Proceeds of Corruption," FATF, 2011, 16.
[399] "Laundering the Proceeds of Corruption," FATF, 2011, 16.

purchase real estate and aircraft within the United States. To do so, a lawyer for the PEP opened bank accounts there."

"However, because of US banking rules requiring an enhanced level of due diligence for funds moving through those accounts, several US banks closed the accounts on the belief that they were being used to conduct suspicious transactions. In response, the lawyers for the PEP would deposit incoming funds into attorney-client or law office accounts, and then transfer the money into newly-created accounts for the PEP. Due to the fact that the lawyer's accounts were not subject to the same enhanced due diligence as the PEP, the lawyer was able to circumvent the enhanced AML/CFT measures. Ultimately, at least two banks were able to identify the fact that the attorney's accounts were being utilised in this manner and closed the attorney accounts, but not before hundreds of thousands of dollars had passed through."[400]

Furthermore, the laundering of the proceeds from corruption was illustrated in the Duvalier case. In this case, "Haitian government assets diverted by Jean-Claude Duvalier were likewise disguised by the use of lawyers as intermediaries, who would hold accounts for the Duvalier family. According to the UK court that examined the matter, had the added advantage of the use of professional secrecy to avoid identifying the client. The court opinion identified numerous accounts held by law firms for Duvalier and his family, both in the UK and in Jersey. The use of professional secrecy was used to attempt to prevent an inquiry into the nature of the funds." [401]

[400] "Laundering the Proceeds of Corruption," FATF, 2011, 6.
[401] "Laundering the Proceeds of Corruption," FATF, 2011, 20

On the same note, the former President of Zambia was involved in a civil forfeiture case in the UK where the court found that legal firms and lawyers are used as vehicles to 'mask' the embezzlement from the government. "Special corporate vehicles had been set up, purportedly for use by the country's security services, and government funds were transferred to accounts held by those entities."[402]

4.2.1 History of Corruption

Corruption has its existence since the sixteenth century where Charles James Fox contended that it is due to immoral acts in the society. A former maritime officer, Samual Pepys had his personal opinions against corruption back in the seventeenth century, and he decided not to receive bribery. On the same note, William Cobbett, the British Journalist opined that public-driven corruption is the ultimate reason why the society is corrupted. For others, corruption is caused by the media, and it acts as a corruption agent. [403]

Those days, corruption rarely took place as there was no distinction between public and private gain. It was acceptable conduct that a person with power uses the public office for their own and family benefits. After the seventeenth century, corrupt practices were taken seriously, and laws were created to fight against corruption. By then, people were already able to distinguish between the public and private sectors.[404]

However, it has been argued that the current and olden days definitions are of no relevance to each other. The key focus of the current definitions is corruption involves

[402] "Laundering the Proceeds of Corruption," FATF, 2011, 20.
[403] "Corruption in historical perspective," Prof Mark Knights, accessed July 22, 2017, https://www.sussex.ac.uk/webteam/gateway/file.php?name=mark-knights---presentation.pdf&site=21.
[404] Knights, "Corruption."

misuse of power while historically, corruption relates to behaviour which deviates from the norm. Change of social circumstances contributes to these differences of perception towards corruption.[405] However, the basic idea of corruption historically is where a person acts immorally through corrupt practices which go against religions, beliefs, and norms. This act may be considered as a deviant behaviour. Overall, there must be measures to be taken to eradicate this unusual occurrence.

Modern and traditional definitions of corruption differ. From the conventional point of view, corruption is considered as a form of immoral act or a tool which makes a system fail while on the other hand, as for a modern society, corruption contributes to isolated abuse of laws.[406]

Throughout history, "corruption has always been descriptive of wrongful conduct appertaining to transgressions of deeply held norms, beliefs, and ideas that emotionally offend anything that goes astray from commonly held expectations. It is associated with threats to the societal fabric, poor governance, social injustice, immorality, and inequality causing misery, deprivation, insecurity, instability, chaos, and death. In short, it denotes failures of human discipline, arrangements, institutions, and integrity. The remedies must, therefore, be within human will, instruction, ingenuity, invention, organisation, and determination to reduce its occurrence and harm."[407]

[405] "New Perspectives on the History of Corruption and Why They Are Important", Dr. Ronald Kroeze, *Anticorp Project*, December 15, 2014, accessed July 20, 2017, http://anticorrp.eu/news/new-perspectives-on-the-history-of-corruption-and-why-they-are-important/.
[406] Kroeze, "New Perspectives."
[407] "A (Very) Brief History of Corruption:
What trends in the prevalence of corruption has the world experienced in recent years?" Bernard Wasow, The Globalist, March 10, 2011, accessed July 24, 2017, https://www.theglobalist.com/a-very-brief-history-of-corruption.

4.2.2 Types of Corruption

Largely, developing countries have allowed for the vast amount of profits generated by free market economies as well as a chaotic system of corruption. The aftermath of the cold war has resulted in developing countries having their focus on corruption rather than foreign aid allocation. In addition, with corruption continuing everywhere, developed and developing countries have institutions which are failing.[408]

Types of corruption vary according to the nature and political system of a society. In democratic societies, it has been identified that there are three main types of corruption and they are: grand and petty corruption, bureaucratic corruption, and legislative corruption.[409]

4.2.2.1 Grand and Petty Corruption

TI has defined grand corruption as "an incident where a person in a public office or a social group or part of a society in a State is responsible for a loss which is 100 times more than the annual income of the people of the State because of bribery, embezzlement or other predicate offences under corruption."[410]

The above definition of grand corruption by TI benefits advocates, scholars, lawmakers, and others in looking for methods in further improving public officials' answerability towards the society they are in and the impact of corruption over the

[408] Edward Fokuoh Ampratwum, "The fight against corruption and its implications for development in developing and transition economies," *Journal of Money Laundering Control* 11, no. 1 (2008): 76.
[409] Dr. Ahmad M. Mashal, "Corruption and Resource Allocation Distortion for "Escwa" Countries," *International Journal of Economics and Management Sciences* 1, no. 4 (2011): 71.
[410] "Grand corruption definition with explanation", UNODC, accessed June 21, 2017, https://www.unodc.org/documents/NGO/Grand_Corruption_definition_with_explanation_19_August_2016_002_1.pdf.

social, economic and financial sectors. TI has taken into account the corruption victims' expressions and gave legal effect to them. As a result, it is said that grand corruption is against human rights where those who commit this crime should be imposed heavy punishment in the eyes of justice.[411]

Grand corruption cases should be dealt with careful investigation, effective prevention and prosecution. Local and international cooperation are needed to watch over this type of crime and ensure that it does not become more severe. This is reasoned as grand corruption is difficult to be detected and measured mainly when a group of people benefits from the corrupt practice. It is often linked to ineffective public policies of a State. However, ineffective policies do not conclusively lead to grand corruption as persons who want to commit this type of corruption may somehow invade the system even with the best public policies. It is because they create policies which are in favour of them and gives them all the benefits.

In contrast, the UNCAC did not form a definition of corruption which is wide-ranging and commonly accepted worldwide. Although the Convention did not mention 'grand corruption' in any of their documents, the preamble of the Convention did take into account corruption cases which involve a huge amount of monies and quantity of assets. The Convention also mentioned the impact of this type of corruption which is the instability of the political institution and unsustainable development of the State's economy. International organisations consider corruption as the "abuse of a public charge for the benefit of private interest."[412] As it may look as if the definition is useful,

[411] UNODC, "Grand Corruption."
[412] "Countering Grand Corruption", Conference of the States Parties to the United Nations Convention against Corruption, accessed July 22, 2017, https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/V1507721e.pdf.

however, there is an issue with applying the definition for corruption cases which involve private companies and NGOs as the definition solely focuses on public sector corruption. The indicators formed does not help in a way as control mechanisms.[413]

Due to the above problem of not covering every possible situation of corrupt practices, academicians and international organisations had some determinations in establishing typologies and guidelines which incorporate both public and corrupt private practices. The United Nations Handbook on Practical-Anticorruption Measures for Prosecutors and Investigators was established as one of the essential references for a typology of corruption and its measures, evidence collection as well as guidelines for the prosecution.[414]

In the handbook, grand corruption is defined as "an expression used to describe corruption that pervades the highest levels of government, engendering major abuses of power. Grand corruption erodes the rule of law, the stability of the economy and governance." "This type of corruption is referred to as "state capture" where a person externally interferes with the political system at the highest level which gives him large private gain."[415]

Petty corruption, on the other hand, is also known as "administrative corruption" where it is the opposite of grand corruption which allows a person to commit corrupt practice,

[413] The United Nations, "Countering."
[414] "United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators," The United Nations, accessed July 21, 2017, https://www.unodc.org/pdf/crime/corruption/Handbook.pdf.
[415] "Countering Grand Corruption", Conference of the States Parties to the United Nations Convention against Corruption, accessed July 22, 2017, https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/V1507721e.pdf.

based on a very small amount of money. Although it involves small amount, petty corruption may give negative impact to public loss. For instance, 'the customs officer who waves through a consignment of high-duty goods having been bribed a mere $50 or so."[416] The apparent difference between the two types of corruption is that grand corruption involves the manipulation by the public officials of the fundamental functions of the government while petty corruption consists of the situation involving functioning governance and social frameworks.[417]

4.2.2.2 Bureaucratic Corruption

In general, bureaucratic corruption presents at all levels of societies and economic development and also regimes. It appears to be that this type of corruption has a different impact as indicated by international corruption actions.[418] Usually, bureaucratic corruption involves corrupt practices with the superior or the public by the bureaucrats. In this context, petty corruption is generally committed where bribes are given to the bureaucrats as an incentive for their work done or to complete the procedure fast.[419]

Apart from corrupt practices in the public office, bureaucratic corruption can also occur in the courts where bribes are given to legal personnel to reduce the penalty

[416] "United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators," The United Nations, accessed July 21, 2017, https://www.unodc.org/pdf/crime/corruption/Handbook.pdf.
[417] The United Nations, "The United Nations Handbook."
[418] Jon Quah S.T, "Bureaucratic Corruption in the ASEAN Countries: A Comparative Analysis of Their Anti-Corruption Strategies," *Journal of Southeast Asian Studies* 13, no. 1 (1982): 153.
[419] Quah, "Bureaucratic Corruption," 153.

costs.[420] The factor for bureaucratic corruption is based on the stability of the supply and demand of services.[421]

This type of corruption cannot be avoided for some reason and it is embedded into the system of government and its economy. Preventing this crime which may not have any 'victim' per se may have a high cost, as well as the bureaucrats, may be part of the enforcement mechanisms.[422] Hence, there should be impartial and effective enforcement established to eradicate bureaucratic corruption before it further damages the system.

4.2.2.3 Legislative Corruption

Legislative corruption comprises of the acts of a group of people who influence the behaviour of legislators in voting during the enactment of legislations. Bribery can be offered to legislators by the pressure groups, and they may buy the votes.[423]

4.2.2.4 Corruption in Developing Countries

There are two types of corruption that occur in developing countries, and they are: high-level corruption and chaotic corruption. The former is also known as well-organised corruption, and this involves expensive assets in exchange of service while

[420] Susan Rose-Ackerman, "The Role of the World Bank in Controlling Corruption." *Faculty Scholarship Series Paper* 59*1* (1997), accessed May 20, 2016, http://digitalcommons.law.yale.edu/fss_papers/591.
[421] Susan, "Controlling Corruption."
[422] Isaac Ehrlich and Francis T. Lui, "Bureaucratic Corruption and Endogenous Economic Growth," *Journal of Political Economy* 107, no. 6 (1999): 270. http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1253782457445/6449316-1261623644460/bureaucratic-corruption-and-endogenous-economic-growth.pdf.
[423] "Legislative Corruption," *The New York Times*, April 5, 1861, accessed July 23, 2017, https://www.nytimes.com/1861/04/05/archives/legislative-corruption.html.

as for the latter which is considered as low-level corruption is usually bribery relating to public officials at a lower level. High and low-level corruption exist in almost all systems of government, and they co-occur.[424]

4.3 Anti-corruption laws in Malaysia

In history, corruption exists as a harm to all countries worldwide, and it is an ancient occurrence of the human race where it contributes to endless experiences.[425] Together with other nations, Malaysia has continuously put efforts in combating corruption. Tan Sri Abu Kassim Mohamed, the former Director of the MACC, said in 2013 that "the efforts commenced from the time when first Malaysian Prime Minister, Tunku Abdul Rahman Al-Haj took charge of the country's wellbeing. During his time of power, he has mentioned that corruption is one of the three harmful elements identified in influencing the development of a country."[426]

Corruption has been a cause for concern for many enforcers. A shift in the economic and political system is resulting in growing corruption cases globally. The negative impact of this serious crime can be seen in the development of many countries. Hence, corruption does not only challenge moral rightness but also, leaves a significant impact on a country's welfare.

Due to the immense effect of corruption, fighting against corruption is one of the important moves made by many enforcers in various countries and Malaysia is one of

[424] Serguei Cheloukhine and Joseph King, "Corruption networks as a sphere of investment activities in modern Russia," *Communist and Post-Communist Studies* 40 (2007): 107.
[425] "The Economic Costs of Corruption: A Survey and New Evidence," Axel Dreher and Thomas Herzfeld, accessed August 2, 2017, https://ssrn.com/abstract=734184.
[426] Nur Shafiqa Kapeli and Nafsiah Mohamed, "Insight of Anti-Corruption Initiatives in Malaysia," *Procedia Economics and Finance* 31 (2015): 525.

them. In this context, the Malaysian government has established a framework in combating corruption in line with good governance and integrity.

"There are five-year economic policies which have caused transformation from an agrarian into an industrialised nation. Malaysia is the twenty-third largest exporter and also, one of the leading trading nations worldwide." However, corruption comes along with the prosperity of a nation. As Malaysia has its Vision 2050 plans, eradicating corruption is part of the plans. In 2004, the National Integrity Plan were established while in 2010, the Government Transformation Programme (GTP) was formed. In the view of combating corrupting under the GTP, corruption is one of the six NKRAs which have been acknowledged. These are identified mainly to increase the efficiency of governance and combat grand corruption."[427]

As this chapter aims to examine the key provisions of the MACCA, the researcher explores the history of Malaysian anti-corruption laws before the enactment of the MACCA.

4.3.1 The Pre-MACC Legal Framework

"Prior to 1967, there was no proper Malaysian anti-corruption framework. In 1950, Taylor's Commission of Enquiry into the Integrity of the Public Service was established to study "incidences of corruption in the Government Service of the Federal Government." Following that, there was a further study by Shah Nazir Alam on corruption."

