

# MALDIVES: CHALLENGES IN RECOVERING PROCEEDS OF CORRUPTION AND SOLUTIONS

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## I. INTRODUCTION

Acts of corruption are not bold or loud like a terror attack. They are silent and lurk around all corners of public offices. They are not noticeable until it is too late. The story is the same wherever we look. The same patterns can be seen in the Maldives, now well-known for the Maldives Marketing and Public Relations Company (MMPRC) Scandal, which saw embezzlement of millions of dollars of state funds through an organized operation by public officials at the top ranks in 2014 and 2015. This paper will explore the challenges to recovering proceeds of corruption, lessons learned from MMPRC cases, and possible solutions in the Maldives.

## II. CHALLENGES IN RECOVERING PROCEEDS OF CORRUPTION

### A. Institutions

#### 1. Anti-Corruption Commission of the Maldives.

The Anti-Corruption Commission (ACC) is the first modern form of democratic institution with the major functions to prevent and prohibit corruption within the public sector of the Maldives. The ACC was established on 16 October 2008, under section 199 (a) of the Constitution of the Republic of Maldives, which was ratified on 7 August 2008.<sup>1</sup> The ACC is administrated under the Anti-Corruption Commission Act (13/2008), which was ratified on 24 September 2008.

The constitution of Maldives states that the definition of corruption shall be written in the Anti-Corruption Commission's Act, which now defines acts of corruption by expressly mentioning specific sections of chapter 510 of the Penal Code of Maldives. The Penal Code criminalizes bribery<sup>2</sup> to public officials, misuse of official authority<sup>3</sup> among others.

#### 2. Prosecutor General's Office of the Maldives

The Prosecutor General's Office of the Maldives, also established in 2008, is the prosecution authority of the Maldives<sup>4</sup> that oversees all investigations, ensures a fair and effective investigation and makes prosecuting decisions.

### B. Current Legal Framework

The current legal framework for asset recovery in the Maldives has its limitations, but despite this, it is being used across the board in all types of cases at present. Since 2020, the prosecution strategy has changed to file a petition for the recovery for proceeds of crime along with the charges that PGO files. This section of the paper will briefly look into the current legal framework and its challenges and limitations to the recovery of proceeds of crime.

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<sup>1</sup> S.199 of the Constitution of the Maldives 2008.

<sup>2</sup> S.510 of the Penal Code of Maldives 2014.

<sup>3</sup> Ibid., S.512, S.513.

<sup>4</sup> Article 223, The Constitution of Maldives 2008.

### 1. Criminal Procedure Code (CrPC) and Its Limitations

Under the Criminal Procedure Code (CrPC) of the Maldives, S.192 paves way for the court to issue a confiscation order of proceeds of a crime upon a conviction. The provision states that, the court may only issue this order if the statute under which the accused was charged expressly provides for the confiscation of proceeds of crime with regard to that offence.

The CrPC provides for the court to amend the order of confiscation if additional proceeds of crime were identified after the initial warrant.<sup>5</sup> It also provides for cases where the defendant was found to have possessed the proceeds of the crime at one point, but it can no longer be identified or located. Under S.195, in such cases the court has the discretion to issue a warrant to confiscate money or property equivalent to the proceeds of crime if the property was given or sold to a third person; taken outside the jurisdiction; there has been unreasonable reduction in the value of the property; or it has been comingled with other monies or properties. In addressing the existence of third-party rights, the CrPC states that it should not bar the confiscation unless the third party can prove that he/she is a *bona-fide* purchaser.

Although the regime appears to be comprehensive and adequate enough, S.192 of the CrPC limits instances where prosecution could seek an order of confiscation and the court to issue an order as it provides that the statute under which the prosecution decides to charge must expressly provide for confiscation of the proceeds of crime. Offences of corruption are now listed under chapter 510 of the PC; however, the PC does not stipulate that the proceeds of those crimes can be confiscated. This is a move away from the legal position of the prior PC of Maldives which expressly provides for confiscation upon conviction. S.14 of the current PC further states that filing criminal charges would not bar civil actions to recover proceeds of crime.

However, this poses a challenge, and there is debate whether recovery can be sought when the PC has not provided for it. The Supreme Court of Maldives (SC) recently published a sentencing guideline which indirectly addresses this. While it does not address confiscation, it addresses the court's role in awarding damages. S.48 of this guideline states that it is at the discretion of the presiding judge to make an order awarding damages, but the judge may only do so if the prosecution has filed a petition to award damages at the time of submission of charges. This same principle also applies to confiscation according to recent decisions of the criminal court.

