

TRACING AND RECOVERY OF PROCEEDS OF CORRUPTION — THE MALDIVIAN CHALLENGE

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I. INTRODUCTION

Corruption is a global epidemic that has devastating effects on economies. Maldives is not immune from this epidemic. The country has been ravaged by corruption and embezzlement of millions in state funds. As Maldives is a developing country with limited resources and a heavy reliance on foreign aid, corruption greatly hinders economic development.

To fight and minimize corruption, three governmental agencies are involved in different stages of enforcement of anti-corruption laws. The Anti-Corruption Commission (ACC) established in 2008 is an independent agency mandated to investigate offences of corruption, conducting studies and research to detect and prevent corruption and raising public awareness on corruption¹. The Prosecutor General's Office (PG Office) is the sole authority tasked with prosecuting offences of corruption² while the Attorney General's Office (AG Office) is the responsible authority for asset recovery. However, there is no clear and specific mandate on the AG Office and no specific and effective mechanism for asset recovery in corruption cases. The Auditor General's Office and Ministry of Finance and Treasury also play an important role in identifying cases of corruption. The efforts to recover stolen, embezzled and laundered state money has not been very effective to date mainly due to an inefficient legal framework for tracing and recovering proceeds of crimes. To address this default, on 20th July 2017, the President of Maldives established the Commission on State Assets Recovery for a one-year period to speedily recover millions of state funds misused, stolen and embezzled. Hence, the commission's mandate is limited to past cases only.

II. CHALLENGES IN TRACING AND RECOVERY OF PROCEEDS OF CORRUPTION

A. Existing Legal Framework

1. The Prevention and Prohibition of Corruption Act 2002

The Prevention and Prohibition of Corruption Act 2002 (PPCA) criminalizes various acts of corruption and bribery. The ACC is mandated to investigate acts of corruption and bribery and forward such cases with evidence to the PG Office for prosecution. In the investigations, the ACC identifies whether there are assets to be recovered and where there are assets to be recovered, ACC identifies the assets and amounts to be recovered. Upon receiving a case for prosecution, the PG Office assesses the evidence presented and pursues criminal charges if the evidence is sufficient to prove a preliminary case. The PPCA clearly states that property and money received through the commission of an offence stated in the Act, wherever the property is, whether sold or given to a third person can be confiscated only when the accused is convicted of such offence.³ PPCA only provides for asset recovery through criminal proceedings and does not provide for recovery of assets through civil action by the government. Hence, if the PG Office declines to prosecute due to lack of evidence in a case of corruption or where a corruption charge could not be proved beyond a reasonable doubt, there are no avenues for asset recovery through PPCA. The Act does not stipulate means for the ACC to trace proceeds of corruption or to recover proceeds of corruption without a conviction.

2. Penal Code 2014

Chapter 510 of the Penal Code (the Code) specifies offences of bribery and official misconduct. Several of

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¹ Article 202, The Constitution of Maldives.

² Article 223, Constitution.

³ Section 24, Prevention and Prohibition of Corruption Act 2002.

the acts criminalized under this Chapter coincide or conflict with offences under PPCA. The Penal Code provides that the Code shall take precedence in such cases of coincidence or conflict.⁴ The Code does not provide for tracing and recovery of assets through criminal proceedings, but the Code does not bar, suspend or affect civil forfeiture or rights to recovery.⁵

3. Prevention of Money Laundering and Terrorism Financing Act 2014

The Prevention of Money Laundering and Terrorism Financing Act is an important piece of legislation which came into effect on April 2014. The Act provides for recovery of assets embezzled and laundered through predicate offences, which involve corruption.⁶ The Financial Intelligence Unit (the Unit) which acts as a watchdog monitoring and collecting intelligence on financial transactions through various financial institutions, was established pursuant to this Act. Financial institutions are obliged to report any suspicious transactions to the Unit which collects the data and reports flagged transactions to investigating authorities.

The Act allows various actions to be legally taken in order to trace proceeds of corruption and other crimes. Court warrants can be obtained to:

- monitor bank accounts
- surveil computer systems, networks and servers
- tap or surveil telephone lines, fax lines, electronic transmissions and communication equipment
- record audio or video of conversations and actions
- intercept or forfeit letters and other communications⁷

Furthermore, the Act provides that the investigating authority may conduct covert operations and controlled delivery operations to trace proceeds of crimes.⁸ Investigating authorities may also obtain temporary injunctions to freeze assets and bank accounts suspected to be proceeds of corruption and other crimes.⁹

The Act provides that the court shall order for proceeds of crime of money-laundering or money-laundering-related offences to be forfeited by the state. It is implied from the wording of the statute that such assets can be forfeited only upon criminal conviction.

4. Mutual Legal Assistance

More often than not, corruption offences are transnational in nature. Thus, recovery of assets is impossible without the assistance of other foreign jurisdictions involved as the Maldives cannot exert its jurisdiction on another country according to the long-established rules of international law. Until 2015, Maldives had no legislation to enforce seeking and providing mutual legal assistance. Law No: 2/2015 (the Mutual Legal Assistance Act) came into force in 2015, pursuant to which assets in foreign jurisdictions may be recovered. However, no request has been made yet to recover assets in a foreign jurisdiction obtained by way of corruption. Thus, this area of law remains to be explored.