[427] "The Anti-Bribery and Anti-Corruption Review, 6th. Ed," Rosli Dahlan and Muhammad Faizal Fai Mohd Hasani, accessed August 2, 2017, http://thelawreviews.co.uk/edition/the-anti-bribery-and-anti-corruption-review-edition-5/1140395/malaysia.

In 1959, the Special Crimes Unit of the Criminal Investigation Department of the RMP and the ACA under the Prime Minister's Department were responsible for handling corruption matters. The former was in charge of the investigations while the latter were accountable to take preventive measures. Besides, the AGC dealt with prosecution matters.[428]

However, with different entities in charge of the various issues, the government established ACA in 1967 with all three entities, i.e., investigation, prevention and prosecution under one management. The agency was created through the Anti-Corruption Act 1967.

After the enactment of the National Bureau of Investigations Act 1973, the ACA's name was changed into National Bureau of Investigations (NBI) where it was parked under the Home Ministry. NBI was given an additional power which is to investigate cases relating to national matters. However, through the ACA Act 1982, NBI's name was reverted to the ACA as a single agency in combating corruption.

With the importance of a corruption agency being impartial and independent, the Malaysian government enacted MACCA in 2008 and established the MACC in replacing ACA and the ACA Act 1982. As a whole, there are a number of laws in Malaysia that deal with corruption, and they include:

- Penal Code (FMS Cap 45) (Revised in 1997 as Act 574);
- Prevention of Corruption Ordinance 1950 (repealed);

[428] "Organisation Info," Malaysian Anti-Corruption Commission, accessed August 2, 2017, http://www.sprm.gov.my/index.php/en/corporate-info/mengenai-sprm/organisation-info/organisation.

- Election Offences Act 1954;
- Prevention of Corruption Act 1961 (repealed);
- Customs Act 1967 (Act 235) (Revised 1980);
- Emergency (Essential Powers Ordinance) 1970;
- Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613);
- Anti-Corruption Act 1997(repealed); and
- Malaysian Anti-Corruption Commission Act 2009.

Currently, the MACCA is the principal legislation enacted in combating corruption after the ACA 97. In the view to combat corruption by the Malaysian government, a good set of anti-corruption laws were formed from Independence until today. Corruption laws are continually being updated to accommodate both private and public sector corruption cases.

However, even with such updated corruption laws, statistics indicate that corruption is still on the rise in Malaysia. As such, "according to the Global Competitiveness Report 2016-2017 by the World Economic Forum (WEF), corruption still remains as the key hurdle in doing business in Malaysia although there are improvements in other aspects mentioned."[429]

"The ACA 97 actually carries a more severe penalty with a mandatory jail sentence of not less than 14 days and not exceeding 20 years and fines amounting to five times the bribe amount or RM 10,000 (whichever is higher) if found guilty. By right, the penalty in the MACCA should be more severe."

[429] "The Global Competitiveness Report 2016–2017," World Economic Forum, accessed August 5, 2017, http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf

In short, Malaysia is known as one of the few countries which have made the initial move in establishing anti-corruption laws. In 2003, Malaysia joined the UNCAC and signed treaties. It was signed in 2003 and amended in 2008.[430] Alongside this move, at the present time, there are 14 anti-corruption courts to deal with corruption cases in Malaysia where the aim is to resolve the matters within the time frame set which is 12 months. The Whistleblower Protection Act 2010 was also enacted as well as taking the Corporate Integrity Pledges.[431] These moves lead to the enrichment of integrity and transparency of the government.

4.3.2 Malaysian Anti-Corruption Commission (MACC)

As aforementioned, MACC was established in 2008 through the MACCA. This Commission is an independent and impartial one. The MACCA came into effect on 1 January 2009 which is the official year of the MACC's operations as an anti-corruption agency.

In order to uphold the values of being independent, transparent and impartial, MACC has five entities which act as a check and balance mechanisms. They are: the Anti-Corruption Advisory Board (ACAB), the Special Committee on Corruption (SCC), the Complaints Committee (CC), the Operations Review Panel (ORP) and the Consultation and Corruption Prevention Panel (CCPP).[432] These bodies are formed

[430] Lynda Lim, "Crimes without criminals: Fighting Corruption in Malaysia," *Centre for Public Policy Studies* (2014):1.
[431] C. Muzaffar, "Washington seeks regime change in Malaysia: US back Opposition Complicit in Corruption and Dirty Tricks," *Global Research* (2013).
[432] Some of these entities have statutory powers under the MACC Act 2009. Section 13: the Anti-Corruption Advisory Board, section 14: the Special Committee on Corruption, section 15: Complaints Committee.

independently to oversee the functions, efficiency, and transparency of the MACC. These five bodies comprise of members from the public as well as retired government servants, politicians, and professionals such as lawyers, academicians, and accountants.

Section 7 of the MACCA sets out the functions of the MACC as follows[433]:

- To receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable;
- To detect and investigate: -
  - Any suspected offence under Act 2009;
  - Any suspected attempt to commit an offence under Act 2009; and
  - Any suspected conspiracy to commit an offence under this Act;
- To examine the practices, systems, and procedures of public bodies in order to facilitate the discovery of offences under this Act and to secure the revision of such practices, systems or procedures as in the opinion of the Chief Commissioner may be conducive to corruption;
- To instruct, advise and assist any person, on the latter's request, on ways in which corruption may be eliminated by such person;
- To advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Chief Commissioner thinks necessary to reduce the likelihood of the occurrence of corruption;
- To educate the public against corruption; and
- To enlist and foster public support against corruption

The MACC's framework is divided into three parts which are based on section 7[434]:

- Enforcement
  - Detect corruption offences

[433] *Malaysian Anti-Corruption Commission Act 2009*, s 7.

[434] *Malaysian Anti-Corruption Commission Act 2009*, s 7.

- Investigate corruption offences
- Prevention
- Detect the risk of corruption in work practices, systems, and procedures
- Advise on the likelihood of the occurrence of corruption
- Community Education
- Educate the public against corruption
- Enlist and foster public support against corruption

4.3.3 Malaysian Anti-Corruption Commission Act 2009 (MACCA)

The objectives of the MACC is to promote integrity and answerability of the public and private sectors through an impartial and independent entity as well as provide education on awareness of the people over corruption and its impact on social, economy and financial systems.

In March 2018, the Parliament tabled the Corporate Liability provision for corruption offences under section 17A of MACCA. On 4 May 2018, the Amendment Bill had been gazetted and it is known as the MACC Amendment Act 2018. The Act is to be in force in 2020. It would give extensive powers to the MACC in combating corruption, taking into account the private sector as employers may be vicariously liable in their employees taking or giving bribes. Datuk Paul Low Seng Kuang commented on the measures and penalty in Malaysia for corruption that "the changes may take into consideration of some satisfactory measures and penalties in line with some of the developed countries such as the UK which has advanced measures and penalties."[435]

[435] Bernama, "Revised MACC Act 2009 to come into force in 2018", *New Straits Times*, October, 6, 2016, accessed August 4, 2017, https://www.nst.com.my/news/2016/10/178559/revised-macc-act-2009-come-force-2018.

The powers of the MACC is wide-ranging, and they are mainly responsible for investigating corrupt practices and can require the related person to be present for further investigations. Similar to police officers, it is seen that MACC officers are given the powers and immunity through the MACCA. Apart from that, the MACC can also take into account other laws, and they include legislations of banking and finance, company affairs, taxation, customs as well as election-related matters.

In addition, there are also administrative responsibilities for the MACC to investigate and take actions against anyone in the public office. There are a few regulations, and they are:

- Public Officers (Conduct and Discipline) Regulations 1993;
- Service Circular No. 12 of 1967 (Anti-Corruption Agency Director's Investigation Report);
- Service Circular No. 17 of 1975 (National Investigation Bureau Investigation Report);
- Confidential General Circular No. 1 of 1984 (Investigation of Corruption Cases against Government Departments);
- Confidential General Circular No. 1 of 1985 (Integrity Vetting by Anti-Corruption Agency Malaysia)

Some of the powers vested in the MACC have been subject to public criticisms. In the case of Datuk Seri Ahmad Said Hamdan v. Tan Boon Wah[436], "the Court of Appeal held that there is no restriction for the MACC to interrogate witness only during office hours. The Court of Appeal went to hold that the ordinary meaning of the words 'from day-to-day' must be 'continuously or without interruption from one 24-hour day to another'. There are also concerns about the removal of the right to remain silent, right

[436] [2010] 6 CLJ 142.

against self-incrimination or spousal incrimination, spousal privileged communication and right of access to legal representation. These have yet to be subject to constitutional challenges."

4.3.4 General application of MACCA

4.3.4.1 Offences and Penalties

The MACCA does not have a legal definition of corruption, but however, the Act's key focus is on gratification. In this context, section 2 defines gratification as follows:[437]

> "(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being the property of any description whether movable or immovable, financial benefit, or any other similar advantage;
> (b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;
> (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
> (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
> (e) any forbearance to demand any money or money's worth or valuable thing;
> (f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted including the exercise or the forbearance from the exercise of any right or any official power or duty; and

[437] *Malaysian Anti-Corruption Commission Act 2009*, s 2.

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f) above."

Since the enactment of the MACCA, there are hundreds of cases where the MACC has applied the 2009 Act to charge those who are corrupted. Often, the offence of giving-accepting gratification and also, through an agent under sections 16 and 17 are seen to be applied by the courts.

Sections 16 and 17 read as follows:[438]

16. Giving or accepting gratification

A person commits an offence if he by himself, or through or with any other person (a) corruptly solicits or receives or agrees to receive for himself or for any other person, or (b) corruptly gives, promises or offers to any person for the benefit of that person or another person, any gratification as an inducement to, or reward for, any person or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction.

17. The offence of giving or accepting gratification by agent

A person commits an offence if—

(a) being an agent, he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

[438] *Malaysian Anti-Corruption Commission Act 2009,* ss 16 and 17.

(b) he corruptly gives or agrees to give or offers any gratification to any agent as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.

As for section 16, as compared to the ACA 97, it is now inclusive of any registered societies or bodies, sports body, cooperatives, youth society or trade union. Prior to MACCA, a public body was only related to the Malaysian government, local authority or any bodies related to the government. The focus was just on the public sector. Besides, section 16 also includes government-linked companies (GLC) whilst the ACA 97 only covered companies which the control power upheld by a public body. Currently, MACCA includes controlling interest.

Through section 17 of the MACCA, the case needs to be proved that the agent must have believed or suspected that his principal was involved in somewhat corrupt practice and the gratification was given in return for completing a task. The same standard is applied to the giver's situation. For circumstances under section 17, it does not matter that the agent had no power, right or opportunity to do, or to forbear from doing, the act in question, or that the act did not relate to the principal's affairs or business. The intention of the agent is irrelevant under this section.

The application of sections 16 and 17 can be seen in the case of Public Prosecutor v. Rahmat Bin Abdullah & Anor,[439] where in 2010 when the complainant in this case

[439] [2017] AMEJ 0586.

whom was the managing director of Syarikat Saujana Serangkai Sdn Bhd went to see the person who drew up the plans ('pelukis pelan') at the land office in Kota Tinggi. The complainant wanted to buy a plan for his land. The land officer requested him to come back the next day as the plan would be ready then. The reason the applicant wanted to buy the said plan was that he wanted approval for cleaning and removing the remnants of wood on the land.

The next day, the complainant again went to the land office to meet the land officer. The complainant was requested to make payment for stamp duty of RM 35.00 to purchase the plan. The complainant duly made payment and gave the receipt to the land office and obtained the plan from him by explaining the reason for the plan and at the time, the first accused who was seated at his desk and the second accused who was standing next to him was nearby and may have overheard his conversation with the land officer.

The following is the summary of what have been given or received:

- The First Accused required a sum of RM 10,000.00 as the Toyota Hilux owned by the First Accused was about to be repossessed by the bank due to outstanding instalments.
- The Second Accused told the complainant that he was interested in a white Proton Perdana registration no. JHC 630 and asked him to purchase the car for him in cash payment.
- The Second Accused contacted the complainant by phone and requested from him a cheque for the sum of RM 13,000.00.
- The Second Accused informed the complainant that RM 8,000.00 out of that sum was to be handed over to the First Accused as the latter's son was going to university. The balance RM 5,000.00, according to the Second Accused, was for him to shift houses.

- The First Accused handed over to the complainant a Toyota Hilux registration no. MAX 2913 for the latter to continue the instalments payments that were already due and owing and was about to be repossessed by the bank.
- A sum of RM 3,000.00 said to be for the benefit of the First Accused and the clerks at the land office. As the complainant had no cash on him at the time, he issued a cash cheque dated 18.6.2010 in the name of the Second Accused.

Based on the above summary, both accused persons were charged under section 17 (a) of the MACCA. As is evident from the charge, the essential ingredients of the offence are:

> a) That both accused persons at the time of the offence were agents of the Land Office Kota Tinggi District; and
> b) That both accused persons corruptly accepted from the complainant gratification as a reward namely, in supposedly assisting him to obtain approval for cleaning and removing the remnants of wood in Mukim Sedili Besar, Kota Tinggi, Johor.

On the same note, in the case of Public Prosecutor (SPRM) v. Arifin bin Drahman,[440] the respondent, Arifin bin Drahman was charged before the Sessions Court, Sibu with an offence under section 17 (a) of the MACCA. The appellant's case was that the respondent had corruptly agreed to accept a gratification in the form of RM 1,500 in cash as a reward for doing an act relating to the respondent's principal's affair.

However, the court concluded the following:

> "It is not disputed that at the material time, the respondent was in the employment of a public body, i.e., Jabatan Perikanan Malaysia and the appellant has failed to adduce credible and sufficient evidence to prove the main element of the offence, i.e. the acceptance of illegal

[440] [2017] 1 AMR 70.

> gratification by the respondent. Thus, it is clear that the respondent did not take the money and there is no evidence that the gratification was paid or given or received corruptly as an inducement or reward did or forborne to do any act in relation to the affairs of that public body."

Moving on, in the case of Public Prosecutor v. Nguyen Van Thin,[441] "the respondent was charged with 2 offences under section 17 (b) and punishable under section 24 (1) of the MACCA. The first charge was for the respondent who corruptly gives gratification of RM 1,500.00 to an agent of the Government of Malaysia, Mohd Zahir Bin Mohamad Basri, Maritime Lieutenant attached to the Malaysian Maritime Enforcement Agency, Miri District 13 as an inducement forbearing to do an act in relation to the principal's affairs, to wit, is to forbear from taking legal action against him, who allegedly has committed an offence under section 8 (a) of the Fisheries Act 1985 and the second charge is for the same issue but under section 6 (1) (c) of the Immigration Act 1959/63."