### 2. Case Study on the Limitations of the CrPC

In 2014 and 2015, Maldives was shaken by the blatant and open corrupt practices which led the top officials of the then government to embezzle millions of dollars in state funds. The PGO has filed charges against various individuals and companies alike in their involvement in this scheme. An individual named Hamid Ismail was one of them, who facilitated the siphoning of state funds. A 100 per cent State Owned Enterprise (SOE) named The Maldives Marketing and Public Relations Company (MMPRC) received \$5 million by leasing an inhabited island of the Maldives to a third party to develop as a tourist island on 4 June 2014. The investor issued a cheque in the amount of \$5 million pursuant to the agreement, which was endorsed by the Managing Director of the MMPRC, facilitating the cheque to be deposited to a company which Hamid Ismail had a 99 per cent share. The funds were deposited and dispersed to various other accounts and eventually cashed. Part of the funds were exchanged for Maldivian currency and used for company purposes. Hamid Ismail was charged with facilitating the embezzlement of State funds. The Criminal Court of Maldives (CrC) found him guilty and convicted him. The case was appealed to the High Court of Maldives (HC), which affirmed the decision of the CrC. It was then appealed to the SC; however, the SC also affirmed the decision of the CrC and the HC.<sup>6</sup> The recovery was not addressed in any of the stages because the prosecution did not seek a confiscation order. After the decision of the SC, the PGO sought an order of confiscation at the CrC under S.192 of the CrPC. The CrC rejected the petition on the grounds that S192 can be applied by a judge when deciding on the case and not independently. The PGO believed that the CrC was not wrong in this decision and since the court cannot give a wider interpretation to the section, PGO has brought the issue to the notice of the Attorney General's Office who is in charge of legislative drafting by the State, and the SC. So far, no changes have been brought to the law.

<sup>5</sup> S.194 of the CrPC.

<sup>6</sup> Case Number: 2019/SC-A/48 (Hamid Ismail vs Prosecutor General's office), Supreme Court Maldives.

3. The Prevention of Money Laundering and Terrorism Financing Act 2014 (AMLA) and Its Limitations

Although the PC does not address the confiscation of proceeds of crime, The Prevention of Money Laundering and Terrorism Financing Act 2014 (AMLA) does address this. Under S.62 of the act, it allows for the court to issue an order of confiscation upon conviction of an offence stipulated in the act. Under this section, the prosecution may ask to confiscate: (1) the laundered funds or property; (2) the instrumentalities used in the commission of a predicate offence; (3) the proceeds of crime, or funds and property derived from proceeds of crime; (4) the intended proceeds of crime or proceeds of crime; (5) the instrumentalities; (6) funds or property with which the proceeds of crime have been intermingled; (7) property derived directly or indirectly from proceeds of crime, including income, profits or other benefits from the proceeds of crime.

The confiscation order pursuant to this section is made against the person to whom the funds or property belong to, unless their owner can establish that he acquired them by actually paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds and that he was unaware of their illicit origin.

4. Case Study on Confiscations in Money-Laundering Cases

Although the AMLA came into effect in 2014, there have been very few prosecutions under the act. The first charge under the AMLA was brought against the former President of Maldives, Mr. Abdullah Yameen Abdul Gayyoom (Yameen) in 2019 in relation to the MMPRC scandal. The case (now widely known as the Vodamula case) has been concluded by the Supreme Court, and some answers as to confiscation/recovery were received in this case.

Yameen was the President of Maldives between 2013 and 2018. During his tenure in 2014 and 2015, the MMPRC was used as a vehicle to siphon State funds and eventually these funds were dispersed to variety of illegal activities, including bribery, corruption, illegal political spendings. After this scheme came to light in October 2015, the president's office requested a special audit of the MMPRC from the Auditor General's office. This audit report was published on 4 February 2016, and it details the widespread scheme, noting that the MMPRC was being used as a vehicle to siphon State funds and that the Managing Director of the MMPRC was illegally endorsing the cheques the MMPRC was receiving, and a majority of these cheques were then deposited to a private company called Scores of Flare Pvt Ltd (SOF). Over 70 million dollars and over 100 million Maldivian Rufiyaa was funnelled through SOF.

The facts of the case are that the MMPRC leased an island named GA.Vodamula to a company on 11 October 2015 for \$1 million. The investor issued a cheque to the MMPRC for the amount. The cheque was endorsed by the Managing Director of the MMPRC and diverted to the SOF. A few days later, the SOF issued two cheques of \$500,000 directly to the then President Yameen. Both cheques were deposited into the president's account by a staff member working for SOF on two separate dates. Yameen kept these funds in his account, and transferred this amount, along with the other monies in his account to an investment bank account. The bank and Yameen agreed that he would keep a total of \$3.4 million dollars, which includes the \$1 million deposited by SOF, in the investment account for 36 months from 14 March 2017. The investment matured on 14 March 2020.