B. Challenges in Existing Asset Recovery Mechanisms

1. Asset Recovery through Criminal Proceedings

Prior to 2014, it was the PG Office that sought recovery of state assets in corruption cases through criminal proceedings. As stated earlier, this was due to the fact that the PPCA provides for asset recovery only when there is a criminal conviction. Due to the low conviction rate and lack of enforcement mechanisms in the Criminal Court for asset recovery in cases that result in convictions, assets were not being recovered in a speedy manner. The PG Office, AG Office, ACC and the Ministry of Finance and Treasury held discussions in 2014 to determine a solution for speedy and wholesome asset recovery within the existing legal framework. It was decided between the parties that the solution was to seek asset recovery under Act Number: 3/2006 (State Monetary Act). Hence, since 2014 asset recovery has not been sought through

⁴ Section 18, Penal Code 2014.

⁵ Ibid, Section 14.

⁶ Section 7, Prevention of Money Laundering and Terrorism Financing Act 2014.

⁷ Section 49, Prevention of Money Laundering and Terrorism Financing Act 2014.

⁸ Ibid., Section 50.

⁹ Ibid., Section 51.

criminal proceedings.

The Criminal Procedure Code (Procedure Code) has come into effect since then on 2nd July 2017, and the Procedure Code stipulates that the court presiding over any criminal case resulting in a conviction shall make an order for recovery of assets if any is owed to the state.¹⁰ As the Procedure Code came into force only recently, no such order has been made yet and the effectiveness of asset recovery through criminal proceedings under the new Procedure Code is yet to be observed.

2. Asset Recovery under Act Number: 3/2006 (State Monetary Act)

The State Monetary Act (SMA) is a statute prescribing rules and procedures to be followed by state authorities in conducting financial transactions. SMA provides only for recovery of funds and assets lost or damaged due to negligence of a responsible person or due to failure to observe the rules and procedures laid down by the statute.¹¹ However, it must be noted that action pursuant to SMA is not recovery per se, as the SMA provides for imposition of fines amounting to the funds lost, and not for recovery itself.

Pursuant to the decision made in 2014 that the AG Office shall seek recovery of proceeds of corruption under SMA, the PG Office forwards investigation reports of the ACC to the AG Office. The AG Office then analyses the evidence to determine whether the case falls under the circumstances for asset recovery under the SMA. So far 66 cases have been forwarded by the PG Office to the AG Office, but only 26 cases have been identified as cases capable of being pursued under the SMA. This is because the SMA is not legislation on recovery of proceeds of crimes and specifies only limited circumstances of state fund loss that warrant recovery action.

Where the AG Office determines recovery can be pursued, the AG Office notifies the Ministry of Finance and Treasury to impose a fine on the person or persons involved. The Minister may request the AG Office to seek civil action against the person or persons involved.¹²

The AG Office faces additional challenges as the investigation reports of the ACC are more focused on securing a conviction rather than asset recovery. In cases involving two or more accused persons, the investigation reports may not ascertain the amounts each one is individually responsible for. Thus, the AG Office is challenged in seeking recovery of assets as the AG Office cannot prove what amounts each individual person has embezzled.

Some cases of corruption come to light several years after the commission of the offence. This results in evidence being lost and the state failing to prove the amounts that have been embezzled.

In August 2016, the Ministry of Finance and Treasury fined and ordered several ex-government officials to pay funds owed to the government. They include the ex-President Mohamed Nasheed, four of his cabinet ministers and two others. The Ministry stated that civil action will be sought through the AG Office if the persons concerned fails to pay the money back. However, the concerned persons have not paid the amounts sought and the AG Office has not taken civil action against them to date.

3. Asset Recovery through Civil Action

The AG Office is the authority responsible for representing the State in civil actions by and against it. Thus, when it comes to recovery of assets through civil action, the AG Office is the responsible authority.

Initiating civil action for asset recovery is inefficient and takes a long time. This is due to lack of proper legal framework to allow the ACC to directly submit its investigation reports to the AG Office and seek asset recovery. Currently, the ACC submits its investigation reports to the PG Office seeking prosecution against accused persons. If the investigation report states that assets are to be recovered, the PG Office forwards the investigation report to the AG Office to take action for asset recovery. If assets or their equivalent cannot be recovered under the State Monetary Act as discussed above, the only choice left is to initiate a civil suit to recover the assets. As the investigations of ACC are criminal based, it takes additional time and further

¹⁰ Section 156 (b) (10), Act Number: 12/2016 (Criminal Procedure Code)

¹¹ Section 24, Act Number: 3/2006 (State Monetary Act)

¹² Ibid., Section 48(b)

inquiries for the AG Office to gather information and evidence relevant to civil action. Furthermore, the AG Office may only seek civil action when a person accused of embezzlement is fined by the Ministry of Finance and Treasury as discussed above. Thus, the procedure for civil action is lengthy, involving several agencies, which limits the efficiency of civil action to recover state funds.

III. CONCLUSION

It is essential to have efficient legal frameworks to rapidly trace and freeze proceeds of corruption in order to successfully recover the assets and secure criminal convictions. Though the Prevention of Money Laundering and Terrorism Financing Act provides various avenues for such, the Maldivian legal framework still lacks efficient legal avenues for asset recovery including confiscation without a conviction and recovery through civil actions. The recent establishment of Commission on State Assets Recovery, though temporary, was an overdue important policy decision to recover assets. It is also crucial to enact specific legislation on recovery of proceeds of crimes that would enable recovery without the need for a conviction and establish permanent special asset recovery offices and build capacity of investigators, prosecutors and state counsellors.