The court examined section 17 (b) of the MACC in this case. In this context, there were a few issues which the court did take into account. The pertinent issue is whether the Respondent had corruptly offered, paid or give the monies which are the relevant to two charges, as a gratification for not taking any legal action against him, the crew and his vessel.

In this case, there were two occurrences of alleged acts of bribery:

- Firstly, when the Respondent in response, handed a transparent file folder containing the Vessel's licence, passports of the crew and RM 1,500.00

[441] [2018] AMEJ 0017.

- Secondly when the Respondent some 6 hours later after the first purported act of bribery, pointed to a cabinet where the agent found RM 1,500.00.

For both acts of bribery identified, the appellant stated that that the respondent nodded his head as a sign of agreement for RM 3,000.00 as bribe. Giving signal can be construed as taking the monies as bribery.

Looking at the evidence, findings in the case shows that:

> "Such non-verbal gestures of the nodding of the Respondent's head at the said 2 occasions are capable of a number of interpretations and do not necessarily mean that the Respondent was indicating to take the monies on the 2 occasions as bribes. Any favourable interpretation should be drawn in favour of the Respondent who is the Accused in this Appeal."
>
> "The court also finds that the mere handing over of the transparent file folder containing all personal belongings, all passports of the crew, licences and cash money of RM 1,500.00 accompanied with a nodding of the head does not per se constitute an offering of a bribe to PW3. The RM 1,500.00 could have been kept inside the said file folder for safe keeping along with the other documents. It would be a dangerous precedent to set that mere handing over a file folder containing all personal belongings, all passports of the crew, licences and cash money of RM 1,500.00 accompanied with a nodding of the head per se constituted an offering of a bribe. There has to be more."

The findings indicate that the prosecution had failed to prove the first ingredient of the offences preferred against the respondent as there seem to be a lack of evidence as to what amounts to a bribery act.

In relation to the second ingredient of the offence, the prosecution satisfied it as they could prove that Mohd Zahir bin Mohamad Basri was lieutenant of the Agensi

Penguatkuasaan MARITIM Malaysia, Sarawak at the time the incident took place. There were testimonials confirming that he is an agent of the principal. The respondent did not dispute this second ingredient of section 17 (b) of the MACCA which relates to bribery act in a principal-agent relationship.

Furthermore, "deception of principal by an agent can be seen under section 18[442] where it is an offence to give an agent or for an agent to use any account or document (when he or she has reason to believe the statement contains false or erroneous or defective material or information) to deceive or mislead the principal."

Section 18 has to be interpreted together with section 24 as the latter provides a penalty for offences under sections 16 to 18 and 20 to 22. In the case of Malaysian Anti-Corruption Commission v. Shahidan bin Bakar,[443] "The court charged the appellant for fifteen counts of the offence under section 18 of the MACCA on the basis that the appellant had knowingly used some documents which include the monthly travelling claims in 2009 for fifteen police personnel which came to RM 535.00 for each claim." "The court held that the appellant pleaded not guilty to the charges, and the court concludes that the appellant was guilty and convicted him under the relevant charges. The sentences were twelve (12) months imprisonment and a fine of Ringgit Malaysia one hundred and fifty thousand (RM 150,000.00) in default of such fine, seventy-five (75) months of imprisonment. It was held that the imprisonment sentences run simultaneously."

[442] *Malaysian Anti-Corruption Commission Act 2009,* s 18.
[443] [2016] AMEJ 1528.

"However, the appeal in this case was not allowed knowing the seriousness of the offence as it can be seen from the punishment imposed through section 24 of the MACCA and the fact that the appellant had deceived and betrayed his principle, i.e., the RMP by stating that they were to install air conditioners for the brass hall of IPK Sabah that the false travelling claims amounted to RM 8,025.00 (RM 535.00 x 15 charges), RM 80.00 each."

"Therefore, the appeal court decided that the charge was suitable, and it is arbitrary for them to interfere with the Sessions Court's judgement as the sentence is not heavy. The sentence was therefore executed in view of that."

Besides, section 18 can also be linked with section 52 of the MACCA where it provides a guideline relating to accomplices as well as agents involved in corrupt practices. The case which illustrates these sections is Public Prosecutor (SPRM) v. Robin ak Sabai[444] where "the respondent was then charged with 36 amended charges under section 18 for knowingly used with intent to deceive his principle, a document which has *Pesanan Kerajaan* which contained false material particulars."

The court put forth the following analysis:

> "The prosecution's case can be gleaned from the amended charge itself. Section 18 of the MACCA is in *pari materia* with section 11(c) of the Prevention of Corruption Act 1997 thus the prosecution has to prove the ingredients of the offence as per the amended charge as in the case of Public Prosecutor v. Yahaya Abdullah."[445]
>
> "Upon analysis, the appeal was dismissed on the basis that the respondent was not involved in the scheme to cheat the government.

[444] [2015] 9 MLJ 22.
[445] [1991] 1 CLJ 398.

There were attempts to implicate the respondent, but there was nothing to support their assertion that it was upon the respondent's instruction that they had prepared and submitted the documents for payments. The principle even mentioned the involvement of the respondent. Now the invoices were given by the respondent to them yet, had in evidence said that they had not given the Petracom and Sarena Enterprise invoices to anybody."

"A valid question that could be asked was who gave the Petracom and Sarena Enterprise invoices to the respondent, bearing in mind that these invoices were the very invoices that were submitted to support the payments paid to the accounts of Petracom and Sarena Enterprise. What was very clear was that they had testified that after receiving the payments from the government he would retain 5% and the balance he would pay to another person. It was also not in evidence that the payment to that person would be shared between the respondent and others."

"Another reason for dismissal is where a witness is an accomplice then his evidence would require corroboration. However, section 52(1) (a) (iii) does away with the need for corroboration. This section did not apply to the present case where the charge against the respondent was for the offence of intending to deceive the government under section 18 of the Act. Section 52(1) (a) (iii) referred to acts in relation to gratification. The prosecution's submission on this had no basis. The court was therefore correct in his finding that both were accomplices and their evidence would require corroboration which the court had found to be wanting."

The court found that the prosecution had failed to establish a prima facie case against the respondent on all the 36 amended charges.

The above case exemplifies the importance given by the Parliament in making the agents or accomplices responsible for the corrupt practices by virtue of sections 18 and 52. Through these sections, corrupt practices may be minimised with the agents or

accomplices being also prosecuted together with the principal. If this is not undertaken, corruption level will continue to be on the rise.

With regard to procurement of withdrawal of tender, section 20 makes it an offence to:[446]

> • offer any gratification to any person who has made a tender for a contract (with the intention to obtain from any public body a contract for work or service or supply of any goods) as an inducement or a reward for a withdrawal of a tender; or
> • solicit or accept any gratification as an inducement or a reward for a withdrawal of a tender.

Section 20 disapproves a person's act of withdrawing from a tender with the view of solely receiving gratification as well as a person giving gratification to encourage another to withdraw from the tender to give way to another party who has special privileges.

Moreover, through section 21, an officer of a public body can be charged under MACCA if:[447]

> -The offers to an officer of a public body any gratification as an inducement or reward for that officer to
> (a) vote or abstain from voting at any meeting in favour of or against any question submitted for approval by the public body; or
> (b) perform or abstain from performing or to assist in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

[446] *Malaysian Anti-Corruption Commission Act 2009*, s 20.
[447] *Malaysian Anti-Corruption Commission Act 2009,* s 21.

(c) assist in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
(d) show or forbear from showing any favour or disfavour in his capacity as an officer of a public body.

MACCA defines officer of a public body as "a member, an officer, an employee or a servant of a public body, a Member of Parliament or of a State Legislative Assembly or a judge of the High Court, Court of Appeal or Federal Court. This section also covers gratification matters relating to GLC.

MACCA also states that "it is an offence for officers of a public body to use their office or position for any gratification, whether for themselves, their relatives or associates by virtue of section 23."[448]

Presently, MACCA defines "relative as (a) a lineal ascendant or descendant of a spouse of the person; and (b) the uncle, aunt, cousin, son-in-law or daughter-in-law of the person."[449] Previously, the ACA 97 only covered the spouse of a person, or the brother or sister of a person or of the spouse of that person, or a lineal ascendant or descendant of a person as 'relative'.

On the other hand, an "associate" of a person consists of:[450]

(a) a nominee or an employee of such person;
(b) a person who manages the affairs of such person;
(c) an organisation or a corporation controlled by such person or his nominee; and

[448] *Malaysian Anti-Corruption Commission Act 2009,* s 23.
[449] *Malaysian Anti-Corruption Commission Act 2009,* s 23.
[450] *Malaysian Anti-Corruption Commission Act 2009,* s 23.

(d) a trust created by such person or a trust in which such person has contributed not less than 20% of the value of the assets of such trust.

In the case of Public Prosecutor v. Melan @ Suilin binti Jauyah,[451] the appellant was charged for the offence under section 23 (1) of the MACCA for using her position as the Headmaster of Sekolah Kebangsaan Menawo Keningau, Sabah to obtain gratification in the appointment of AIE Enterprise for the programme known as Rancangan Makanan Tambahan (RMT).

The appellant was found guilty on the basis that the appellant did not create a reasonable doubt on the prosecution case and therefore, she was sentenced to twelve (12) months imprisonment. The appellant made an application to appeal against both the conviction and sentence.

"From the court's observation, it is clear that the accused herself had participated in the supply of food for the RMT programme for 2011 and benefited from it in terms of monetary gains. Thus, the statutory presumption under section 23 of the Act which states that the accused had used her office for gratification was invoked against her."

Another case which has illustrated the application of section 23 is the case of Public Prosecutor v. Mohd Shabri bin Hassan.[452] In this case, "as a public official, DH41 rank under Higher Education Service Officer, Tuanku Sirajuddin as part of Department of Political Commerce, at Tuanku Syed Sirajuddin Polytechnic, Ulu Pauh, Perlis in Kangar District has misused his position by receiving bribe of RM 39,006.50 to approve the coursework given to his wife and brother-in-law's company SSN Dot Com

[451] [2016] AMEJ 1269.
[452] [2016] MLJU 1066.

and Resources Company. This indicates that he has committed an offence under section 23 (1) and punishable under section 24 of the same Act."

"Section 24 (1) of the MACCA provides the punishment under section 23 of the Act whereby apart from mandatory imprisonment sentence, the court shall impose a fine of not less than five times of the gratification where such gratification is capable of being valued or RM 10,000.00 whichever is the higher."

"Therefore, the court did not impose a sentence of fine in the punishment. The value of the gratification was uncertain although the appellant had to gain monetary advantage through the appointment. A fine of RM 10,000.00 would be appropriate and the imprisonment sentence of 12 months is maintained."

Similarly, section 22 relates to bribery offence committed by foreign public officials which were not included in the previous ACA 97. This provision is introduced to consider the UNCAC's provisions under the treaty. Section 22 reads as follows:[453]

> -A person commits an offence under this provision if, he by himself or by or with any other person gives, promises or offers, or agrees to give or offer, to any foreign public official ("FPO"), whether for the benefit of that FPO or of another person, any gratification as an inducement or reward for the FPO to:
> (a) use his position to influence any act or decision of the foreign state or public international organisation for which the FPO performs any official duty; or
> (b) do or forbear from doing, or assist in procuring, expediting, delaying, hindering or preventing the performance of any of his official duties; or

[453] *Malaysian Anti-Corruption Commission Act 2009*, s 22.

(c) assist in procuring or preventing the granting of any contract for the benefit of any person.

Section 2 defines an FPO as a person who: "(a) holds a legislative, executive, administrative or judicial office of a foreign country; or (b) exercises a public function for a foreign country; or (c) is authorised by a public international organisation to act on behalf of that organisation."

Section 22 also "makes it an offence to solicit, accept or obtain or agree to accept or attempt to obtain by the FPO for the benefit of himself or of another person on any of the grounds above."[454]

Section 22 illustrates that local and foreign public officials are treated equally as it is also an offence for the FPO to be involved in receiving or giving gratification. This section is sufficient in punishing an FPO if there are abuse of powers conferred upon him by the international organisations.

Moreover, "it is equally an offence for any person to attempt or to do any act preparatory to or in furtherance of the commission of any offence or abet or engage in a criminal conspiracy to commit any offence under the MACCA." This is provided under section 28 of the Act.

However, if a person fails to make a report of bribery to the MACC or the police, "he can be punished by a fine not exceeding 10,000 ringgit or imprisonment not exceeding

[454] *Malaysian Anti-Corruption Commission Act 2009*, s 22.

two years, or both. Section 25 stipulates this penalty." The application of this section is best illustrated in the case of Md Ezam Md Daimon v. Amona Building Management Services Sdn Bhd[455] where the claimant was appointed as a Manager at the respondent's company. The claimant has been suspended by the respondent for 14 days, and the suspension has been continuous. Then the respondents have issued a notice that informs the claimant of the domestic inquiry to be held. The domestic inquiry was executed, and the claimant was charged with the charges brought against him and was his job was terminated immediately. The claimant puts forth an argument that his dismissal has been an unjust one."

"The issue with regard to section 25 (1) is that the claimant has stated and submitted a written statement indicating that they paid the monies to the nominee specified on the cash voucher and used the other amount as his allowance. The claimant states that he made the payment on behalf of the respondent. Claimant's evidence that payments made to government agencies are also on the respondents' instructions."

However, in this case, it is understood that the money given is 'under table'. In other words, it is something that is made unlawfully. Therefore, "according to the claimant, no official receipt was issued. In this context, the provisions under the MACCA which require that a report is made on any non-missed strike transaction is considered. These provisions have placed responsibility on the claimant to report on such payments if he finds it a bribery transaction under the MACCA. Hence, the claimant's responsibility to comply with the company's directives should be viewed in the legal perspective of the stated under the MACCA."

[455] [2011] 2 ILR 69.

4.3.4.2 Evidence

Section 50 provides a presumption in certain offences, and the section reads as follows[456]:

> (1) Where in any proceedings against any person for an offence under sections 16 , 17 , 18 , 20 , 21 , 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

Section 50 demonstrates the significance of presumption of intention for corruption cases. In any case of giving or receiving, be it promises or for real, the acts are automatically considered as corrupted. However, sufficient evidence is necessary if there is a need to prove that it is not a corrupt practice but an act of good faith.