Between the time that Yameen received the monies to his account and up until the time he deposited the money and later questioned by the authorities in relation to the monies, various activities took place. After the initial investigations in relation to the MMPRC were launched, in 2016, the president of the ACC notified Yameen that he has received \$1 million dollars over the phone. Yameen asked the president to quickly determine if the money was State funds belonging to the MMPRC. Despite many attempts by the ACC, the president refused to cooperate during the investigation and refused to give a statement. In 2017, the ACC sent a list of questions that they wanted to ask about the MMPRC scheme to the president and Yameen's statement was taken, albeit, not through the traditional methods. In 2018, the election was upcoming and rumours of the \$1 million to Yameen's accounts were fast spreading and opposition was quick in their step to use this against Yameen. Yameen then informally discussed with the ACC to hand over the \$ 1 million to the ACC until such an investigation could be carried out to determine the source of funds. After this discussion, the ACC sent a letter to Yameen asking him to sign an agreement to transfer the monies he received from SOF to an Escrow account under the ACC's name. Yameen replied to this letter in writing agreeing to do so. In March of 2020, an agreement was signed and pursuant to this agreement Yameen transferred \$1 million. The legal minister of the president's office officially informed the ACC that Yameen

had in fact transferred \$1 million to the account as agreed.

Fast forward to 2019, the FIU sent a Transaction Analysis report in relation to an STR raised by the bank in relation to \$1 million dollars transferred from a well-known businessperson in Maldives to a former minister's account, who then transferred this amount to the then President Yameen. It was only then that investigative authorities discovered that Yameen had in fact lied to the ACC, and he had not transferred the \$1 million that he received from SOF to the escrow account per the agreement, and he had in fact transferred \$1 million he acquired through other methods. The ACC also discovered that he was still harbouring suspected proceeds of crime in his investment banking account, and it was maturing and acquiring profits throughout this time.

A case was initiated against the president for providing false information to the investigative authorities and on suspicion of money-laundering. In his defence, Yameen claimed that the monies were given to him by his former Vice President for his political spending. He could not provide the source of funds and why he would receive such a large amount, how it is legal, and why he invested money he received for political spending for 36 months, and had it held in a bank account unutilized during his presidential campaign. In February 2019, Yameen was charged with money-laundering. The prosecution did not ask for a confiscation order for the monies laundered; however, the investigative authorities had his account frozen pursuant to a court order they sought. In November 2019, he was convicted of money-laundering. He appealed the decision to the HC, which affirmed the decision of the CrC. He then appealed the case to the SC, which then overturned the decision in November 2021.<sup>7</sup>

The decision of the SC was an interesting one, not only because it was irregular, and the SC departed from legal principles that the SC has always upheld. For the purpose of this discussion, the decision itself is not important, and it is what the SC said about the suspected proceeds of crime that is important. The SC, while finding that Yameen was not guilty, stated that, Yameen acquired the money, and invested it knowing very well that it was suspected proceeds of crime and that he as the president of Maldives, has done this without a second thought to his responsibilities as the president, and he has in fact put forward his own interests before his people and the electorate. And for this reason, the SC concluded that the State has the right to pursue a civil case to recover the monies without it hindering the rights of Yameen under S.60 of the constitution, which expressly lays down the principle of double jeopardy.

Pursuant to this decision, the MMPRC has initiated a case against the former president to recover the \$1 million. The case is now ongoing. This is the first case in which a civil action was sought after an accused was acquitted. Hence, it is yet to be seen how this would change or impact the asset recovery regime.

##### 5. Challenges Identified during the Investigation of the MMPRC Scandal

It is worth noting that after Yameen's tenure ended in 2018, the current government came into power with the promise of recovering lost state funds through the MMPRC. The President established the Presidential Commission on Corruption and Asset Recovery (PCCAR), with the task to investigate the corruption cases that were not adequately investigated and recover lost state funds. The PCCAR entered into a joint investigation agreement with the Maldives Police Service (MPS) and the ACC. The PCCAR was dissolved in early 2022, and the exact reasons for the decisions were not made public by the President's office. But it is thought that the commission was duplicating resources and work that was done by the ACC. Following the dissolution, all the pending investigations and documents maintained were handed over to the ACC, which is continuing the work.

The PCCAR during its tenure noted various challenges to asset recovery and asset-recovery-focused investigations on many platforms including their public appearances to the parliament. Some of the many noteworthy challenges are listed below.

###### (a) *Lack of proper mechanisms for property registries*

No law in Maldives requires an integrated property registry to be kept. The Maldives is geographically made up of small islands, which means that all islands have their own property registry. It takes a lot of

<sup>7</sup> Case Number: 2021/SC-A/30 (Abdullah Yameen Abdul Gayyoom vs. Prosecutor General's Office), Supreme Court of Maldives.

effort and time for the investigative authorities to determine if someone has property somewhere other than where his permanent address is registered, and criminals often take advantage of this system.