In the case of Public Prosecutor v. Muhammad Firdaus Bin Mohd Ramli & Anor,[457] the key issue was whether the court made a mistake in concluding that the presumption under section 50 (1) of the MACCA had been rebutted. In this context, this case involves an appeal made by the Public Prosecutor against the decision of the lower court to acquit the first and second respondents of a charge via sections 16 (a) of the MACCA. The respondents were jointly charged as they received a bribe of RM80,

[456] *Malaysian Anti-Corruption Commission Act 2009,* s 50.
[457] [2018] AMEJ 0024.

000.00 from the complainant in return of an arrangement to be made for the complainant's company under a project through the Elections Commission.

The summary of the case is as follows:

> "At the end of the prosecution's case, the Sessions Judge found that the prosecution had led two sets of conflicting evidence through two witnesses on a question of crucial importance in the case. The Sessions Judge, therefore, found that the presumption under section 50(1) of the MACCA that kicked in upon proof that the RM80, 000.00 had been received by the respondents, was rebutted by witness evidence.
>
> It was said that by virtue of section 50 of the MACCA, "there was no duty on the prosecution to establish anything more than the payment of money to the respondents to warrant the defence being called. It is also clear from section 50 that once the prosecution established that gratification in any form cash or kind had been paid or accepted by a public servant, the Court is required to presume that the said gratification was paid or accepted as a motive or reward to do (or forbear from doing) any official act. However, it is a trite law that statutory presumptions raised during the prosecution case may be rebutted during the prosecution case itself."

By the same token, the case of Public Prosecutor v. Mohamad Nazri bin Daheri[458] also raised the issue under section 50. In this case, "the appellant was accused of three charges under section 17 (a) for soliciting gratification to wit, money from one Stephen Kon as an inducement to give protection to him if he carries out illegal timber logging activities."

[458] [2018] 2 AMR 445.

Again, similar to Firdaus' case, the fundamental issue raised by the court is whether presumption under section 50 (1) was initiated. Under section 50 of the MACCA, a respondent is required to prove three ingredients and here, the respondent was required to prove that the appellant had accepted gratification, and during the time of accepting gratification, the appellant was an agent, i.e., an officer of the RMP and that the gratification was accepted by the appellant as inducement for forbearing to do an act in relation to his principal's affairs to wit, giving protection to witness who had allegedly committed an offence of illegal timber logging, and therefore, the appellant shall be presumed to have accepted the gratification corruptly unless the contrary is proven.

The respondent proved the following:

> "The respondent had proved the first ingredient of the amended three charges against the appellant. With regard to the second ingredient of the three amended charges, the appellant was, in fact, an agent, i.e. an officer of the PDRM and this was never disputed or challenged by the appellant. As regards the third ingredient and based on the evidence, the appellant did accept the gratification of giving protection to the witness who had allegedly committed the offence of illegal timber logging.
>
> On the evidence adduced, the third ingredient had also been proven. In the circumstances and since the first and second ingredients have been proven, the appellant shall be presumed under s 50(1) of the Act to have accepted the said gratifications corruptly from the witness. As was laid down in Attan b Abdul Gani v PP [1970] 2 MLJ 143, the burden is on the appellant to rebut the said presumption by offering an explanation that is." It was reasonably sufficient to invite belief in its probable truthfulness" and which, the appellant has failed to do."

From the above, this appeal court had concluded that the lower court's decision was not wrong, and the court took into account all relevant evidence and factors adequately which comprised of the appellant's mitigation factors even before deciding on the sentence. It is noted that the trial judge in this case also took account of the public interest and deterrence as the aim of sentencing in this case. In relation to the appellant's sentence, this court held that the sentence imposed was fair and just and was in line with sections 17 (a) and 24 of the MACCA.

4.3.4.3 General Provisions

Similar to AMLATFPUAA, section 66 of the MACCA[459] has extra-territorial effect where Malaysians undertaking corrupt practices in other places than Malaysia shall be considered to be committed in Malaysia. Under subsection 2, it shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.[460]

Apart from section 66, section 26 also gives an extra-territorial effect where it is an offence for a person to conceal, use, deal, hold or receive gratification or illegally acquired assets other places than Malaysia.[461] The punishment for this offence shall be a fine not exceeding RM 50,000 or imprisonment not exceeding seven years or both. Upon the proving of the offence, the burden is reversed, and the accused has to prove that he did not exercise the corrupt practice, i.e., the gratification. The punishment for corruption is imprisonment exceeding 20 years and a fine of not less than five times the sum or value of the gratification that is the subject matter of the offence, where the

[459] *Malaysian Anti-Corruption Commission Act 2009*, s 66.
[460] *Malaysian Anti-Corruption Commission Act 2009*, s 66.
[461] *Malaysian Anti-Corruption Commission Act 2009,* s 26.

gratification is capable of being valued or is of a pecuniary nature, or RM 10,000, whichever is higher.

With regard to freezing and seizure, section 31 of the MACCA provides the enforcers with the power to search and seize. The section reads as follows:

> a. Whenever it appears to the Public Prosecutor or an officer of the Commission of the rank of Chief Senior Assistant Commissioner or above as authorized by the Public Prosecutor upon information, and after such inquiry as he thinks necessary, that there is reasonable cause to suspect that in any place there is any evidence of the commission of an offence under this Act, he may by written order direct an officer of the Commission to – (a) enter any premises and there search for, seize and take possession of, any book, document, record, account or data, or other article; (b) inspect, make copies of, or take extracts from, any book, document, record, account or data; (c) search any person who is in or on such premises, and for the purpose of such search detain such person and remove him to such place as may be necessary to facilitate such search, and seize and detain any article found on such search; (d) break open, examine, and search any article, container or receptacle; or (e) stop, search, and seize any conveyance.
>
> b. Whenever it is necessary so to do, an officer of the Commission exercising any power under subsection (1) may –
>
> (a) break open any outer or inner door or window of any premises and enter thereinto, or otherwise forcibly enter the premises and every part thereof;
>
> (b) remove by force any obstruction to such entry, search, seizure or removal as he is empowered to effect; or
>
> (c) detain any person found in or on any such premises, or in any conveyance, searched under subsection (1), until such premises or conveyance has been searched.

c. Whenever it appears to an officer of the Commission that there is reasonable cause to suspect that there is concealed or deposited in any place any evidence of the commission of any offence under this Act and such officer has reasonable grounds for believing that, by reason of delay in obtaining a written order of the Public Prosecutor or an officer of the Commission of the rank of Chief Senior Assistant Commissioner or above under subsection (1), the object of the search is likely to be frustrated, he may exercise in and in respect of such place, all the powers mentioned in subsections (1) and (2) as if he was directed to do so by an order issued under subsection (1).

d. No person shall be searched under this section except by a person who is of the same gender as the person to be searched.

From the above, it is noted that tracing, search and seizure are regulated by the MACCA through section 31. This section allows the enforcers to carry out search and seizure based on suspicion as the suspects may not be able to disguise the evidence relating to the corrupt practices with the enforcers acting quick in searching and seizing relevant evidence. MACCA does not have any specific provisions relating to freezing. However, section 37 could be utilised for freezing but limited to movable property and monetary instruments. Section 37 may not cover all types of cases as it has limited applications. Apart from section 31, MACCA also has provisions relating to the seizure of movable and immovable property through sections 33 and 38 respectively.

"The reviewing experts are of the opinion that Malaysia has not implemented the provisions. No regulations with regard to transformed or converted property exist. Currently, only section 40 of the MACCA and section 55 of the AMLATFPUAA regulate forfeiture cases and address the possibility of forfeiting the equivalent value of property in cases where the property has been disposed of or cannot be traced. The

reviewing experts recommend including such provisions in MACCA and AMLATFPUAA."

4.4 Forfeiture provisions under the MACCA

Similar to AMLATFPUAA, MACCA also has instruments accessible for enforcers when circumstances call for forfeiture of property or criminal proceeds. In this context, MACCA has powers to forfeit a person's property during an investigation where the key aim is to take away criminal benefits from corrupt persons. The forfeiture of criminal proceeds and property is contained under section 40 of the MACCA. The section reads as follows[462]:

> (1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-
>
> a) the offence is proved against the accused; or
>
> b) the offence is not proved against the accused, but the court is satisfied-
>
> i) that the accused is not the true and rightful owner of such property; and
>
> ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.
>
> (2) Where the offence is proved against the accused, but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as penalty a sum which is equivalent to the amount of the gratification or is, is in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

[462] *Malaysian Anti-Corruption Commission Act 2009,* s 40.

It must be noted that section 40 of the MACCA regulates the forfeiture of proceeds of crime, property, equipment or other instrumentalities used. This section covers both circumstances where the case is proved and non-proved, based on reasonable grounds of suspicion according to subsections 1 (a) and (b). However, if the property is not found, the accused may be fined based on the amount received as gratification. Previously, section 36 of the ACA 97 provided provisions for forfeiture.

Section 40 is in line with Article 31 of the UNCAC for freezing, seizure, and confiscation which reads as follows:

> 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
> (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

The forfeiture of proceeds of crime on convicting a person for an offence formed is in line with the Convention. It also involves forfeiture in instances where there are no prosecution or conviction. This is where the enforcers do not have sufficient evidence to prosecute the suspects even though the proceeds seized are from corruption. Therefore, the prosecution may submit for forfeiture in lieu of prosecution. Subparagraph 1 (b) provides that properties, equipment and also other instrumentalities relating to corruption can also be forfeited.

The application of section 40 was illustrated in the recent case of Public Prosecutor v. Rahmat Bin Abdullah & Anor[463] where "using the evidence collected, the car was clearly proven to have been purchased as a result of the proceeds of the cash cheque of RM 45,000.00. The car, therefore, was undoubtedly a property that was demonstrated to be the subject matter of an offence or to have been used in the commission of an offence within the ambit of section 40 (1) of the MACCA."

The court concluded that:

> "It is also artificial to separate the sum of money given, i.e. the sum of RM 45,000.00 from the purchase of the car itself as they are part and parcel of the same transaction. To put it another way, if the sum of RM 45,000.00 had not been accepted, the purchase of the car would not have taken place. As an offence was clearly also proven against the Respondent in the main appeal, this also fulfilled the condition under paragraph (a) to section 40 (1). Under all the circumstances, therefore, there was sufficient evidence that the car ought to have been forfeited."

Similarly, in the case of Public Prosecutor v. Mohd Khir bin Toyo[464], section 36 of the ACA 97 was applied. "Mohamad Khir, in this case, was in possession of full value of land and a house that was worth at least RM 5 million, and that his payment of RM 3.5 million was insufficient to be considered as full payment." Mohamad Khir had also "accepted a valuable thing" for him and his wife through the land transfer by paying a sum which he knew to be "inadequate." It was submitted that the requirements under section 36 (1) of the ACA 97 had been fulfilled. However, as to whether the subject of

[463] [2017] 1 LNS 741.
[464] [2015] AMEJ 1394.

forfeiture should be the difference between the value and the consideration paid, it was stated that the whole of the subject matter should be forfeited."

With regard to the standard of procedure for the MACCA when it comes to forfeiture, the second respondent[465] said:

> *If we wait for people to come to us, there may be hardly any cases. Most of the tasks done here are by surveillance. MACC has to make proactive actions such as looking for suspicious activities through STR from the BNM. Upon receiving the information, we will supervise these individuals. If we think we have a case to move on with these individuals, we will either write an IP or start a surveillance to get more information. Another issue, in terms of prosecution, we will urge the agencies to send IPs to us. Without IPs, there cannot be any prosecution. We have to ensure that there is sufficient evidence to charge a person that we do it our best level to bring him to courts and forfeit the proceeds.*

It is essential to note that the MACCA has exclusive provisions relating to forfeiture but not provisions with regard to the handling of frozen or seized assets. A bill is being drafted in line with the need of having a proper procedure for the administration of froze or seized assets before any forfeiture is done. This is crucial as prior to a forfeiture order, the enforcers should, by right, freeze or seize the assets before the suspects get away with those assets. "Currently, the administration of confiscated property is only regulated by Standard Operating Procedures, and every agency is responsible for the administration of such property." Hence, it is urged that provisions

[465] Officer of the MACC.

relating to the management of frozen or seized assets are to be included under the MACCA.[466]

Apart from section 40, MACCA also permits civil forfeiture where no conviction or prosecution is needed. The following is section 41 in its original words[467]:

> (1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence in this Act.

It is understood that section 41 supports the new civil forfeiture regime. This is applied as the properties or proceeds can be taken away without any conviction and thus, halting the entire network of the corrupt practices. Section 41 is also in line with Article 31 of the UNCAC which strongly encourages enforcers to apply for civil forfeiture as one of the tools to deprive benefits from the criminals.

The benefits of forfeiture are also strongly acknowledged by Malaysian legal enforcers, and the second respondent also commented that:

> *"To forfeit is to take away the properties or proceeds from the criminals. If we take away their benefits or valuables from them, they cannot be operating, and we also cripple their activities through freezing of properties and accounts."*

[466] UNODC Country Review Report, Malaysia, 7.
[467] *Malaysian Anti-Corruption Commission Act 2009*, s 41.

In addition, the provisions under section 41 are similar to the old section 37 of the ACA 97. The application of this section is seen in the case of Public Prosecutor v. Mohd. Shahrul Hisyam Sakri.[468] In this case, the public prosecutor or respondent with three isolated applications against the appellants had applied for forfeiture orders to the court to forfeit certain seized property under section 37 (3) (a) of the ACA 97.

The prosecution made these applications on the basis that under an investigation of a case in which the respondent was satisfied that the money seized from the appellants pertained to the offence of corruption under section 11 (b) of the MACC i.e., the offence of giving or agreeing to accept gratification. However, in return, the appellants submitted show cause affidavits providing reasons for the court not to make any forfeiture orders for the properties.

After careful considerations, both the respondent's and appellants' affidavit filed by and also, the submissions made concluded that each appellant had failed to discharge the burden of proof placed upon them. "The appellants did not provide satisfactory justifications as to why the seized monies should not be forfeited to the Government." For that reason, the prosecution case for appeal was approved. "Counsel for the appellants submitted that the respondent's failure to file an affidavit-in-reply to refute the assertions in the appellants' affidavits meant admission to the contents of said affidavits."

[468] [2010] 4 CLJ 760.

The appeal was dismissed by Zaleha Zahari JCA on the basis that:

> (1) The respondent was obliged to file an affidavit-in-reply if the matter raised was within the respondent's knowledge. If the matter raised was not within the respondent's knowledge, the respondent need not reply, and such failure would not amount to an admission of the matter adduced in the affidavits in question. It fell to the court to appraise and consider the matter adduced in reaching its decision. The word- "satisfied" in the context of an application like this was a question of fact and subjective consideration.
>
> (2) It was clear in the pleaded cases that the JC had given due and careful consideration of the respondent's case and the appellants' explanation and the documents adduced. The appellants' explanation that the money seized from them was personal money without any supporting proof was insufficient to discharge the obligation placed upon them explaining why the seized money should not be forfeited. The JC did not err when deciding to distrust the explanation given by the appellants. There was no misdirection or misreading of the evidence adduced. Therefore, it was inappropriate for the court in the appellate stage to interfere with the findings of the said decision. The JC had exercised his discretion correctly when he allowed the respondent's applications, and his findings should not be disturbed.

It must be noted with the cases discussed that for forfeiture orders to be made, the courts must make a careful and rigorous analysis as to the reasons for forfeiting monies or properties with proper and reasonable grounds that the monies or properties are from unlawful activities. Section 41 does not require any conviction or prosecution. It may give room for judges to be erred in law as the monies or properties may not necessarily be from unlawful activities. Hence, the courts must be meticulous in making orders for forfeiture.

4.5 Conclusion

These days, the global community faces challenges in fighting against corruption as one of the serious offences. As analysed, Malaysia continuously takes effort in establishing a framework to combat corruption. Anti-Corruption Act 1967 was first enacted specifically in the view to combat corrupt practices. Before 1967, there was no proper legal framework to combat corruption, and the police were in charge of investigating corruption cases. As time passes by, more stringent and specific laws were needed in fighting against this offence, and that is where the MACC was established through the MACCA to handle and investigate corruption cases in Malaysia independently.

The establishment of the MACC as a single entity to fight corruption and the enactment of the MACCA have fulfilled the community's hopes in having an independent and impartial body in overseeing corrupt practices. These ensure transparency and answerability in handling corruption cases in Malaysia. MACCA is reflected as an all-inclusive Act which covers all possible ranges of corrupt acts committed locally and outside Malaysia.

In effort to combat corruption, Malaysia has also constantly take into account international convention relating to corruption such as UNCAC. Anti-corruption laws are implemented in line with the Articles of the Convention. This indicates that the framework in fighting against corruption in Malaysia is considered as a well-established one with international initiatives being incorporated.

As corruption involves corrupt practices and abuse of powers relating to properties as well as retaining the proceeds of crimes, MACCA has, to a certain extent, powers and capabilities in forfeiting, freezing and confiscating through sections 40 and 41 of the 2009 Act. Key factors in corrupt practices are said to be money and properties. Hence, it is the responsibility of the commission to forfeit monies and properties to halt the entire process of corruption. Without forfeiture, the corrupt would continue to commit this serious offence as money and properties are the motivating factors.

CHAPTER FIVE

A COMPARATIVE ANALYSIS OF FORFEITURE PROVISIONS BETWEEN AMLATFPUAA AND MACCA

" Corruption is like a ball of snow, once it's set a rolling it must increase."

– Charles Cateb Colton.

5.1 Introduction

In this chapter, the researcher aims to analyse the forfeiture provisions of the AMLATFPUAA and the MACCA respectively. The researcher investigates on their strengths and weaknesses as well as the adequacy of the provisions within these laws in tracing and forfeiting criminal proceeds for corruption. The researcher also strives to analyse the perception of legal enforcers in using the current AML law, especially forfeiture to combat corruption. This chapter is written to answer the third research question and achieve the third research objective of this study.

It is a known fact that crimes such as money laundering and corruption can intimidate the strategy, political and economic regimes of both developed and developing countries. Society's confidence on their governments' ability to put the criminals behind bars may be lower. Laws are formed to overcome the effects of the crimes, and AMLATFPUAA and MACCA exist mainly to combat money laundering and corruption respectively in Malaysia.

With both legislations containing forfeiture provisions, the similarities and differences between them are identified and analysed. In this context, the offences, standard of proof, civil forfeiture, as well as the problems faced by legal enforcers in applying these provisions are the basis of comparisons. Alongside forfeiture provisions, freezing and seizure provisions are identified under both legislations, and they are also analysed.

On the same note, the researcher suggests utilising AML law as a mechanism to combat corruption in Malaysia by taking into account the perceptions of legal enforcers through interview sessions. This method is chosen by the researcher to reflect the readiness of legal enforcers in using forfeiture provisions under the AMLATFPUAA to fight against corruption in Malaysia.

5.2 The Legal Framework of Forfeiture in Malaysia

As discussed in chapter three, forfeiture provisions were mainly under AMLA which was enacted in 2001. It was then amended in 2003 to include terrorism financing and renamed as AMLATFPUAA. In 2014, it was further revised and redesignated as AMLATFPUAA to take into account proceeds of unlawful activities. This framework was established in line with the FATF Recommendations and the United Nations Convention.

To summarise, AMLATFPUAA's forfeiture provisions are divided into two: criminal forfeiture under section 55 and civil forfeiture under section 56. There are differences between these forfeiture provisions, and they are: the prosecution of the suspect and

time limit for forfeiture. However, these two types are only ordered by the court if there are established offence (s) under section 4 of the Act.

It is understood that civil forfeiture is a new regime where applications are made to recover losses if there is no strong evidence to prosecute the defendants for crimes committed. It is also known as forfeiture without conviction. The fundamental aim of civil forfeiture is not to punish criminals but to take away their benefits from the crime committed without prosecution. It is peculiar and different from criminal forfeiture where punishment is not the main aim.

Civil forfeiture is also different from confiscation in that the latter involves the state of the proceeds of the crime. In this context, the proceeds subject to confiscation have to be related to a criminal offence and not a direct result from such an offence and the confiscation, regardless of whether it is a penalty or a measure, always results in the final deprivation of the property.[469]

The property of the criminals is the only target under civil forfeiture. It affects the property but not the penal code application. Without a doubt, civil forfeiture includes a suppressive state measure, which carries the element of a sanction. It relates to public law principles where the State has absolute power. "Civil forfeiture is not punishment under the punitive system envisaged in the Criminal Code of any one of the countries in question. It is a specific, adverse consequence for a committed crime or another unlawful act which differs from criminal forfeiture imposed by a criminal court."[470]

[469] Nikolay Nikolov, "General characteristics of civil forfeiture," *Journal of Money Laundering Control* 14, no.1 (2011):16.
[470] Nikolov, "General Characteristics," 17.

In theory, civil forfeiture is considered as a new form of public law tool to punish the offender. It is also a novel criminal and administrative law proceedings which have substantive and procedural standards. Concurrently, it also takes into account the civil procedure, criminal, tax, customs and commercial law.[471]

5.3 Comparative Analysis

The researcher analyses the forfeiture provisions between AMLATFPUAA and MACCA comparatively in terms of offences covered, standard of proof and freezing provisions, regulatory bodies, and their challenges. This comparative analysis shall be seen as follows:

5.3.1 Offences Covered

Under AMLATFPUAA, it is noteworthy that section 4 of the Act provides the ambit of money laundering offences where any person who engages or attempts to participate in money laundering activities is deemed to have committed an offence. A person may be charged for money laundering alongside another conviction. Section 3 clearly defines money laundering as previously been discussed in chapter three. Sections 3 and 4 of the AMLATFPUAA are to be read together with all provisions under Part VI of the Act which relates to forfeiture.

To reiterate, these are the following words of sections 3 and 4 of the AMLATFPUAA. The former defines money laundering while the latter sets the ambit of money laundering offences as mentioned:

[471] Nikolov, "General Characteristics," 17.

Section 3:
money laundering offence" means an offence under subsection 4 (1).

Section 4:
(1) Any person who—

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence, commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

(2) For the purposes of subsection (1), it may be inferred from any objective factual circumstances that—

(a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or

(b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

(3) For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

(4) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious

> offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

While on the other hand, MACCA has similar but limited forfeiture provisions under sections 40 and 41. Under these provisions, a forfeiture can be made if the court is satisfied that the offence is proved or if the court believes that the accused is not the actual owner of the property. Section 41 relates to civil forfeiture of property. It is essential to note that these provisions are only related to forfeiture of property acquired. However, AMLATFPUAA has a more specific explanation on money laundering offences which applies to forfeiture provisions. In view of thoroughness, AMLATFPUAA clearly leads as it now covers many grounds of money laundering offences which include proceeds of unlawful activities.

AMLATFPUAA is comprehensible in its own manner. It catches all acts which relate to money laundering and hence, the application to forfeit criminal proceeds. Although comparable, it must be implicit that they were enacted based on the nature of each Act and they work on their strengths and weaknesses in their own rights. Legal enforcement for both Acts has to be innovative and focused into amendments of the forfeiture provisions to accommodate possible acts which may come under the regime of corruption. Forfeiture of illicit proceeds can only be applied once it has been determined that an act is an unlawful one and corruption falls under the definition given by the AMLATFPUAA. This is illustrated through Second Schedule of the AMLATFPUAA where offences under sections 16 to 23, sections 26 and 28 of the MACCA are included as serious offences.

Based on the comparisons made, it can be firmly said that forfeiture provisions under the AMLATFPUAA are stronger than the MACCA as the enforcers can proceed to apply these provisions based on suspicions. It is sufficient if they find that the suspect possesses proceeds or properties relating to corruption which is one of the predicate offences under the AMLATFPUAA. This is a powerful law to catch the ill-gotten gains before suspects escape with those proceeds or properties.

Therefore, it is sturdily encouraged that forfeiture under the AMLATFPUAA should be used regularly to forfeit proceeds or properties in Malaysia as suspicion is the triggering factor in commencing with the search of criminal proceeds or properties relating to corruption. Provisions of forfeiture under the AMLATFPUAA have a solid basis in fighting corruption.

5.3.2 Standard of Proof

As the standard of proof for criminal forfeiture does not allow the prosecutors to forfeit criminal proceeds effortlessly due to the high standard of proof, it is the new regime-civil forfeiture which rescues or mitigates the burden of prosecutors in successfully forfeiting criminal proceeds from money laundering.

Similarly, section 56 (1) also allows prosecutors to opt for civil forfeiture when there is no prosecution, and the standard of proof is provided under subsection (4). Similar to MACCA, it is given as an alternative for forfeiture under criminal proceedings. Civil forfeiture is considered a new regime which is applied for money laundering offences. The effect of the lower standard of proof under the AMLATFPUAA is where it gives the enforcers the tool to suspect criminals for money laundering and corruption as only

reasonable suspicion is needed to commence with their investigations which includes forfeiture of the criminal proceeds. Hence, the lower standard of proof is considered to be an advantage for AMLATFPUAA as compared to MACCA.

However, the issue of lower standard of proof was pointed out in the Mutual Evaluation Report 2015 as follows:[472]

> Authorities consistently expressed the view that recovering property was more effective than prosecution in dissuading criminal activity. This was based on (a) belief that confiscation has more of a deterrent effect than prosecution and (b) because the standard of proof is lower for property recovery so AGC is more likely to be successful in property recovery (especially where the evidence for a prosecution is weak). Point (a) is not consistent with the FATF standards, and Malaysian authorities did not demonstrate any unique circumstances as to why this would be the case in Malaysia. In fact, members of the judiciary noted that recovery of property was not having as much of a deterrent effect as the prosecution. In relation point (a), confiscation indeed may be more dissuasive in cases where the evidence is insufficient to prosecute. However, Malaysian authorities appear to have adopted this as a regular practice in lieu of pursuing ML prosecutions. This presumes that prosecution and confiscation are mutually exclusive and authorities should choose one over the other, which is also inconsistent with the FATF methodology. It essentially allows criminals to pay their way out of crime and never face any criminal punishment.

In addition, MACC should make full use of sections 55 and 56 of the AMLATFPUAA which are essential in allowing a *bona fide* third party to make a claim if he has interest in the property through section 61. However, the burden is on the claimant to prove

[472] APG Mutual Evaluation 2015, 55.

that there is a valid interest, no link to the laundering activities, no consent given to the illegal use of the property, no rights acquired from the suspect relating to the property and the claimant took effort in preventing the illegal activity.

5.3.3 Freezing Provisions

Apart from forfeiture provisions, freezing of property before seizure and forfeiture orders is one of the most prevailing provisions of the AMLATFPUAA. Through section 44, property or other things related to the crime could be frozen up to eighteen months and it will not expire if the person is charged. This section stops the said person from handling the property anymore unless the circumstance falls under section 44 (3) (b). While freezing has been ordered by the court, the person may not be allowed to travel out of Malaysia.

Part V of the MACCA deals with provisions relating to the investigation, search, seizure, and arrest. Unlike AMLATFPUAA, there is no specific provisions relating to freezing although the legal enforcers have some powers to freeze property acquired through corrupt practices up to nine months[473] which allows AMLATFPUAA to be in a better position than MACCA. The freezing period is longer under the AMLATFPUAA, and the researcher is of the opinion that the longer the freezing period is, the less likely that the property would be disposed, and investigation can be carried out without any disruption.

[473] Bernama, "MACC to freeze, seize and forfeit ill-gotten wealth from corruption," *New Straits Times August 14, 2016,* accessed 15, January 2018, https://www.nst.com.my/news/2016/08/165398/macc-freeze-seize-and-forfeit-ill-gotten-wealth-corruption.

It must be mentioned that the court would not review the freezing order under section 44. It was illustrated in the case of Khor Peng Chai & Ors v. Bank Negara Malaysia and Anor[474] and Mohd Zawawi Salleh J noted that:

> The purpose of section 44 is to assist in an investigation where there are reasonable grounds to suspect that a money laundering offence has been or is being or is about to be committed. As such, the court will not interfere with the enforcement authority, as it could jeopardise the investigation process.

Moving on to seizure procedure, sections 45 to 54 of the AMLATFPUAA provide the provisions for seizure. The procedure of seizure is divided into the movable and immovable property and also, whether it is a financial or non-financial institution. Movable properties can be seized through section 45 where the investigation officer may obtain the seizure order if there are reasonable grounds to believe that the property is acquired through the commission of unlawful activities.