*(b) Unjust enrichment not being an offence in the Maldives*

The investigation of the MMPRC scandal uncovered public officials and high profile politically exposed persons (PEPs) and their family members and close associates in possession of large amounts of unexplained wealth completely unmatched to their income. The investigative authorities often come to a dead end when this happens because no law in Maldives prohibits such possession and there is no law that would allow investigative authority to question these persons. There is also no law that would have the persons answerable in any other avenue.

With the PCCAR continuously advocating for unjust enrichment being criminalized, on 6 May 2021, the parliament passed an amendment to the PC, adding a new offence named "unjust enrichment". However, upon reading the elements of the offence, it becomes very clear that the act criminalized was not really that of unjust enrichment but in fact money-laundering. This section is, therefore, pointless because under S.18 of the Penal code, the prosecution must prioritize prosecutions under the AMLA if there are similar provisions in the PC criminalizing the same acts that are criminalized under the AMLA.

*(c) Cash-based economy*

The Maldivian economy is very cash intensive. All businesses big and small are heavily operated through cash. Although businesses earning over a certain amount requires registration with the Maldives Inland Revenue Authority (MIRA), and declaration and payment of Goods and Services Tax (GST), many do not comply with this. Under the law, MIRA can only take action if the business is registered with MIRA and is evading tax. This leaves a large loophole for all criminals. Furthermore, under Maldivian law, while tax evasion is classified as a serious offence under the CrPC, the offence warrants house arrest under the Tax Administration Act and is considered a level 1 misdemeanour under the PC and warrants a jail sentence of 4 months and 24 days. Under S.1005 of the PC, this sentence is often reduced and changed to house arrest considering the sentence prescribed under the Tax Administration Act. Additionally, it is noteworthy that it is only recently that the parliament passed the Income Tax Act, which prescribes tax brackets and requires individuals and businesses to declare and pay taxes if they receive a certain amount of income.

*(d) Record keeping*

Under law, banks and businesses alike are required to maintain records up to 5 years. Often times, acts of corruption and money-laundering are not discovered until much later in Maldives, evident from the MMPRC scandal of which investigations are still ongoing. This creates a great obstacle for a speedier investigation and sometimes for any investigation at all.

*(e) Legal framework for asset recovery being limited*

The challenges posed by the current legal framework is detailed in 2.2 of this paper.

*(f) Lack of accountability and symbolic asset declarations by public officials*

One of the things that investigation of the MMPRC scandal brought to light was the requirement of public officials to declare their assets. This is a requirement under the law, and the Auditor General's Office has the mandate to receive and vet them. However, it came to the attention of the investigators that many parliamentarians and top government officials did not file the declarations during the time periods they were required to do so. Furthermore, inaccuracies were noted in many that were filed, with many officials omitting to include properties and monies that they have to their names. For instance, in the Vodamula case, the prosecution noted that the president himself did not declare his assets to the Auditor General for 4 years during his tenure. There were no actions taken and no accountability by the public officials regarding this.

*(g) Designated Non-Financial Business and Professions (DNFBP) are not regulated*

The MMPRC scandal revealed public officials with extravagant lifestyles, with luxury properties to their names. These properties were often bought from private real estate firms and were paid for in cash in bulk. Under S.39 of the AMLA, dealers in real estate shall report as a suspicious transaction to the Financial Intelligence Unit when involved in transactions for their client concerning the buying or selling of real estate. However, there is no mechanism for such reporting in place, and DNFBP's remain largely unregulated to this date.

*(h) In rem proceedings are not provided for in the law*

An effective asset recovery regime would be independent from the criminal justice system. A legal framework should be drawn up for the state to proceed with *in rem* proceedings against the property or monies in question whether or not a criminal investigation or prosecution is ongoing. This would allow the police and prosecution to prioritize and focus on the important cases.

### III. SOLUTIONS

Maldives has come a long way, albeit slowly, in terms of its asset recovery regime. The Maldivian law and legal system have prescribed various avenues for asset confiscation. These avenues are not effectively utilized by state institutions for various reasons. Lack of procedures and mechanisms is at the top of this list. However, it is notable that the prescribed avenues are still not being employed to the full extent.

Changes to the current law to close the loopholes are needed, and the Attorney General's Office appears to be working on it. It is a myth to think that in every single case of corruption a conviction could be acquired. Hence, specific legislation on the recovery of proceeds of crime allowing *in rem* proceedings and detailed procedures for asset tracing, freezing, management, and confiscation is required for effectively recovering proceeds of crime.

### IV. CONCLUSION

The asset recovery regime in the Maldives is in its infant stage and much work needs to be done to learn the lessons from the past experiences, especially the MMPRC scandal, and patch the loopholes of the statutes and keep the regime afloat. With it being young and merely symbolic and unemployed for much of its existence, the familiarity with the regime is low among the investigators, prosecutors and others involved in the criminal justice system. Much work needs to be done to train on the current legal framework and improve it.