Similar to section 45 of the AMLATFPUAA, sections 33 and 34 of the MACCA relate to seizure provisions. AMLATFPUAA excludes financial institution's properties to be seized under section 45 while section 33 of the MACCA does not state any exclusion specifically. The procedure for seizure of movable property is set out under section 46 of the AMLATFPUAA. Under this section, the investigation officer takes over the seized property and shall keep it under his supervision only if it is practical. A similar procedure is set out under section 34 of the MACCA.

[474] [2011] 1 LNS 216.

However, AMLATFPUAA has a special provision relating to the seizure of movable property of financial institutions under section 50 which MACCA trails. This section is another ground-breaking tool enacted by AMLATFPUAA. Through section 50, the investigation officer is allowed to seize movable property which includes monetary instruments that relate to the laundering of money by the institution.

It is also essential to take note that the court would not review any decisions relating to section 50 (1) for seizure order. In the case of City Growth Sdn Bhd & Anor v. The Government of Malaysia[475], there was an order made by the applicants in this case to quash the order which was made against their accounts. Section 50 (1) of the AMLATFPUAA was relevant to their case. The key issue identified here was judicial review can be made for section 50 (1). As such, the court decided to reject the application and stated that section 50 (1) is not reviewable. The prosecutor was only doing his job, and there were no proper grounds for the court to interfere with the decisions made.

Raus Sharif J, at p. 424 noted:

> Looking at the order of the Deputy Public Prosecutor as well as the provision of section 50 (1) of AMLA, I am of the view that the order of the Deputy Public Prosecutor is not reviewable under O.53 of the [Rules of High Court]. To me, s.50 (1) of AMLA is part and parcel of the investigation process into an offence under s.4 (1) of AMLA. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s.50(1) of AMLA was enacted to enable the Public Prosecutor or his

[475] [2005] 7 CLJ 422.

> Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders, the Deputy Public Prosecutor was merely exercising a function under AMLA."

As section 50 is a specific provision, legal enforcers in MACC should utilise AML law to combat corruption, and the researcher urges that they should expand their regime to investigate financial institutions which are corrupt.

Besides, AMLATFPUAA and MACCA have similar provisions that look into the seizure of immovable property through sections 51 and 38 respectively. However, there are a few differences which put AMLATFPUAA ahead of the MACCA. Firstly, section 51 sets out four specific circumstances which may allow the public prosecutor to seize the immovable property which is identical to provisions under section 45 of the AMLATFPUAA and secondly, the punishment for non-compliance of a seizure order under section 51 is stricter than section 38. Under the AMLATFPUAA, the fine is not exceeding five times the value of the property or five million or imprisonment not exceeding seven years or both while MACCA only imposes a fine of twice the value of the property or fifty thousand ringgit or imprisonment not exceeding two years.

Another noteworthy innovative tool formed under the AMLATFPUAA is section 52 which allows seizing of a business run by a person who is prosecuted under AMLATFPUAA. Through this section, an enforcement agency is authorised to make

seizure orders relating to the business activities and their office. This section is another advantage which AMLATFPUAA has over MACCA as it provides explicitly a provision pertaining to the seizure of a business.

In Malaysia, "the Attorney General's Annual Report of 2010-2011 reported that twenty-six (26) civil forfeiture cases were filed under the AMLATFPUAA and out of 26; twenty-one (21) cases were successful. The total amount of monies that were forfeited to the Federal Government of Malaysia was RM 9,165,304.46. Despite monies, properties such as vehicles and houses were also forfeited. These imply that the rate of success for civil forfeiture cases in Malaysia is considerably high as civil forfeiture regime is newly introduced into the jurisdiction."

AMLATFPUAA's forfeiture provisions are primarily being used for fraud cases, although there have been some non-conviction based forfeitures for other types of offences, including small amounts for corruption, tax, smuggling, kidnapping and illicit arms trafficking. Forfeiture in relation to drugs, smuggling and corruption, are primarily done under DDFP, Customs Act, and MACCA respectively. Table 5.0 shows yearly forfeited figures by types of forfeiture:

Table 4.0 : Forfeited Figures

	2009	2010	2011	2012	2013
AMLA (Fraud RM50M; Tax RM0.8M; Corruption RM0.7M; Smuggling RM0.4M); Others RM6.1M)	RM 36.8M (USD 11M)	RM 15.7M (USD 4.7M)	RM 3.5M (USD 1M)	RM 1.3M (USD 0.4M)	RM 0.2M (USD 0.6M)
MACCA (Corruption)	RM 1.4M (USD 0.4M)	RM 0.2M (USD 0.06M)	RM 0.3M (USD 0.09M)	RM 2.5M (USD 0.7M)	RM 1.4M (USD 0.4M)
DDFP (Drugs-Administrative Forfeiture	RM 10.3M (USD 3M)	RM 8.3M (USD2.5M)	RM 15.8M (USD 4.7M)	RM 12.4M (USD 3.7M)	RM 6.8M (USD 2M)
Customs Act (Smuggling-Forfeiture)	Not available	Not available	RM 54.7M (USD 16.3M)	RM 61.7M (USD 18.4M)	RM 52.6M (USD 15.7M)

Source: adapted from FATF and APG, Mutual Evaluation Report 2015[476]

Based on table 4.0, for corruption, "while RM 87.6M was seized during 2009-2013, only RM 6.6M and two properties have been forfeited under the MACCA– though some cases are pending. While confiscation values have been low, some cases have been significant. Nevertheless, generally, the corruption-related forfeiture to medium or low-level corruption and low values were forfeited."[477]

[476] "Legal systems and operational issues in Anti-money laundering and counter-terrorist financing measures - Malaysia," FATF and APG, accessed October 15, 2017, www.fatf-gafi.org/publications/mutualevaluations/documents/mer-malaysia-2015.html.

[477] APG Mutual Evaluation Report 2015, 65.

"There was also RM 55.6M fines imposed under the MACCA during 2009-2013. While fines are generally considered as punishment, not forfeiture, in MACC cases the value of the fine can be five times the amount of offending and fines are often used in lieu of forfeiture where the property cannot be recovered. However, the proportion of fines that can be taken to relate to unrecovered property is unknown. As MACC focuses more on fine than forfeiture for corruption as a form of punishment, AMLATFPUAA should be utilised in recovering the unlawful proceeds from corrupt practices."[478]

Table 5.0 shows the number of cases for money laundering according to different predicate offences:

Table 5.0 : Money laundering Cases from 2009 to 2013

	2009	2010	2011	2012	2013	TOTAL:
Investigations	**138**	**94**	**124**	**230**	**235**	**821**
Drugs	0	0	0	0	0	0
Fraud	34	30	34	105	47	250
Corruption	5	5	30	49	50	139
Prosecutions	**22**	**16**	**19**	**15**	**60**	**132**
Drugs	0	0	0	0	0	0
Fraud	21	15	13	13	59	121
Corruption	1	0	2	2	1	6
Convictions	**12**	**5**	**12**	**8**	**19**	**56**
Drugs	0	0	0	0	0	0
Fraud	11	5	8	8	19	51
Corruption	1	0	1	0	0	2
Acquittals	8	9	2	1	2	22

Source: adapted from FATF and APG, Mutual Evaluation Report 2015[479]

[478] APG Mutual Evaluation Report 2015, 65.
[479] "Legal systems and operational issues in Anti-money laundering and counter-terrorist financing measures - Malaysia," FATF and APG, accessed October 15, 2017, www.fatf-gafi.org/publications/mutualevaluations/documents/mer-malaysia-2015.html.

Thus far, "the main outputs have been an increasing number of ML investigations, a large number of prosecutions of predicate offences and forfeiture of property. Only 132 of the 821 ML investigations were prosecuted for ML, and 56 only convictions were secured (noting that 257 of the 821 ML investigations are ongoing)." As can be seen in table 5, between 2009 and 2013, ML investigations and prosecutions relating to corruption are small in number. This indicates that MACC should be encouraged to effectively utilise AML law more often as a tool to combat corruption apart from using their very own Act, MACCA.

It must be noteworthy that AMLATFPUAA allows legal enforcers to investigate and recover ill-gotten proceeds. It makes available for freezing, seizure, and forfeiture of those unlawful proceeds. Through section 58 of the Act, the forfeited property will be passed to the Federal Government.[480] The forfeiture provisions are utilised mainly for drugs, fraud and corruption are at the lower levels, and it has not been proven that Malaysia is efficiently allowing these crimes not profitable as compared to the usage of forfeiture in tax and smuggling cases.

5.4 Problems Faced by Legal Enforcers in Utilising Forfeiture Provisions under AMLATFPUAA and MACCA

Looking into problems faced by the enforcers in using forfeiture provisions, one of the significant issues faced is lack of evidence as the nature of offence is such and this is reasoned, as mentioned earlier in this study, money laundering activities are carried out in many different ways where criminals ensure that the proceeds of crime are not

[480] Errol Oh, "Our broad and powerful anti-money laundering law deserves more scrutiny," *The Star,* April 12, 2014, accessed 10 January, 2018, https://www.thestar.com.my/business/business-news/2014/04/12/do-you-know-a-money-launderer-our-broad-and-powerful-antimoney-laundering-law-deserves-more-scrutiny/.

easily detected and if so, they somehow cover the trails on which the proceeds were moving.

With regard to the impact of cross-border money laundering offences, there are difficulties in obtaining evidence from another country as the differences in each countries' definitions of money laundering and the scope of this crime have led to complications over judicial and police collaboration and cross-border investigations. Other than that, the penalty for money laundering offences also may differ. Countries involved must find common grounds to collect relevant evidence successfully. This incurs high cost and also greatly time-consuming for legal enforces who are involved in such investigations.

As Malaysia has MACMA to be applied for cross-border money laundering offences, difficulties in obtaining evidence were acknowledged in the Mutual Evaluation Report, and it was stated:

> Malaysia has only received one MLA request from a foreign country to take confiscation action. In that case, one of the limitations in MACMA identified at R.38 regarding assistance Malaysia can provide to foreign countries to restrain and forfeit property was borne out in practice. While the request was made under MACMA because the country was not a 'prescribed country' the timing of the country's forfeiture order and the direction required by the Minister meant that MLA was not practical. Fortunately, in that case, the matter was dealt with under the non-conviction-based provision in AMLA by consent. While the other issues identified at R.38 have not yet arisen in practice, they similarly have the potential to impede the provision of MLA assistance.

For criminal forfeiture, prosecutors are unable to prove the case as the standard of proof is high and it requires reliable and robust evidence which can be employed in determining the case. Besides, as civil forfeiture is a new regime for both jurisdictions, it is believed that enforcers are not willing to go for civil forfeiture as money laundering is considered as a serious offence, they would possibly want to prosecute the accused.

Moreover, looking at forfeiture laws under both AMLATFPUAA and MACCA, the focus is on public-order or organised crimes and those with the greatest potential for profits. Enforcement agencies are drawn to forfeiture due to the potential to receive proceeds. This could discourage them from channelling resources into areas where the possibility to receive forfeiture proceeds is zero. In the lowest margin, by employing stringent forfeiture laws, it appears to increase agencies' enforcement activities in areas where the chances of receiving proceeds are great. To overcome these problems, legal enforcers, especially in Malaysia, should possibly investigate other offences where forfeiture regime could be employed, and this could be corruption which is damaging.

Due to the complex nature of forfeiture, the Malaysian government should be equipped with mechanisms or channels which would first detect money laundering activities. Rather than putting pressure on the enforcement authorities, governments should advise banks and other financial institutions to improve on their system as transactions can be traced beforehand on the basis that the accused has made transfers of money which may not be a conventional way of dealing with money laundering today.

It is known that Malaysia has an accommodating, comprehensive and flexible legal framework which focuses on the recovery of property, and most importantly, proceeds of the crime and; is seeing some successes, mainly through administrative recovery. However, results in remaining high-risk areas such as drugs, fraud, and corruption are still considered as low, and there has been a significant drop in AMLATFPUAA's forfeitures being utilised recently. Malaysia has forfeited properties from immediate targets but not the higher-level organisers of crime; legal enforcers have problems linking properties to offences and targeting more complex cases. The scope of forfeiture cases has been limited as Malaysia has not prioritised targeting foreign predicate offences or following the proceeds of the crimes committed by Malaysian whom moved offshore. Results in civil forfeiture are greater than before.[481]

In addition, international cooperation is needed to carry out forfeiture proceedings. This is when the laundering of money goes international, involving two or more countries. Constant engagement between governments should exist to gain information on the unlawful activities. Automatically, everything else follow suit if there is cooperation between countries with AML regime. Overall, it is stressed that forfeiture of criminal proceeds is one regime where every enforcement authority may reluctantly employ as, again, it is believed to be one of the best ways to ensure that criminals do not easily get away without having to face the consequence for the crime they have committed.

[481] APG Mutual Evaluation Report 2015, 57.

5.5 Interviews with AML and Anti-Corruption Officers

The researcher interviewed AML and anti-corruption officers in Malaysia. The first respondent[482] was asked on the relationship between money laundering and corruption.[483] He was of the opinion that money laundering and corruption are interlinked. The respondent also contended that corruption comes first, and money laundering is at the far end. Laundering of the money is undertaken to 'clean' unlawful criminal proceeds from corruption.

However, the first respondent stated that the AML unit faces challenges in proving the crime, especially when the proceeds are from predicate offences. The standard of procedure for forfeiture of criminal proceeds usually involves the legal enforcers submitting IPs first. The Investigation Officer (IO) will then pass the IPs to the Attorney General (AG) to look at the sufficiency of evidence for the case. In any case, where the evidence is insufficient, further investigation will be undertaken. Once all investigations are completed, the unit will decide whether to apply for criminal or civil forfeiture.

When asked how AML law can be utilised to combat corruption or other predicate offences, both the respondents unanimously responded that AMLA covers all forfeiture of properties and proceeds of unlawful activities and it is known that all agencies are encouraged to utilise AML law although they have their own legislation which is very specific. They strongly agreed that AMLATFPUAA is applicable for other predicate offences and it includes corruption as well.

[482] Officer of the AGC.
[483] Interview was conducted in office of the Department of Investigation and Prosecution, Attorney General's Office. The interview was conducted at 10 A.M. on 5 January 2017.

However, for other agencies to utilise AML law, there is a high need of cooperation among them. The first respondent stated that there is an excellent existing cooperation among the agencies. In Malaysia, the NCC is headed by the BNM, and all other enforcement agencies are under one umbrella to oversee issues relating to predicate offences. Following the respondent's statement, to a certain extent, the usage of AML law to combat corruption should not face any challenges as there is sufficient cooperation among the agencies through NCC.

Furthermore, the first respondent was of the opinion that forfeiture of the criminal proceeds is considered to be the best tool to trace and get back the unlawful proceeds. The respondent further stated that the vital aim of forfeiture as a mechanism of AML law is to stop the criminal organisations from operating. This prevention can be undertaken through the freezing of their accounts and assets if they can be identified and traced.

Looking into ideal AML law relating to forfeiture, the respondent suggested that the U.S marshal should be taken as an ideal agency. The reasoning was that it is centralised and the investigation starts early as compared to Malaysia. The respondent also contended that each agency does their work first, only then investigations start. This might lead to enforcers not being able to trace the proceeds.

The respondent ended the session by suggesting that there should be more prosecutions regarding money laundering and corruption. It was explicitly stated that the prosecution should charge the person and forfeit the proceeds. Both civil and criminal

forfeiture are equally useful in forfeiting criminal proceeds. If the prosecution is unable to trace the suspects, then civil forfeiture will then be utilised. In any case, where the corrupt money and a person cannot be traced within 6 months, there should be an auto forfeiture.

On the same note, the second respondent[484] was also interviewed, and the respondent believed before charging under AMPLATFPUAA, investigation officer must look whether the elements of corruption as a predicate offence is satisfied under mainly sections 16 and 17 of the MACCA. Corruption as predicate offence is listed under the AMLATFPUAA through Schedule Two. Only then, they may consider utilising AMLATFPUAA. However, the second respondent further stated that for possession of the property, it is better to opt for AMLATFPUAA as it is recognised that there are difficulties in utilising AMLATFPUAA as it is challenging to prove predicate offences. Hence, corruption comes first, only then AMLATFPUAA can be employed to combat corruption.[485]

Similar to the first respondent's opinion, the anti-corruption officer also contemplates that for predicate offence such as corruption, the intention of the person committed is difficult to be proved although the IPs are complete with all information relating to the offences. Evidence regarding the suspects' intentions is usually difficult to be deciphered. Witnesses may not be well cooperative in order for the enforcer to prove the case.

[484] Officer of the MACC.
[485] Interview was conducted in office of the Department of Investigation and Prosecution office, MACC. The interview was conducted at 10 A.M. on 10 January 2017.

Due to the difficulties in proving the intention of predicate offences, the second respondent stated that MACC has to be proactive in order to ensure constant supervision over these issues and it can be done through proper investigation of STRs from the BNM, supervise the individuals through IPs and collect accurate information regarding the case. By carrying out these steps, there should be sufficient evidence to prosecute the suspects. Therefore, forfeiture as a part of the legal mechanisms under the AMLATFPUAA shall be utilised if a few preliminary steps are taken by the MACC.

As such, the respondent mentioned that AMLATFPUAA is utilised parallel with MACCA. AMLATFPUAA alone may be employed if they are unable to prove the direct possession of properties related to corrupt practices. Proceeds gained through unlawful activities are best forfeited using AMLATFPUAA as the Parliament has amended the said Act to include proceeds of unlawful acts. The second respondent also pointed out this amendment. In line with the first respondent's view, the anti-corruption officer also considered the enactment of a single Act relating to money laundering and corruption as these two crimes are common these days. Prevention of these two financial crimes would reduce the harm to the financial, social and economic sectors of societies.

Gaining perceptions of the respondents for these crimes are definitely valuable to the study as it is one of the objectives. The researcher is grateful for the interview sessions conducted to seek for opinions on utilising AML law as a tool to combat corruption in Malaysia as forfeiture of unlawful proceeds is the key focus of the study. Hence,

interview sessions are conducted to answer the third research question and achieve the third research objective of this study.

5.6 Conclusion

It is clear from the above analysis that AMLATFPUAA is the most comprehensive tool for the enforcers to be utilised to trace financial crimes, especially proceeds of unlawful acts. The criminal organisations may not be able to benefit from the illicit proceeds if those proceeds are forfeited. By halting the financial system of a criminal organisation, it may prevent them from continuing their illegal acts in the future.

The comparative analysis on forfeiture provisions between AMLATFPUAA and MACCA indicates that MACCA may lag behind AMLATFPUAA as AMLATFPUAA entails more detailed provisions of forfeiture as compared to MACCA. Here, MACCA should possibly take AMLATFPUAA as the benchmark and make further amendments on forfeiture provisions by undertaking more research. This can be carried out to ensure that Malaysia prepares itself to face more possible scenarios involving corruption and money laundering.

Hence, to reiterate, based on the analysis, the benefits of utilising forfeiture provisions under AMLATFPUAA outweigh MACCA's forfeiture provisions in terms of duration of freezing and seizure order, punishment, procedure, and circumstances covered. Through interview sessions, AML and anti-corruption officers showed their readiness in utilising AML law as a tool to combat corruption more often now than before.

However, to utilise forfeiture provisions under the AMLATFPUAA, cooperation between agencies in proving corruption as the predicate offence and proper investigations are needed. These three factors are essential to the success of utilising forfeiture as the most innovative tool under the AMLATFPUAA.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSIONS

"Fighting corruption is not just good governance. It's self-defense. It's patriotism."
-Joe Biden.

6.1 Introduction

Through this chapter, the researcher would like to provide recommendations for further improvements in the legal framework relating to corruption in Malaysia. The researcher contends that the anti-corruption framework should incorporate the active application of AML law. This chapter answers and meets the final research question and objective of this study.

6.2 Suggested Improvements for Effective Anti-Corruption Framework

The following are a few suggestions for further improvement of the Malaysian anti-corruption framework:

6.2.1 Enhancing Trust and Coordination among Agencies

Combating corruption using AML law would be effective if the relevant agencies are cooperative and information sharing may assist them in enhancing confidence. This can be undertaken through monthly meetings. AML and AC officers should communicate each other's expert knowledge by ensuring their roles are played well.

A proper framework should be established in building cooperative relationships between multiple agencies in combating corruption using AML law, and it includes a willingness to share information whenever investigations with regard to corruption arise. Through an established framework, enhanced coordination among agencies are formed, and corruption cases could be solved even if other jurisdictions are involved. However, for this suggestion to work, tasks for each agency should be distinctive and specific. Each agency should carry out the duties efficiently so that fighting corruption using AML law can be done collectively.

Hence, it is essential to take note that to invoke forfeiture order effectively, the close cooperation between enforcement agencies such as AGC and MACC is vital. In addition, there should not be any misuse of powers among the agencies. For instance, the Malaysian Enforcement Agency Integrity Commission (EAIC) acts as a watchdog in monitoring the affairs of the officers in enforcement agencies to avoid abuse of powers. The commission was established through Section 3 of the Enforcement Agency Integrity Commission Act 2009. Abuse of powers can be minimised if not eradicated.

Combating corruption using AML law would be effective if there is a foundation built among agencies by mutually trusting each other and with established coordination, trails of corrupt practices can be identified, and relevant evidence can be gathered for courts to charge the suspects.

6.2.2 The Need for a Well-Established and Efficient Workforce Regulating AML Systems.

Agencies which monitor the affairs of reporting institutions should employ well qualified employees. These employees' roles and responsibilities should be clearly defined, and this can be done through the enhancement of the current codes of practice and regulations. A well-established workforce is essential in combating corruption using an effective AML law.

An effective AML law depends on the ability of the relevant employees to monitor the use the AML/CFT systems in detecting the laundering of the proceeds. They should be well-versed with the system and how it combats corruption. Through a well-established and vigilant workforce, tackling corruption via AML law would be plausible, and forfeiture of the proceeds can be utilised more often as detection of the laundering process could be increased. Therefore, having said that, there is indeed a need for a well-established and efficient workforce for a useful framework for fighting corruption by utilising AML law.

6.2.3 Enhancing the Implementation of Extraterritoriality

Another suggestion would be that to increase the element of extraterritoriality. In this context, when it comes to a money laundering case, the prosecution should increase the number of cases being prosecuted, and the courts hear cases which the crime occurred in another country. This is to mean that the predicate offence is committed in another country and the unlawful proceeds are laundered in the local jurisdiction.

6.2.4 Setting Up of a Special Unit for Anti-Money Laundering and Anti-Corruption (AMLAC)

As the researcher recognises the strong relationship exist between money laundering and corruption, it is suggested to combat corruption by setting up a special unit to manage money laundering investigations relating to corruption. Currently, there are various agencies involved in handling money laundering and corruption cases. Hence, the researcher urges this new set up to be in charge of corruption cases which are linked to money laundering in precise.

Alongside this particular unit, BNM shall also be involved to assist in investigating suspicious transactions. By involving BNM in this new set up, it can be ensured that the corrupt do not escape with a large number of corrupt monies. STRs and CTRs should be utilised in tracing the corrupt funds which may be deposited in various financial institutions. It is known that proper and efficient AML/CFT systems are helpful in combating corruption alongside other predicate offences.

6.2.5 Stricter Punishment for Non-Compliance of Forfeiture Orders for Corruption

The researcher suggests imposing stricter punishment for corruption in terms of non-compliance with forfeiture or even freezing and seizure orders. As analysed by the researcher via the previous chapter, in any event where there is non-compliance of the forfeiture order, the court may impose a fine of twice the value of the property or fifty thousand ringgit or imprisonment not exceeding two years. While under the AMLATFPUAA, there is a stricter punishment where a fine will be imposed not exceeding five times the value of the property or five million or imprisonment not exceeding seven years.

The researcher proposes that the sanction should be similar to AMLATFPUAA or more than that. As corruption is an act which affects the entire financial, social and financial sections of a nation, the punishment should be stringent. The researcher urges to increase the fine to at least seven times the value of the property or seven million or imprisonment not exceeding twenty years.

6.2.6 Adequate Training for Legal Enforcers Dealing with Money Laundering and Corruption

Training is considered to be essential in providing exposure and encouragement for legal enforcers to be more proactive. It allows the enforcers to expand their horizons relating to money laundering and corruption, in particular, implementation of the relevant laws. By receiving adequate training, the legal enforcers ought to be more vigilant and efficient in dealing with high profile money laundering and corruption cases.

Moreover, increased efficiency would lead to better productivity. This is true when enforcement agencies start their IPs based on the evidence collected. They will need to analyse the facts of the case given and with training provided, technical issues can be solved with ease. Former senior judges and high ranking legal enforcers, as well as officers from the Central Bank of Malaysia, can possibly share their experiences in handling money laundering and corruption cases.

As money laundering and corruption as serious offences affect the public as a whole, it is utmost important for training to be provided to maintain the perception of the public and the welfare of the community. Improvement in dealing with technical issues is vital for AML regime as there is a need to prove corruption to be a predicate offence

first and legal enforcers need to be familiar with forfeiture rules. Therefore, they should be exposed to multiple jurisdictions' AML regimes, especially forfeiture and anti-corruption laws to deprive benefits of criminals as much as they can.

As an example, the Council of Europe has developed training schemes involving anti-corruption and AML standards, measuring and monitoring mechanisms, ethical values, and principles in the public service, best practices, and international success stories. It is considered a form of education for legal and law enforcement professionals as well as other interested parties, and it is taught by international and national trainers and practitioners.[486]

6.2.7 The Decrease of the Amount for Cash Threshold Report (CTR)

It is interesting to note that cash transactions limit when it comes to money laundering and corruption is RM 50,000 in Malaysia and comparing with other jurisdictions, it is much lower, and for instance, in the U.S, the lower limit is 10,000 USD while in the U.K, it is 9,000 GBP. This shows that Malaysia's lower limit to prompt reporting CTR is technically high. This lower limit gives ample of chances for the launderers to launder monies at ease.[487]

As Malaysia is a developing country, it is suggested that a lower limit for CTR is essential in combating corruption which has been a prevalent crime. Although the limit is similar to other countries, it must be clearly understood that developed countries have lower corruption and poverty levels. Therefore, a slightly higher limit is

[486] "Basic Anti-Corruption and Anti-Money Laundering Concepts," Council of Europe, accessed 27 February, 2018, https://rm.coe.int/16806f0066.
[487] Guru Dhillon, "A Legal Analysis on Money Laundering in the Football Industries of The United States of America, England and Malaysia", (Ph.D diss., Universiti Utara Malaysia (UUM), 2014).

reasonable. As Malaysia's corruption level is at a worrying level, this suggestion should be taken into consideration.

"There was a report by the Global Financial Integrity in 2015 on 'Illicit Financial Flows from Developing Countries: 2004- 2013,' which contends that 'there was a loss of US$7.8 trillion in developing economies from 2004 to 2013 in terms of unlawful proceeds. As for Malaysia, the report guesstimates for Malaysia that there was a loss of USD 418 billion from 2004 to 2013. Specifically, for the enforcement agencies, they have investigated cases worth of RM 13.1 billion in 2011 and 2012. The amount should be more as the lower limit is only RM 50,000 and the system would not have caught amount lower than that which is laundered. It is highly recommended that the central bank should reduce the lower limit in line with other jurisdictions."[488]

6.2.8 Recognise the Need for Stricter Punishment for Corruption

As for corruption in Malaysia, the punishment is not severe. For public officials, if they are not prosecuted, they will only be given a warning letter, and there is no proper punishment or whatsoever which causes them to undertake corrupt practices without any fear of severe punishment. This is in line with TI's suggestion.[489]

The penalty for corruption in Malaysia is: (i) imprisonment for a term not exceeding 20 years; and (ii) a fine of not less than five times the sum or value of the gratification or ten thousand ringgit whichever is the higher. Previously, Anti-Corruption Act 1997, provides for (i) imprisonment for a term of not less than fourteen days and not more

[488] Mohd Yazid bin Zul and Kepli Maruf Adeniyi Nasir, "Money Laundering: Analysis on the Placement Methods," *International Journal of Business, Economics and Law* 11, no. 5 (2016): 32.
[489] Akhbar Satar, "Impose severe penalties for corruption offences," *Malaysiakini*, accessed January 20, 2018, https://www.malaysiakini.com/letters/284379.

than twenty years maximum and (ii) a fine of not less than five times the sum or value of the gratification or ten thousand ringgit whichever is the higher.[490] The differences between these two Acts indicate that the punishment for corruption has increased. A severe punishment is needed to deter future corruption.

6.2.9 Enhance the Effectiveness and Transparency of the Implementation of Relevant Laws

There is a strong need to enhance the effectiveness and transparency of the implementation of the AMLATFPUAA and MACCA to combat corruption using AML law. Enforcement agencies must be careful and meticulous in implementing the laws as corrupt practices are considered to be one of the serious offences worldwide, and occurrence of these crimes should be minimised. As evidence, "from 2005-2009, the Public Complaints Bureau (PCB) has acknowledged that complaints against federal civil servants in Malaysia in the nature of Failure to Enforce and Unfair Action amounted to 24% (or 5,346) of all complaints received. Based on the latest statistics provided by PDRM, JKDM, *Imigresen*, and JPJ, the compliance units of these key enforcement agencies require major strengthening to improve the overall effectiveness of their roles."

6.2.10 Increase the Integrity and Credibility of the Agencies

Integrity means combating corruption with the aim of minimising the risk of corrupt practices harming the economic and financial sector of a country as well as creating a culture of high integrity among the enforcers. With high integrity in dealing with corruption cases, the credibility of the enforcers would be enhanced and hence, investigations would be carried out meticulously and with due diligence.

[490] Satar, "Impose Severe."

MACC, AG, and BNM are key agencies in dealing with money laundering and corruption in Malaysia. In successfully utilising AML law in fighting against corruption, it is suggested that enforcers' integrity and credibility should be increased, and they should be more thorough in dealing with collecting evidence and information relating to corruption.

MACC should therefore strictly implement their codes of practice, ensuring that the officers are apolitical. This is also essential in avoiding abuse of powers by the officers. By doing so, good governance would be formed, and hence, combating corruption using AML law should be workable.

Apart from the above agencies, financial institutions should also increase their integrity and credibility as placement and layering give impact on the financial system. These stages impact financial institutions as launderers use them as a platform to clean 'dirty' monies. Due to this reason, financial institutions should be more focused in fulfilling their obligations and protect against funds deposited in their institutions.

6.2.11 The Need for an All-Encompassing Framework for Coordination

There is a high need for a well-established framework of coordination. Measures to fight against money laundering and corruption are distinct and separate. Different agencies work together for better and satisfied results of combating corruption. In order to successfully employ AML law to fight against corruption, proper coordination should be formed, and reliable data should be shared among them.

Current measures should therefore, be revised. Measures to fight against corruption using AML law should be improved to ensure that different institutions work together by the sharing of actionable information. As such, the reliability of the data collected should be varied and appropriate to all relevant agencies relating to AML and anti-corruption.

6.2.12 Enhance the Information Sharing between Countries for Cross-Border Corruption

"Cross-border corruption occurs within and among many jurisdictions, each of which may experience only a part of a much more complicated process. A world in which capital, people, information, and enterprises move freely and rapidly from place to place offers new development opportunities of many sorts, but also makes accountability more difficult; because the agents of cross-border corruption are capable of doing business almost everywhere, it is difficult to hold them accountable anywhere."

"Even when government or international organisations decide to confront the problem, the result can be a mismatched: government of developing states, and international organisations with their finite resources and limited mandates, may be no match politically or economically for powerful interests, often working in secret, that hold the leverage underlying cross-border corruption."

As cross-border corruption involves many jurisdictions, to investigate adequately, other countries should be willing to work with the Malaysian enforcement agencies. This can be undertaken by sending more liaison officers to other countries. Liaison officers should be meticulous and vigilant in gaining relevant evidence and reliable

information for a complete investigation of corrupt practices which involves cross-border. As a result, with liaison officers placed in other jurisdictions, forfeiting criminal proceeds from corruption could be utilised fully as they would be able to collect reliable information and relevant evidence to identify the source of the cross-border corruption and the trails.

6.3 Future Research

This study has examined the relationship between money laundering and corruption and also, combating corruption using AML law in Malaysia. The researcher suggests that there are a few research focus which could be derived from this study.

The following research could be undertaken:

1. Forming the link between money laundering and Politically Exposed Persons (PEPs) as this is the current issue and a little research has been done in Malaysia.
2. Analysing the possibility of combating grand corruption using forfeiture of criminal proceeds in Malaysia.
3. Examining other predicate offences in relation to money laundering using forfeiture of criminal proceeds.

6.4 Conclusion

Overall, the researcher believes that she has answered and met all four research questions and objectives of this study.

In relation to the first research question and objective, the researcher contends that money laundering and corruption are two prevalent crimes which are interlinked.

Money laundering refers to as an act of 'cleaning' 'dirty' monies gained through unlawful activities whilst corruption is a dishonest act by a person who abuses power given through illicit and private gains. Corrupt gains are concealed through the laundering process. This process allows them to benefit from the unlawful activities without punishment as it assists in hiding the profits. Corruption is considered as a predicate offence which occurs prior to money laundering. To reiterate, AML law is established based on two key aims, and they are: to deprive the criminals from enjoying their ill-gotten gains and to protect the image of financial institutions from those criminals.

By answering and meeting the second research question and objective, findings show that Malaysia's AML law is well-established with the enactment of AMLA which was passed in 2001. AMLA was further amended in 2003, and it was known as AMLATFA in 2007. This AML law was renamed in 2014, and it is now known as AMLATFPUAA. Overall, AMLATFPUAA is comprehensive and covers all possible circumstances relating to money laundering, terrorism financing, and criminal proceeds.

With the enactment of the AMLATFPUAA, Malaysia is able to fill in the gaps by establishing a system which is in line with international AML standards such as the FATF Recommendations, UN's convention and treaties and the APG's resolutions. AMLATFPUAA sets out ground-breaking methods to recover unlawful proceeds from various predicate offences, and it includes corruption as well.

Through chapter four, the researcher answered the first research question and met the second research objective with regard to corruption. Alongside money laundering, fighting corruption has been one of the key responsibilities of the government in Malaysia. For many years, Malaysia has recognised the need and urgency in forming anti-corruption laws with the view to combat corruption from all aspects. Prior to the enactment of ACA 97, the government had taken various measures in fighting corruption. In 2009, MACC was established through MACCA which was modelled after Hong Kong and Australian's Anti-Corruption Agency. The fundamental aim of establishing MACC is to consolidate various agencies under one umbrella. MACCA acts as a single Act to combat corruption which provides power to MACC to carry out an investigation for offences stated in MACCA.

Findings of the study show that forfeiture regime is indeed one of the most powerful regimes in the view to take away all illegal proceeds and assist in striking at the economic base of criminal activity universally. Legal enforcers should readily employ forfeiture provisions when it is necessary. However, it is undeniable that the success of forfeiting illicit proceeds from suspects depends on proving cases based on the evidence collected by the enforcers.

The findings under chapter five have answered the third research question and met the third research objective. It appears that MACCA's forfeiture provisions are broad to cover all aspects of corruption. But however, from the analysis made, AMLATFPUAA has a more comprehensive forfeiture provisions which gives it an advantage over the MACCA in terms of punishment for the offences, duration of forfeiture, freezing and seizure, the procedure as well as circumstances covered by the Act. However, the

researcher is certain of the significant utilisation of the AMLATFPUAA's forfeiture provisions are seen in fraud cases in Malaysia. For predicate offence such as corruption, it is understood that enforcers are contented in employing their own Act, and here, it is the MACCA.

On the same note, with the introduction of civil forfeiture into the regime and a lower burden of proof, enforcement agencies have opportunities to attack suspects and target on the illegal proceeds from illegal acts. MACC should also consider in utilising civil forfeiture whenever the situation calls for. Although forfeiture regime exists mainly to take away unlawful monies, enforcers ought to promote fairness. They should not blindly apply forfeiture provisions. The legitimacy of the funds or property must be investigated thoroughly. It is suggested that this is done to avoid wrongful convictions.

Moreover, when the crimes involve cross-border transactions, legal enforcers in Malaysia should establish an effective system or common ground on how to execute the forfeiture regime. The need to address multiple legal systems, languages and time zones can significantly complicate the challenges faced by them. Relevant evidence and cooperation are highly required in the view to identify and apply forfeiture provisions on crimes involving money laundering internationally.

To reaffirm, the comparative analysis between forfeiture provisions under the AMLATFPUAA and MACCA displays that AMLATFPUAA is more comprehensive than the MACCA as the provisions of forfeiture are far more detailed than the provisions of the MACCA. It is believed by the researcher that the MACC should utilise more the provisions under AMLATFPUAA to reduce corruption level in

Malaysia by making AMLATFPUAA as the yardstick and improvise on their action plans.

The research and amendments on forfeiture provisions of the AMLATFPUAA can be employed by the MACC as these two Acts possess similar forfeiture provisions. Comparisons are effortlessly made. On the whole, it is safe to state that there should be a proper and consistent check and balance on the effectiveness of AMLATFPUAA and MACCA in the view to increase the likelihood of forfeiting individuals the benefits derived from illicit acts.

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APPENDICES

Appendix 1: E-mail Correspondence with BNM Officer

From: **ANUSHA A/P AURASU** <anushaa@acd.tarc.edu.my>
Date: 2016-07-19 11:31 GMT+08:00
Subject: PEMOHONAN MENEMURUMAH PEGAWAI DI BAHAGIAN PENASIHATAN, POLISI DAN UNDANG-UNDANG, BANK NEGARA MALAYSIA
To: bnmtelelink@bnm.gov.my

Tuan/Puan,

Merujuk kepada perkara diatas, saya Anusha a/p Aurasu, seorang pelajar kedoktoran (Ph.D) dari Universiti Utara Malaysia ingin menemuramah pegawai-pegawai di Bank Negara Malaysia berkaitan dengan kajian saya. Dengan e-mel ini, saya melampirkan surat kebenaran bagi temuramah.

Saya berharap tuan/puan akan memberi maklumbalas secepat mungkin. Segala perhatian dan kerjasama tuan/puan didahului dengan ucapan jutaan terima kasih.

Sekian,

Anusha Aurasu,
Pensyarah
Pusat Pengajian Pra-Universiti,
Kolej Universiti Tunku Abdul Rahman,
Jalan Genting Kelang, Setapak,
53300 Kuala Lumpur.

[redacted]@bnm.gov.my> 8/2/16

to anushaa, [redacted]

Dear Ms Anusha,
We refer to your e-mail to our BNMTelelink on this matter. We would appreciate if you could share the following for our consideration:
1. What is the nature of your research; i.e for PhD thesis or journal?. Would it be made public?
2. Could you please share the list of questions or scope of your interview with us first for our assessment?

At the meantime, we would like to share about our microsite on AML (http://amlcft.bnm.gov.my/) that could be relevant in your research, as this website explained about Malaysia's regime in fighting money laundering and relevant predicate offences including corruption.
This website discussed comprehensively about Malaysia legal & regulatory framework, preventive measures, enforcement as well as domestic and international cooperation.
In addition, you may want to have a look at Malaysia's active participation in fighting AML through Financial Action Task Force (FATF -http://www.fatf-gafi.org/). This includes the recent mutual assessment by the FATF on Malaysia's compliance and effectiveness towards international standards in fighting AML.

From: **ANUSHA A/P AURASU** <anushaa@acd.tarc.edu.my>
Date: 2016-07-19 11:31 GMT+08:00
Subject: PEMOHONAN MENEMURUMAH PEGAWAI DI BAHAGIAN PENASIHATAN, POLISI DAN UNDANG-UNDANG, BANK NEGARA MALAYSIA
To: bnmtelelink@bnm.gov.my

Tuan/Puan,

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Saya berharap tuan/puan akan memberi maklumbalas secepat mungkin. Segala perhatian dan kerjasama tuan/puan didahului dengan ucapan jutaan terima kasih.

Sekian,

Anusha Aurasu,
Pensyarah
Pusat Pengajian Pra-Universiti,
Kolej Universiti Tunku Abdul Rahman,
Jalan Genting Kelang, Setapak,
53300 Kuala Lumpur.

[redacted]@bnm.gov.my> 8/2/16

to anushaa, [redacted]

Dear Ms Anusha,
We refer to your e-mail to our BNMTelelink on this matter. We would appreciate if you could share the following for our consideration:
1. What is the nature of your research; i.e for PhD thesis or journal?. Would it be made public?
2. Could you please share the list of questions or scope of your interview with us first for our assessment?

At the meantime, we would like to share about our microsite on AML (http://amlcft.bnm.gov.my/) that could be relevant in your research, as this website explained about Malaysia's regime in fighting money laundering and relevant predicate offences including corruption.
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In addition, you may want to have a look at Malaysia's active participation in fighting AML through Financial Action Task Force (FATF -http://www.fatf-gafi.org/). This includes the recent mutual assessment by the FATF on Malaysia's compliance and effectiveness towards international standards in fighting AML.

ANUSHA A/P AURASU <anushaa@acd.tarc.edu.my> 8/11/16

to Asraf

Dear [redacted]

Thank you for the prompt reply. I am a Ph.D candidate (going into my 4th semester). The aim of the interview is to support my research problem and objectives. It is indeed for my Ph.D thesis. It will be made public i.e. as reference in the library or might be published as an article in the future if successful. Kindly refer to the attachment as I have provided a few possible questions which will be asked to interviewees. Hope this may assist you in allowing me to carry out the process. If you have any other doubts/questions, please do not hesitate to ask me.

Many thanks,
A. Anusha.
Lecturer,
Tunku Abdul Rahman University College,
Setapak, Kuala Lumpur.

[redacted]@bnm.gov.my> 11/22/16

to ANUSHA, [redacted]

Hi Anusha,
Sorry for the long wait.
We are sorry to inform you that, as a matter of internal policy, we are not able to accommodate your request for the interview.
We would like to recommend the following websites, which might be useful for your research:
FATF Works on Corruption :
http://www.fatf-gafi.org/publications/corruption/?hf=10&b=0&s=desc
(fatf_releasedate)

UNCAC Report on Malaysia :
https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2014_02_04_Malaysia_Final_Country_Report.pdf

Wishing you all the best.

Thank you
Best regards,

[redacted]
Bank Negara Malaysia
Tel : [redacted]
http://amlcft.bnm.gov.my/.

Appendix 2: List of Interview Questions

1. Could you please tell me about yourself and your experience?
2. Can you tell me about AG's role in fighting against money laundering?
3. How do you ensure constant supervision over this crime?
4. What are the legal issues with regards to the implementation of AML laws in Malaysia?
5. What are the actions taken to overcome the issue identified?
6. What is the standard of procedure when the AGs handles money laundering cases?
7. How does the AG relate money laundering with corruption?
8. Can AML laws be utilised to combat corruption?
9. What differences it can make if AML laws are utilised in combating corruption?
10. What is the role of forfeiture in fighting against money laundering?
11. Is forfeiture of proceeds of the crime be the best tool to prevent this crime? What do you think?
12. How effective will it be if forfeiture is utilised in combating corruption?
13. To what extent will the Malaysian AML laws act as assistance to the enforcement agencies in combating corrupt activities?